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[Weekly Reporter, Oct. 26, 1902.]

THE

WEEKLY REPORTER,

1901-1902

(FIFTIETH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1901, TO THE 12TH OF AUGUST, 1902.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. L.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the fiftieth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains a summary of the cases published from the 2nd of November, 1901, to the 30th of August, 1902 (both inclusive), in the WEEKLY REPORTER and from the beginning of September, 1901, to the end of August, 1902, in the Law Reports, the Law Journal Reports, and the Law Times Reports.

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FROM THE 24TH OF OCTOBER, 1901, TO THE 12TH OF AUGUST, 1902.

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1901—1902.

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CHANCERY DIVISION. *Mr. Justice Cozens-Hardy and Mr. Justice Farwell*	JOHN HUMPHREYS DAVIES, PAUL STRICKLAND, and GODFREY R. BENSON, Barristers-at-Law.
CHANCERY DIVISION. *Company Cases*	L. W. BYRNE, Barrister-at-Law.
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(BANKRUPTCY CASES)	PAUL M. FRANCKE, Barrister-at-Law.
PROB., DIV., and ADM. DIVISION	GWYNNE HALL, Barrister-at-Law.

A TABLE

OF

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Veazey v Chattle	C.A.	263	110	[1902] 1 K. B. 494; 71 L. J. K. B. 252; 85 L. T. 574
"Veritas," The	P.D. & A D.	30	163	[1901] P. 304; 70 L. J. P. 75; 85 L. T. 136
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Wagstaffe v Bentley	C.A.	—	135	[1902] 1 K. B. 124; 71 L. J. K. B. 55; 85 L. T. 744
Waite v Parkinson	CH.D.JOYCE,J	—	174	85 L. T. 456
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Waldock v Winfield	C.A.	—	114	[1901] 2 K. B. 596; 70 L. J. K. B. 925; 85 L. T. 202
Wales v Carr	CH.D. FAR. J.	313	120	[1902] 1 Ch. 860; 71 L. J. Ch. 483; 86 L. T. 288
Walker v Elmore's German Metal Co.	C.A.	—	26	85 L. T. 767
Walker and Oakshott's Contract, *In re*	CH.D.JOYCE,J	41	181	[1901] 2 Ch. 383; 70 L. J. Ch. 666; 84 L. T. 809
Walker District Council v Wigham	CH.D. FAR. J.	—	101	85 L. T. 579
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Walter v Ashton	CH.D BYRNE,J	—	172	[1902] 2 Ch. 282
Walters v Harrison. *In re* Whitmore	C.A.	—	189	[1902] 2 Ch. 66
Ward v Dwelley. *In re* Chenoweth	CH.D. FAR. J.	663	64	86 L. T. 890
Ward v Fry	C.A.	72	16	85 L. T. 394
Warren v Brown	C.A.	97	56	[1902] 1 K. B. 15; 71 L. J. K. B. 12; 85 L. T. 444
Warton v Redman. *In re* Redman	CH.D. KEK J.	19	62	[1901] 2 Ch. 471; 70 L. J. Ch. 669; 85 L. T. 13
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Waudby v Waudby	P D. & A.D.	176	49	[1902] P. 85; 71 L. J. P. 43; 86 L. T. 123
Way, In the Goods of	P.D. & A.D.	—	193	[1901] P. 345; 71 L. J. P. 13; 85 L. T. 643
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Wellington (Mayor) v Johnston	P.C.	—	126	[1902] A. C. 396; 86 L. T. 538
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Westminster City Council v Army and Navy Auxiliary, &c.	K.B.D.	631	118	[1902] 2 K. B. 125; 71 L. J. K. B. 546
——— v London County Council	K.B.D.	429	98	[1902] 1 K. B. 326; 71 L. J. K. B. 244; 86 L. T. 53
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Weston, *In re.* Bartholomew v Menzies	CH.D.BYRNE,J	294	54	[1902] 1 Ch. 680; 71 L. J. Ch. 343; 86 L. T. 551
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Wilkinson, *In re.* Esam v Attorney-General	CH.D. KEK.J.	—	22	[1902] 1 Ch. 841; 71 L. J. Ch. 663
Wilkinson, *In re.* Lloyd v Steel	CH.D. HDY.J.	—	194	85 L. T. 43
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Wise v Dunning	K.B.D.	317	87	[1902] 1 K. B. 167; 71 L. J. K. B. 165; 85 L. T. 721
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Wright v Carter	CH.D. KEK. J.	—	176	86 L. T. 110
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Wyatt v London County Council	K.B.D.	—	103	85 L. T. 629
X. Y., *In re.* *Ex parte* Haes	C.A.	182	14	[1902] 1 K. B. 98; 71 L. J. K. B. 102; 85 L. T. 564
Yates v Terry	C.A.	293	133	[1902] 1 K. B. 527; 71 L J. K. B. 282; 86 L. T. 133
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WEEKLY REPORTER,

1901-1902.

House of Lords.

From C. A. (Ireland). } May 2, 1901.

BULLIVANT AND OTHERS *v.* ATTORNEY-GENERAL FOR VICTORIA. (*a.*)

Practice—Discovery—Privilege—Solicitor and client—Evasion of statute.

Confidential communications between solicitor and client, which are not in themselves parts of a criminal or illegal proceeding, are privileged from disclosure, and this is not displaced by a mere allegation that certain documents were prepared "with intent to evade" the payment of duty. The word "evade" is ambiguous, and to displace such privilege there must be some definite charge.

Decision of Court of Appeal *reversed.*

Appeal from an order of the Court of Appeal (Collins and Romer, L.JJ.) [1900] 2 Q. B. 163, 48 W. R. Dig. 149, affirming that of Mathew, J., ordering production of documents.

An information was filed by the Attorney-General of Victoria against the executors of the late James Austin on the ground that before his death he executed certain voluntary conveyances with the intention and for the purpose of evading the provisions of a Victorian Act (54 Vict. No. mlx).

A commission had been issued from the Supreme Court of Victoria for taking the evidence of Stanley Austin and others in this country. He was a solicitor and admitted that the conveyances were settlements made for the benefit of himself and others and prepared by his late firm, and that he had in his possession a diary of his former partner and other documents which contained entries of instructions given by the testator with respect to these conveyances, but he objected to produce them on account of privilege as solicitor.

Section 115 of the Administration of Probate Act of the Colony of Victoria, 1890, provides that if any person makes any conveyance, assignment, gift, &c., of any estate, real or personal, &c., "with intent to evade the payment of duty," such property shall be liable.

Sir R. T. Reid, K.C., and *Upjohn, K.C.* (*E. M. Pollock* with them), for the appellants.—The allegation of fraud is not sufficient to displace the privilege of a solicitor in this case. The charge is not specific and clear. The mere statement of an "intent to evade" is insufficient; there must be evidence of some device or contrivance for that purpose: *Simms v. Registrar of Probate*, [1900] A. C. 323, 48 W. R. Dig. 184.

Reg. v. *Cox*, 33 W. R. 396, 14 Q. B. D. 153; *In re Postlethwaite*, 35 W. R. 563, 35 Ch. D. 722; and *Williams* v. *Quebrada Railway, &c., Co.*, 44 W. R. 76, [1895] 2 Ch. 751, were also referred to.

Haldane, K.C., and *Rowlatt*, for the respondent.—The charge amounts to this, that there is a secret trust which the documents of which discovery is sought afford evidence. The privilege was personal to the testator.

Sir R. T. Reid, K.C., replied.

Earl of HALSBURY, L.C.—It appears to me that the judgment appealed from ought to be reversed. I do not think it desirable to express any opinion with reference to the true construction of the Victorian statute beyond this: We are not here upon the question of sufficiency of pleading at all. I think it fallacious to suppose that we are to ascertain for the purpose of this inquiry whether or not the pleadings do mean or do not mean one or the other of the two different sets of meanings which have been attributed to them.

I think that the broad propositions may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding. Those are the two principles, and of course it would be possible to make both propositions absurd, as is very often the case with all propositions, by taking extreme cases on either side. If you are to say, "I will not say what these communications are because until you have actually proved me guilty of a crime they may be privileged as confidential," the result would be that they could never be produced at all, because until the whole thing is over you cannot have the proof of guilt. On the other hand, if it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing into which he is endeavouring to inquire may have been illegal or not, the privilege in all cases disappear at once. The line which the courts have hitherto taken, and will, I hope, preserve, is this: that in order to displace the *primâ facie* right of silence by a witness who has been put into the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

present go into the modes by which that can be made out, but there must be some definite charge of something which displaces the privilege.

Now, when I look at all that is to be found here, I find no such definite charge at all. If, for the purpose of evading the payment of duty to which the man was liable, he entered into some secret and covinous arrangement whereby, although he should still retain the property during his lifetime, nevertheless colourable deeds should be executed which would show that the property was not liable to duty, that would undoubtedly be a fraud, and I think that there would be no doubt that a person who was engaged in such a transaction could be compelled either to produce the correspondence or to state the conversation showing how it was intended to carry out the alleged fraud. But there is no such allegation—there is nothing here which any court can regard as an allegation of fact sufficient to displace the privilege. If the fact were merely that the person did execute voluntary deeds the effect whereof was that the tax never fell upon the property at all, I do not know that there is any offence in that either in Victoria or in this country. People are not bound to continue in the same condition of things, either as regards their direct or indirect taxation, which will render either the consumption of articles in the one case or the property they have in the other always liable to the tax, and I decline to believe that the colony has made such an enactment until it is established that that is the enactment which they have made.

In the parallel, but not exactly similar, case in the Privy Council where the word "evade" was used, the Privy Council held (I myself was a party to that judgment) that it must be understood that where it was intended to be an allegation that a fraud had been committed you must allege it and prove it, and that it was no fraud for a man to make a voluntary conveyance of his estates, not having any secret trust, and not having any arrangement whereby the deed could say one thing and the voluntary arrangement mean another; that the fact that he did intend to make a gift during his lifetime was no offence and no breach of the Act of Parliament, and nothing that could be considered tainted with the character of fraud: *Simms* v. *Registrar of Probates*. That being so, it appears to me that it would be an abandonment of the principle which has been held sacred in this country if, when a person has done that which in itself may be innocent, you should simply, because you choose to suggest that it was done with the view of evading the payment of a tax, require the witness to disclose the whole of his affairs, and enable the private communications between himself and his solicitor to be displayed to the court.

I cannot help thinking that if this question had arisen in the ordinary course the error which has been committed would not have been committed, but we have got into a somewhat artificial condition of things by the method in which we are endeavouring to apply the procedure here, which would be a proceeding in open court. Here there is a commission, and to fortify such commission a statute has been passed for the purpose of giving the judges in this country power to enforce the attendance of witnesses just as if the cause of action had arisen in this country. If you construe the statute, bearing its object in mind, it is simple enough. The statute was passed for the purpose of assimilating the administration of justice all over her Majesty's dominions. What you would have to do when you got to trial and the privilege was pleaded would be this—the judge would have to satisfy himself whether there was really established to his satisfaction a charge of fraud or something that would displace the privilege—I do not say that it must be proved—but that it would be a reasonable and proper thing under the circumstances to establish the proposition that the issue to be tried was whether there was really a fraud or not, and that this was a piece of evidence relevant to establish the fraud. In this case it is obvious that nobody can suggest there is any evidence of it, nor, as it appears to me, any allegation of it, and, upon the broad proposition that there is neither proof nor allegation, nor anything which would displace the privilege, it appears to me that the orders made in this case were wrong, and that your lordships ought to reverse them.

Lord SHAND.—If the respondent had made a relevant averment of fraud or of a fraudulent contrivance to defeat the right of the Government to death duty, to which in the actual circumstances the Government was entitled, I should have held the order made by Mathew, J., and the Court of Appeal to be right. Privilege could not be pleaded as a protection to fraud, and the averment of fraud or fraudulent contrivance with a specification of particulars would, in my opinion, be enough. In this case I agree that there is no averment of fraud or even of illegality, having regard to the decision of the Privy Council in *Simms's case*. The statement is merely that the deeds in question were granted to "evade" payment of death duty due, using the word which occurs in the statute. If that term merely means to "avoid" the duty, as was held in *Simms's case*, then there is here no averment of fraudulent contrivance, or indeed of any illegal proceeding, and in the absence of this I agree that the alleged privilege fails.

Lord DAVEY.—I am of the same opinion. I do not dissent from what was said by Mr. Haldane, that it must be assumed for the present purpose that the case stated in the pleadings is true for the purpose of testing the right of production. But that renders it, of course, of extreme importance to see what is stated in the pleadings, and what are the issues upon which the trial is now presumed to be proceeding. I also agree with what was said by Sir Robert Reid, that if a man in his pleading, whether he be the Attorney-General or anybody else, merely sets out a sentence from a statute which is capable of two meanings without saying which he means, the one being consistent with the absolute innocence of the transaction and the other meaning involving a charge of either fraud or illegality, he must say which he means, and if he intends to charge illegality he must state facts for the purpose of showing what the illegality is. I agree with the Lord Chancellor that it is not a question of pleadings as between the parties, but that what we have to see is whether a witness who is called upon to produce privileged documents is bound to produce them or not, and for that purpose we must look to see what are the issues which are raised by the pleadings.

Now the information states only certain voluntary deeds, and then contains an allegation that these voluntary deeds were executed for the purpose of evading payment of certain death duties which are imposed upon property passing upon the death of the testator. The section under which it is sought to say that it was an illegal transaction is this—I will read it shortly: "If any person has made, or shall hereafter make, any conveyance," and so forth, "with intent to evade payment of duty under this part of the Act." If the duty never attached, if there is no section of the Act which imposes a duty upon voluntary *inter vivos* transactions, I cannot see how a person who is a party to such a transaction can be said to do it

with intent to evade payment of a duty which the Act does not impose upon the transaction itself. I do not mean to give any definite opinion upon the construction of this clause. It is, however, certainly capable of that meaning, and if it is capable of that meaning, the witness is entitled to say that if you mean to say that the executing of these voluntary conveyances which, upon the face of them, purport to be a parting by the testator with the property comprised in them out and out, a parting with the whole *jus disponendi* of it, so that it would become no longer his property but the property of somebody else, and would be property of somebody else at his death—if you mean to say that the executing of those conveyances was an illegal transaction, you must tell us in what respect it was illegal; and if you merely quote the words of the statute to which I have already referred, if they are capable, as I think they are at least capable—I do not put it higher than that—of a perfectly innocent meaning which would render those transactions perfectly innocent in themselves, then I do not think that is stating such a case or raising such an issue for trial between the parties as would enable you to call upon a witness to produce documents which would otherwise be privileged from production.

I think that the fallacy of the Court of Appeal, if I may respectfully say so, is in treating the statute as if it made the execution of voluntary deeds with or without the intention to put property in such a position as not to incur liability to the tax as being an improper or an illegal act. In my opinion it is nothing of the kind. It is a perfectly legal act, and there is nothing upon this information which to my mind clearly states any such case of illegality as would overrule the privilege on the part of a witness.

Lord BRAMPTON.—I entirely concur.

Lord LINDLEY.—I also concur; but I will add a few words out of respect to the learned Lords Justices, from whom I differ.

The question arises in this way: In May, 1896, a gentleman died, and under the colonial law his estate had to pay certain duty. Some time before he died he executed some voluntary conveyances, and it is said that under the law of the colony the property comprised in those voluntary conveyances was subject to duty. In order to obtain evidence about those documents a commission was sent over here, and under the statute to which reference has been made (22 Vict. c. 20) witnesses were called before that commission, and we have to consider the matter from the point of view of an action or information in this country raising certain definite issues, in support of which witnesses were called and examined. When the witnesses were called they were asked to produce these documents, and above all the instructions given to the solicitor who prepared them. The answer was at once set up by the witnesses, "Those are privileged documents," the privilege being founded upon the ordinary professional confidence which has been held in this country to be a good ground for the non-production of documents.

Now, starting there, I observe that the grounds, whatever they are, are legal as well as equitable. There is no equitable doctrine, as distinguished from a legal doctrine, involved in the matter. *Primâ facie*, if a witness swears, as this witness did, to circumstances which give rise to the privilege, the privilege must prevail, unless there is a good answer. What we have to consider, therefore, is the answer to the privilege so raised.

Now, there are two answers. The first is a very short one, if it is good for anything. It is said that, the testator being dead, the privilege is gone. I am satisfied that that answer is insufficient. It struck one at first as curious. I never heard it stated before; but it does appear that in the case of *Russell* v. *Jackson*, 10 Hare 204, it was considered, and in the judgment of Turner, V.C., there are some passages which have been invoked in favour of that being a good answer; but they are easily explicable when one comes to look at them. The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone—it remains. In the case before Turner, V.C., for the reasons which were given by Mr. Haldane, and are apparent in the judgment, the privilege could not be set up. One person was trying to set it up against the other, both claiming under the testator, and the Vice-Chancellor held that it could not be set up. So much for that answer.

The next answer given to this claim of privilege is that there was illegality or fraud or trickery, and that this solicitor, or those concerned, cannot set up the privilege because there is no privilege involved in consulting a solicitor as to how you are to do an illegal act. That raises the question whether there was any illegality at all involved in the preparation of these deeds. As to that, the case stands in this way. The whole claim for this duty is based upon a colonial Act of Parliament which renders the duty payable upon any conveyance with intent to evade the payment of duty. The word "evade" is ambiguous. There are various ways of evading a statute. The discussion and the decision which took place in the Privy Council in the case of *Simms* v. *Registrar of Probates* show the ambiguity of the expression. Now the pleadings follow the Act of Parliament. I do not see that the witness can quarrel with that in any way, and the affidavit made in support of the application for an order for the production of these documents follows the Act of Parliament—they both use the ambiguous expression "evade." As I have said, there are two ways of construing the word "evade"; one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, "Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it." This is an act of quite a different character. Now when we look at the answer given to the witnesses who set up this privilege, we find that the answer says: "You are evading the Act of Parliament." What does that mean? Do you mean to say that I, as a solicitor, have been conspiring to do that which is illegal? That is not said—there is no pretence for it. If you mean that, you have not said so; if you mean the other thing, your answer does not destroy the privilege. That is the short answer.

It appears to me that the Court of Appeal have overlooked the fact that the word "evade" has the double meaning to which I have referred. They seem to have assumed that what was done here must have been a conspiracy to avoid the consequences of the Act. Under these circumstances I think that the appeal ought to succeed, and that the order appealed from should be reversed.

Appeal allowed.

Solicitors, *Crowders, Vizards, & Oldham; Freshfields.*

Court of Appeal.

From K. B. Div. (Vaughan Williams and Stirling, L.JJ.) — Aug. 2, 1901.

In re COLLYER-BRISTOW & CO. (*a.*)

Solicitor—Bill of costs—Taxation—Preparing umpire's award—Award taken up by one party to the arbitration and costs of umpire paid—Right of party to an order for taxation in Chancery Division—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *ss.* 38, 41.

One of the parties to a reference took up the award and paid the amount fixed by the umpire. The amount included the bill of costs of the solicitors employed by the umpire to draw up the award, and it directed that the solicitors' bill of costs should be taxed under section 38 *of the Solicitors Act,* 1843.

An order for taxation having been obtained in the King's Bench Division to tax the solicitors' bill, the solicitors appealed.

Held, dismissing the appeal, that the umpire being chargeable with the bill and the party who took up the award having paid it, the case came within the words of the Act, and that although the obtaining of the order to tax in the King's Bench Division was irregular, still the judge had jurisdiction to direct taxation. Following, however, the decision in In re Pollard, 36 *W. R.* 515, 20 *Q. B. D.* 656, *the order must be varied by directing that the taxation should take place in the Chancery Division.*

Appeal from an order of Phillimore, J., at chambers, affirming an order of Master Chitty, directing the taxation of a firm of solicitors' bill of costs in connection with the preparation of an award under the Lands Clauses Acts.

The Lowestoft Water and Gas Co. served upon Sir Savile Crossley notice to treat for the purchase of land under the Lands Clauses Acts, and each party appointed an arbitrator, and the arbitrators appointed a lay umpire.

The arbitrators having differed, the umpire made his award.

In drawing it up he employed the solicitors, Messrs. Collyer-Bristow & Co., and notice was given to the parties that the award was ready and could be taken up on payment of £107 6s. 4d., being the fee and legal expenses of the umpire.

The Lowestoft Water and Gas Co. paid the umpire his fees and took up the award.

The umpire awarded the sum of £4,119, and the award directed the company to pay to Sir Savile Crossley his costs of the reference and the costs of the award, including the fees of the arbitrators, which were assessed at sixty guineas each, and the umpire's fee of seventy-five guineas, and in addition the costs and expenses of and incidental to preparing and perfecting the umpire's award.

In drawing up the award the solicitors, Messrs. Collyer-Bristow & Co., had consulted counsel in the matter, and the award was drafted by counsel.

The Lowestoft Water and Gas Co. took out a summons for the taxation of the solicitors' bill of costs as between solicitor and client.

The masters and the judge at chambers made the order to tax.

Messrs. Collyer-Bristow & Co. appealed.

Ernest M. Pollock, for the solicitors.—There is no jurisdiction to order this bill to be taxed under section 38 of the Solicitors Act, 1843, as the bill is but a mere item in a larger bill of costs which the company would have to pay to Sir Savile Crossley, and which they would have obtained an order to tax as between party and party. The company cannot pick out one item and apply to have that item taxed as between solicitor and client, and then impose upon the solicitor a liability to pay the costs of taxation if one-sixth were taxed off. *In re Cowdell,* 31 W. R. 335, 52 L. J. Ch. 246, decided that a person liable to pay costs as between party and party is not entitled to a reference for taxation under the third-party clause (section 38) of the Solicitors Act, 1843. Moreover, this bill of costs has been already paid, and there are no special circumstances which entitle the company to have a paid bill taxed. Again, this bill of costs not being for work done in any court of law or equity the taxation if the order stand must take place in the Chancery Division: *In re Pollard,* 36 W. R. 515, 20 Q. B. D. 656; *Wombwell* v. *Barnsley Corporation,* 36 L. T. Rep. 708, 25 W. R. Dig. 141.

C. Herbert Smith, for the company, was heard only on the question whether the taxation should not take place in the Chancery Division, and said the company raised no objection to the order being varied.

THE COURT dismissed the appeal, but varied the order by directing the taxation to take place in the Chancery Division.

VAUGHAN WILLIAMS, L.J.—The result of this case is that in the main the appeal fails because, according to our judgment, although the application that the bill of costs should be taxed in the King's Bench Division was irregular, there was jurisdiction in that court to make the order appealed from, and under this part of the case all we have to do is to make the same order indicated as the correct one in *In re Pollard,* so as to bring the taxation into the Chancery Division. As regards the question whether the taxation is one that can be dealt with under section 38 of the Solicitors Act, 1843, I am of opinion that it is. The bill of costs is not the bill of the solicitor to one of the two parties to the reference, but of the umpire's solicitor. It seems to me that it is a bill of costs which ought to be taxed as between solicitor and client, and that the case is within the very words of section 38. In my judgment there was a liability on the company to pay these charges of the umpire's solicitor, and although those charges were void before the order for taxation was asked for there are ample special circumstances justifying the making of an order to tax because at the moment when the award was taken up it was impossible to predict what the effect of the award would be. There only remained the last question—namely, in what division ought the taxation to take place? In my opinion, though the application to the King's Bench Division to make an order for taxation of this bill was irregular, still there was jurisdiction in that division to make this order for taxation, and in these circumstances the only thing that is now necessary to be done is to make the same order as in *In re Pollard*—namely, to direct the taxation to take place in the Chancery Division. I am therefore of opinion that this appeal, the order being so varied, should be dismissed.

STIRLING, L.J.—I am of the same opinion. Three points were argued—whether there could be a taxation under section 38 of the Solicitors Act, 1843; whether there were special circumstances justifying the making of the order; and whether if taxation is ordered it should be carried out in the Chancery Division or in the King's Bench Division. [Having stated the facts that gave rise to these questions, the learned Lord

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Justice said :] Following the words of the section we have to inquire who was the party charged. Clearly the umpire was the party charged. Then who is the party who had the bill? It has been paid, not by the umpire, but by the company, so that we have the company not chargeable with the bill but having paid it. The case is thus brought within the terms of the section and the company are entitled to make such application for a reference for the taxation of the bill as the umpire might himself make, and that application must be for taxation of the bill as between solicitor and client.

Great stress was laid on the decision in *In re Cowdell*, but that case was different from the present one. There the solicitor whose bill of costs was in question was solicitor to one of the parties to a reference and had delivered a bill of costs made out as between solicitor and client. The local board, who were the other parties to the reference, applied for taxation under section 38 of the Solicitors Act, 1843. Fry, J., declined, and in my opinion justly declined, to order taxation on the ground that the bill delivered by the solicitor was a different bill from that for which his clients were made liable for. Hence the application was to tax the costs of the umpire's solicitors, and nothing else, and it appeared to me that there was ample jurisdiction to make an order under section 38. It was next argued that as there had been payment of the bill taxation could only take place if there were special circumstances either generally under section 41 or applicable to the person making the application under the latter part of section 38. The question of what are special circumstances has been considered in many cases in which it is needless to enter. The position in this case is that as between the umpire and solicitor there does not appear to have been any payment by the umpire and the company made the payment to the umpire at a time when it was not known what the provisions of the award would be.

Under this state of things there are special circumstances to justify the making of an order for taxation.

On the last question, in view of the decision in *In re Pollard*, I think taxation should take place in the Chancery Division.

I wish, however, to add this. If there was a party and party taxation proceeding under the Lands Clauses Acts in the King's Bench Division, I do not think it would be improper for the master who was taxing the costs in that division, and who had *seisin* of the whole cause, to deal with the whole matter. But in the present case the only question is as to the taxation of the bill of costs of the umpire's solicitors. I think such a bill of costs in the present circumstances should be taxed in the Chancery Division, and with that variation the order made for taxation is one that should stand.

Solicitors, *Collyer-Bristow & Co.; Williams & James*, for *Worship & Rising*, Great Yarmouth.

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) June 27, 1901.

HAND *v.* BLOW. (*a.*)

Landlord and tenant—Mortgage by sub-demise—Appointment of receiver—Liability to pay rent and damages.

A receiver appointed by the court on behalf of mortgagees of leasehold property by way of sub-demise, who has gone into possession, is under no liability to pay to the lessor rent due under the lease out of funds coming to hand during his occupation of the premises. A receiver in such a case is in exactly the same position as the mortgagees would have been in had they gone into possession, and no special right arises against him in favour of the landlord by reason of his position as an officer of the court.

This was an appeal from a decision of Stirling, J.

The action was a debenture-holder's action, the debentures being secured by a trust deed which in various ways dealt with the property of the company named Owen Jones (Limited), which had issued them.

Part of the property of the company consisted of certain leasehold houses, Nos. 116, 118, 120, 122, and 124, Edgware-road.

By the trust deed that property was charged with the debenture debt, and it also purported to be sub-demised to the trustees by the company. It was doubtful whether that sub-demise was effectual by reason of a mistake with reference to the original lease under which the property was held; but it was admitted that the trustees of the debenture deed were not assignees of the lease under which the company held, but that at most they were sub-lessees.

Under the lease the rent was payable in advance, and the rent was paid down to the 25th of December, 1899, thus covering the period to the 25th of March, 1900.

On the 29th of August, 1899, in this action an order was made appointing one Page to collect, get in, and receive the debts, &c., of the business carried on by the defendant company, and to manage the said business, and accordingly he entered into possession of these leasehold houses on behalf of the debenture-holders.

On the 24th of March the receiver removed all the chattels of the defendant company from these premises. He did not pay the rent which fell due on the 25th of March nor did he deliver up possession to the landlord.

On the 29th of March, the rent not having been paid, the landlord took out a summons asking that he might be at liberty to distrain for the rent which had become due.

On the 26th of April that summons was amended by asking that in default of sufficient distress being found or non-payment of the rent and costs the applicant might be at liberty to enter upon the premises and determine the lease, and in the latter alternative that the receiver be ordered to pay to the applicant a sum calculated at the rate of £930 per annum for use and occupation by the receiver and manager from the 25th of March, 1900, to the date of determination, together with such sum as might be due for dilapidations under the covenant in that behalf to the date of re-entry.

On the 7th of May the master in chambers gave leave to the applicant to re-enter and determine the lease, and on the 9th of May such re-entry was actually made.

The question was now raised whether or no it was right and proper that the receiver should be ordered to pay the rent for the period from the 25th of March, 1900, down to the 9th of May, when the lease was put an end to, and also pay for dilapidations, by which it seems was meant damages for breaches of certain covenants, as, for example, the covenant to deliver up in a proper state of repair.

Stirling, J., held that the receiver was under no such liability.

P. F. Wheeler (*Upjohn*, K.C., and *Begg* with him), for the appeal, referred to *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Co.*, 16 W. R. 928, L. R. 6

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Eq. 14, 488; *Great Eastern Railway Co.* v. *East London Railway Co.*, 44 L. T. Rep. 903, 29 W. R. Dig. 188; *Jacobs* v. *Van Boolen*, 34 SOLICITORS' JOURNAL 97; *Balfe* v. *Blake*, 1 Ir. Ch. Rep. 365; *In re Lundy Granite Co.*, 19 W. R. 609, L. R. 6 Ch. App. 462; *In re Oak Pits Colliery Co.*, 30 W. R. 759, 21 Ch. D. 322; *In re Marriage, Neave, & Co.*, 45 W. R. 42, [1896] 2 Ch. 663; *Paterson* v. *Gas Light and Coke Co.*, [1896] 2 Ch. 476, 45 W. R. Dig. 61; *Neate* v. *Pink*, 15 Sim. 450.

Martelli, for the trustees and receiver, was not called upon.

RIGBY, L.J.—I think for the reasons given by Stirling, J., in his judgment, which has been read, that this claim cannot be sustained, and the appeal must therefore be dismissed with costs.

COLLINS, L.J.—I am of the same opinion. [His lordship stated the facts, and continued:] Mr. Wheeler, who has argued this case with great ingenuity, has admitted that there was no privity of estate at law between the trustees and the head lessor, and that therefore there was no liability for rent as between the trustees and the head lessor. But then comes the main basis of his contention. He says that the court has assisted the debenture-holders by putting in its own officer as receiver, and therefore a new right arises as against the receiver. But is there any reason why a lessor should be in a better position because a receiver has been substituted for the original sub-lessee? The lessor had no right against the original sub-lessee, and if the sub-lessee had done what the receiver has done the lessor would have been in exactly the same position as he is now. It seems to me, therefore, the appellant can show no ground why the receiver should be under any greater liability than the sub-lessees. But then it is said that when a receiver has been appointed the rights of the landlord are suspended, and that if, in the present case, there had been no receiver the lessor might have been able to realize the assets; and it does seem to me that there is some ground for saying that if damage has accrued to the landlord by the action of the court the receiver should make good the loss. But there is no authority for that proposition, and it is not my province to create a new equity. The court does not protect every inconvenience arising from its action. The cases which have been cited on behalf of the appellant have been distinguished by Stirling, J., in his judgment. Broadly speaking, they are all cases of direct liability between a lessor and his lessee; in none of them was there any question between a lessor and his sub-lessee. For the reasons I have given the appellant's claim rests on no right in law, and he has no right in equity by reason of the receiver having been appointed in substitution for the sub-lessees; while, if any right could arise in his favour by reason of his having lost certain rights through the appointment of a receiver, there is no case carrying him so far. I think the judgment of Stirling, J., was right and on the grounds he has given.

ROMER, L.J.—I agree. This appeal fails for the reasons given by Collins, L.J. The case has been well argued, and I only desire to add a few words on the principles laid down by the authorities. If in the case of a company or person whose estate is being dealt with by the court a receiver or liquidator has occupied or used premises which are part of the estate, then the court will see that the rent or other liabilities payable to the landlord in respect of those premises and as to which the person whose estate is being dealt with is liable, are paid to the landlord by the receiver. But this principle does not apply and cannot be applied to a case between mortgagor and mortgagee, where the mortgaged premises are leaseholds subdemised or agreed to be subdemised by the mortgagor to the mortgagee, and mortgaged by the mortgagor to the mortgagee; in that case the mortgagee is not liable to pay rent either to the mortgagor or to the mortgagor's landlord. In such a case the receiver is appointed in right of the mortgagee. The court is not administering the mortgagor's estate; it is only dealing with the mortgaged property, and that mortgaged property involved, *ex hypothesi*, no liability to the landlord in respect of rent or any other outgoings. It should be remembered that in such a case, between mortgagee and mortgagor the latter remains liable for the rent, even if the mortgagee should go into possession, and that the mortgagee, even though going into possession and paying no rent, is not liable to the landlord for rent in respect of such occupation. Is the position changed by the appointment of a receiver? Not at all. The appointment of a receiver does not take away from the mortgagor his primary liability. The landlord has no claim as against either the mortgagee or the receiver. Of course in a case where the landlord has got a right to re-enter he can apply to the court, notwithstanding the appointment of a receiver, and get leave to re-enter; but the mere fact that by reason of the appointment of a receiver an application has first to be made to the court does not in itself give him any special rights. There is no authority whatever in support of the proposition, that in such a case as I have indicated, between an ordinary mortgagor and an ordinary mortgagee, where a receiver has been appointed by the mortgagee to enforce his security, the landlord has a right to apply to the court and ask for his rent to be discharged out of the assets received by the receiver during his occupation of the property. An argument as to there being something unfair or dishonest in the receiver remaining in occupation without paying rent, and that such a state of things requires the intervention of the court, is only a plea *ad misericordiam*. This is a question of a right legal or equitable, and if the applicant has no right, there is no dishonesty in refusing to comply with the application. If this application had been right, which in my opinion it clearly is not, a general principle would have had to be laid down in all cases between a mortgagor and a mortgagee. I think it clear that such a principle ought not to be established.

Solicitors, *Duffield, Bruty, & Co.; H. E. Warner & Co.*

From P. D. & A. Div. (Rigby and Collins, L.JJ.) — June 13, 14, 1901.

FORBES SMITH v. FORBES SMITH. (*a*.)

Costs—Divorce—Wife's petition—Husband's petition—Costs against co-respondent—Costs of wife's petition—Party to proceedings—Appeal—Final order—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), s. 34—*Judicature Act*, 1890 (53 & 54 *Vict.* c. 44), s. 5.

The power to order payment of costs conferred on the court by section 5 of the Judicature Act, 1890, *must be confined to parties to the proceedings. The co-respondent to a petition presented by a husband does not become a party to a cross-petition presented by the wife on the making of an order for the consolidation of the two suits, as such an order is only an arrangement for the convenience of trying the two suits together and involves nothing analogous to "consolidation" at common law.*

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

A co-respondent, therefore, in such a case not being a "party to the proceedings" within section 34 of the Matrimonial Causes Act, 1857, there is no jurisdiction to make him pay the costs of the wife's petition.

An order directing payment of costs is not an interlocutory order working out the final judgment, but is part of the final judgment though separated from it by an interval of some days.

This was an appeal from a decision of Jeune, P.

On the 2nd of February, 1900, the wife, the respondent in the present proceedings, presented a petition for a judicial separation on the ground of her husband's cruelty.

On the 27th of March, 1900, the husband presented a petition for the dissolution of the marriage on the ground of the wife's adultery with the co-respondent Chadwick. Damages were claimed against the co-respondent.

On the 26th of April, 1900, the registrar ordered the husband's suit to be consolidated with the wife's suit.

The co-respondent made no objection to this order. The wife and the co-respondent filed answers to the husband's petition denying the adultery.

On the 18th of July, 1900, the suits were tried by the President with a jury.

At the trial the charges of cruelty against the husband were withdrawn, there being no evidence in support of them. The wife's petition was, therefore, dismissed.

On the husband's petition, the adultery was found proved as against the wife and the co-respondent and damages were awarded against the co-respondent. A decree *nisi* was made for dissolution of the marriage with costs and damages against the co-respondent.

On the 28th of January, 1901, the decree was made absolute.

On the taxation of costs the husband claimed to tax against the co-respondent not only his costs of his own petition but also his costs of the wife's petition, on the ground that by reason of the consolidation order the two suits were united and had become the proceedings within section 34 of the Matrimonial Causes Act, 1857. The matter was referred by the registrar to the court.

Before the President it was contended that the husband's costs of the wife's petition could be ordered to be taxed against the co-respondent under section 34 of the Matrimonial Causes Act, 1857, and that in any event jurisdiction was given to the court to do so under section 5 of the Supreme Court of Judicature Act, 1890.

On the 20th of May Jeune, P., held that, though the discretion given by section 5 of the Act of 1890 must be confined to persons who were parties to the proceedings, yet that the co-respondent was a party to the wife's petition within section 34 of the Act of 1857, and he ordered him to pay the costs accordingly.

The co-respondent appealed.

There was some doubt whether the appeal was an interlocutory or final appeal. Leave to appeal was refused both by the President and the Court of Appeal. The co-respondent, however, brought on the appeal.

By section 34 of the Matrimonial Causes Act, 1857, "Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings."

By section 5 of the Supreme Court of Judicature Act, 1890, "Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Marshall Hall, K.C., and *Moore*, for the appellant.—There was no jurisdiction to order the appellant to pay the costs of the wife's petition. The consolidation order was merely a direction to try the suits together for the convenience of all parties.

Grazebrook, contrà.—First of all, the order appealed from was an interlocutory order, and leave to appeal has been refused. On the merits I submit that the decision was right, especially having regard to the extensive jurisdiction given to the court by section 5 of the Judicature Act, 1890.

Marshall Hall, K.C., replied.

The following cases were referred to: *In re Binstead*, 41 W. R. 452, [1893] 1 Q. B. 199; *Blakey v. Latham*, 38 W. R. 193, 43 Ch. D. 23; *London County Council v. Churchwardens of West Ham*, 40 W. R. 662, [1892] 2 Q. B. 173; *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 450; *The City of Manchester*, 5 P. D. 221; and *Marsden v. Lancashire and Yorkshire Railway Co.*, 29 W. R. 580, 7 Q. B. D. 641.

RIGBY, L.J.—For the reasons which my brother Collins will state in detail I think there was no jurisdiction to order the co-respondent to pay the costs of the proceedings upon the wife's petition, and therefore I think the decision of the learned President ought to be reversed.

COLLINS, L.J.—The first question is whether there is any right of appeal at all. It is said that the order appealed from is an interlocutory one, and leave to appeal from it has not been obtained. If the order was interlocutory, it is clear that no appeal can be brought without the leave of the court. But, having regard to the authorities which have been cited by the appellant's counsel, I have come to the conclusion that the order was a final one, and consequently the leave of the court is not required. [His lordship stated the facts, and continued:] It appears to me that the order of the President is, under the circumstances, really part of the final judgment. There was no jurisdiction to make any order as to costs, except as part of the final judgment; and although the order which interpreted the final judgment was not originally part of it and was separated from it by some days, I think it was not the less a part of the final judgment. It seems to me that *The City of Manchester* is an authority for so holding. In that case, in an action for a collision at sea by which the plaintiffs' ship was sunk, the Admiralty Division, on the 25th of April, held both vessels to blame, and ordered the owners of *The City of Manchester* to pay the plaintiffs half their damages. On the 20th of May a supplemental order was made giving the plaintiffs their costs of the action. On appeal by the defendants it was objected that the second order was interlocutory, and that the appeal, having been brought after twenty-one days, was too late. The Court of Appeal held that the order was final. James, L.J., said: "The order as to costs which is under appeal can only be sustained on the ground of its being part of the decree, for if the case had been disposed of by a final judgment the court would have had no jurisdiction to make a subsequent order. There is, therefore, no ground for the objection that this is an interlocutory order which must be appealed from within twenty-one days."

And I think *Marsden* v. *Lancashire and Yorkshire Railway Co.* bears out the same view. In my opinion this order was not an interlocutory order for working out the final decree, but was part and parcel of the final decree itself.

This, then, being an appeal against a final order, the question next arises whether the decision was right. The parties have consented that the appeal shall be heard by two judges. Can the order be maintained? The question turns upon section 34 of the Matrimonial Causes Act, 1857. The power to order a co-respondent to pay costs is a statutory one; the court has no inherent power to visit with costs a co-respondent who is not in the strictest sense of the word a "party" to the proceedings. He is introduced into the suit by virtue of the provisions of the statute. It seems to me that the learned President was quite right in holding that the power given by section 34 is limited to persons who are parties to the proceedings. And I think "the proceedings" must mean the proceedings in a suit to which the co-respondent is a party—*i.e.*, the proceedings upon "a petition presented by a husband." The section gives no power of itself to visit with costs any person who is not a party to the proceedings.

Then comes the fact that an order was made for the consolidation of the two suits, and it seems to me that, rightly considered, this was not a "consolidation" order in the only sense which would make it material for the present purpose. No power to consolidate suits is given by the Matrimonial Causes Acts, or in the Divorce Court Rules made thereunder. Then, if we endeavour to ascertain the meaning of consolidation in the Supreme Court, we find that by rule 8 of order 49, "Causes or matters pending in the same division may be consolidated by order of the court or a judge in the manner in use before the commencement of the principal Act in the superior courts of common law." That throws us back upon what was meant by consolidation in the common law courts before the Judicature Act, and this is thus stated in Lush's Practice (2nd ed.), at p. 752. [His lordship read from "If two or more actions are depending at one time by the same plaintiff against the same defendant," down to "with such other terms as may be agreed on, or (if the order be made against the plaintiff's consent) imposed by the court or judge," and continued:] The cases there mentioned are all cases of actions brought by the same plaintiff, and capable of being joined in one writ, and the term "consolidation" cannot, as it seems to me, have any application when the actions or suits are brought by different persons, one by A. against B., and another by B. against A. To apply the term "consolidation" to such a case as the present would be a misuse, or, at any rate, a loose use of the term, and I cannot see that in such a case the suits can, strictly speaking, be consolidated. Unless the two suits are made one, so that the cost of the wife's petition can properly be described as part of the costs of the husband's petition, the court has no power under section 34 to compel the co-respondent to pay the costs of the wife's petition. We cannot visit him with the costs of proceedings to which he was not a party. The jurisdiction arises only if the proceedings on the wife's petition have become part of the proceedings on the husband's petition, and I do not think that is the result of the order for consolidation. In my opinion there has been in this case nothing analogous to consolidation at common law. The practice of trying at the same time petitions by a husband and a wife has been adopted merely for convenience, and does not operate to consolidate the two suits in the sense of constituting one suit out of the two.

The last point taken was upon section 5 of the Act of 1890. The learned President has satisfactorily disposed of the argument upon that section, and I entirely concur with him. Some limitation must be put upon the generality of the words. They cannot enable the court to order the costs to be paid by a stranger to the proceedings; they can only mean that the court may order the costs to be paid by any of the parties. The section does not confer jurisdiction to visit a co-respondent with costs unless he is a party to the proceedings, and here the co-respondent was not a party to the wife's petition unless the consolidation order has made him one. I have already stated my reasons for holding that the consolidation order had no such effect. In my opinion, therefore, the learned President had no jurisdiction to order the co-respondent to pay the costs of the proceedings on the wife's petition, though, if he had jurisdiction, he may have had abundant ground for exercising his discretion in that way.

Appeal allowed.

Solicitors, *Fladgate & Co.*; *Williamson, Hill, & Co.*

From K. B. D. (Collins and Stirling, L.JJ.) } May 15, 16, 23, 1901.

ROSE v. BUCKETT. (*a*.)

Bankruptcy—Action for trespass—Claim for personal damage—Bankruptcy of plaintiff—Cause of action remaining in plaintiff.

An action was brought for trespass and conversion of goods, and damages were claimed for the personal inconvenience thereby occasioned to the plaintiff. The plaintiff subsequently became bankrupt.

Held, that, the damage to the goods being admitted to be nominal, the essential cause of action was the personal injury to the plaintiff, and that this cause of action did not pass to the trustee in bankruptcy but remained in the plaintiff, who was, therefore, entitled to prosecute his action.

As to where one and the same cause of action results in substantial damage to the property of the bankrupt, as well as injury to his person, Quære.

This was an appeal from a decision of Grantham, J.

An action was brought for trespass and conversion of the plaintiff's goods, which had been given as security for a bill of sale, and damages were claimed for the personal annoyance thereby caused to the plaintiff.

After the action was entered for trial the plaintiff became bankrupt, and his trustee in bankruptcy refused to prosecute the action.

The plaintiff brought the action on for trial, but on the application of the defendant Grantham, J., stayed all proceedings on the ground that all causes of action were vested in the plaintiff's trustee in bankruptcy.

The plaintiff appealed.

W. R. Warren, for the appellant.—The damages to the plaintiff's house and goods are merely nominal, and if damages can be recovered at all it must be for the personal inconvenience he has sustained. The claim, therefore, is one for personal damage, which does not pass to the trustee in bankruptcy. The action can be maintained by the plaintiff on two grounds—first, the personal claim can be separated from the trespass; secondly, there having been no

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

damage to the goods the only ground of action is the personal claim.

He cited *Clark* v. *Calvert*, 8 Taunt. 742, 3 Moore 96; *Beckham* v. *Drake*, 2 H. L. Cas. 579; *Rogers* v. *Spence*, 12 Cl. & Fin. 700, 13 M. & W. 571; *Hodgson* v. *Sidney*, 14 W. R. 923, L. R. 1 Ex. 313; *Morgan* v. *Steble*, L. R. 7 Q. B. 611, 20 W. R. C L. Dig. 8; *Brewer* v. *Dew*, 11 M. & W. 625; and *Howard* v. *Crowther*, 8 M. & W. 601.

Blake Odgers, K.C., and *Spokes*, for the respondent.—Where there is a cause of action for injury to the to the property of a bankrupt that passes to the trustee in bankruptcy, and where there is a cause of action for injury to the person or reputation of the bankrupt that remains in him. But the cause of action in respect of property passes to the trustee, even though personal damage be sustained, and the authorities show that in such a case the cause of action cannot be split up: *Brunsden* v. *Humphrey*, 32 W. R. 944, 14 Q. B. D. 141; *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262; *Wadling* v. *Oliphant*, 24 W. R. 246, 1 Q. B. D. 145; *Emden* v. *Carte*, 29 W. R. 600, 17 Ch. D. 169; *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210. [COLLINS, L.J., referred to Baldwin on Bankruptcy (8th ed.), p. 293, and to *Boddington* v. *Castelli*, 1 W. R. 359, 23 L. J. Q. B. 31.] [STIRLING, L.J., referred to *Ex parte Vine, In re Wilson*, 26 W. R. 582, 8 Ch. D. 364.]

Warren, in reply, cited *Stanton* v. *Collier*, 2 W. R. 197, 3 El. & Bl. 274; *Chamberlain* v. *Williamson*, 2 M. & Sel. 408; *Ashby* v. *White*, 2 Ld. Raym. 938, cited from Pollock on Torts (6th ed.), p. 182; Williams on Bankruptcy (7th ed.), p. 200; *Prosser* v. *Edmunds*, 1 Y. & C. Eq. Ex. 481; *Hill* v. *Boyle*, L. R. 4 Eq. 260; *Wood* v. *Downes*, 18 Ves. 120.

Cur. adv. vult.

COLLINS, L.J.—This case appeared to raise a point of some difficulty, upon which the authorities were not easy to reconcile, and we therefore took time to look into them. The action was for trespass and conversion of the plaintiff's goods, and damages were claimed in addition for the personal annoyance caused thereby to the plaintiff. After the cause was entered for trial the plaintiff became bankrupt, and, on application made to Grantham, J., before the jury were sworn, he stayed all proceedings on the ground "that all causes of action were vested in the trustee in the bankruptcy"—*i.e.*, the official receiver. From this order the plaintiff appeals. The general principles which determine whether a cause of action does or does not pass to the trustee in a bankruptcy are well settled, and may be stated in the language of Parke, B., in *Beckham* v. *Drake*. [His lordship read from the judgment on p. 627, and continued:] It is admitted in the present case that the damage to the land and goods was merely nominal, and, if substantial damages could be recovered at all, it would be for the annoyance and personal inconvenience caused to the bankrupt, and it was contended, therefore, for the plaintiff that the cause of action remained in the bankrupt and did not pass to his trustee. On the other hand, it was contended that the action was one of trespass to the land and conversion of the chattels of the plaintiff which imported some injury to his estate, the damages for which, even though nominal only, would, therefore, pass to the trustee, and that the annoyance, &c., was not itself a cause of action, but only damage flowing from the original cause of action which was single and passed to the trustee. This raised a question as to the possibility of dividing a cause of action, and leaving one part to be sued on by the bankrupt and the other by the trustee, and *Brewer* v. *Dew*, *Rogers* v. *Spence*, and *Hodgson* v. *Sidney* followed in *Morgan* v. *Steble*, were cited. It is not, however, necessary in my opinion to review these authorities or to determine the vexed questions left undecided by Parke, B. (see *Beckham* v. *Drake*, and Lord Campbell in *Rogers* v. *Spence*), for I think this case stands clear of the difficulty which would arise where one and the same cause of action results in substantial damage to the property of the bankrupt as well as injury to his person or annoyance to his feelings. Where the damages to property by trespass and conversion are merely nominal the cause of action in respect thereof is not regarded as one affecting the value of the property passing to the trustee, so as to give him a right of action in respect thereof, but rather as a wrong personal to the bankrupt himself on which his trustee could not found an action. This view is well put by Cresswell, J., in his opinion delivered to the House of Lords in *Beckham* v. *Drake*, summing up the result of *Clark* v. *Calvert*, *Rogers* v. *Spence*, and *Brewer* v. *Dew*. He says: "In *Clark* v. *Calvert*, *Rogers* v. *Spence*, and *Brewer* v. *Dew* it was decided that rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignee if he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt independently of his rights of property and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action." Passages to similar effect in different language will be found in the opinion of the other judges: see, in particular, Parke, B., at p. 626 and Wilde, C.J., at p. 634 of 2 H. L. Cas. These opinions are specially valuable coming from judges some of whom had taken part in the cases referred to, summarising their effect, and they negative the technical ground on which alone Mr. Odgers contended that *Clark* v. *Calvert* and *Rogers* v. *Spence* were decided—viz., that under the then statute the assignees unless they interfered took no interest in land let to the bankrupt. Grantham, J., treated the action as one that could not under the circumstances give rise to "vindictive" damages, and therefore as not falling within the test applied by Lord Abinger in *Brewer* v. *Dew* as determining that the right to sue remained in the bankrupt. But the damages claimed here, whether the facts will support the claim or not, are technically "vindictive" in the sense in which Lord Abinger used the words—that is to say, they are not merely compensation for damage to land or goods, but something more, and so far as they are more they are in character "vindictive" in the legal sense. But as I have already shown, even if the damages were nominal only, the cause of action remains in the bankrupt. I am of opinion therefore that the action here is one in which, in the words of Cresswell, J., above cited, "the primary personal injury to the bankrupt is the principal and essential cause of action," and though the facts as far as one can surmise them from the pleadings and materials before Grantham, J., make vindictive damages in the popular sense improbable, we should not be justified in interfering with the plaintiff's right to have the stay removed if the cause of action is in point of law vested in him notwithstanding his bankruptcy. I think the appeal must be allowed. As regards the costs the learned judge in the court below did not give judgment; he simply stayed the action. I do not think that the analogy of a new trial will apply to this case. I think that the appellant ought to have the costs of this appeal. The other costs will, of course, be dealt with in the action—that is to say, those costs will abide the event.

STIRLING, L.J.—I am of the same opinion. I desire also to rely on the very clear expression of opinion of Cresswell, J., in the case which has been referred to of *Beckham* v. *Drake*. As to the earlier authorities which were the foundation of the argument on behalf of the appellant in the present case I should desire to add only one word with reference to the question whether there has been any such change in the bankruptcy law since the time when those cases were decided as to alter the right of the bankrupt and his trustee. Now it is quite true that the language of the present Act is different from that which was in force at the time when those cases were decided. Even under the general words which were found in the old bankruptcy statutes—such, for example, as "goods and chattels," it was decided so long ago as the well-known case of *Ryall* v. *Rowles*, 1 Ves. sen. 348, by Lord Hardwicke that *choses in action* were included. In the present Bankruptcy Act in the definition section 168 there is found a definition of "property," which is the word used in the body of the Act, and it is defined to include "money, goods, things in action, land, and every description of property whether real or personal," and also a number of other things which I need not mention. That change in the language of the Bankruptcy Act was first introduced in the Bankruptcy Act of 1869, and it was pointed out very properly that under this Act things in action are specifically referred to which they were not in the previous Bankruptcy Act. Upon that it seems to me that there is direct authority which shows that nevertheless the state of the law as determined by the earlier cases to which I have referred still remains in force. That is the case of *Ex parte Vine, In re Wilson*, alluded to in the course of the argument, where it was held in the Court of Appeal that under the Bankruptcy Act of 1869, as before it, damages in an action for personal tort recovered by an undischarged bankrupt did not pass to the trustee in bankruptcy. The language of the Act of 1883 is in this respect undistinguishable from that of the Act of 1869, and it seems to me that it is an authority which guides us in the present case. I therefore arrive at the same conclusion as the Lords Justices.

Appeal allowed.

Solicitors for the appellant, *Farlow & Fuller*.

Solicitors for the respondent, *Ellis, Mundy, & Clarke*.

(1902) 2 Ch. 632.

High Court of Justice.

Chan. Div. } Farwell, J. } July 2, 3, 4, 5, 6, 11, 1901.

CACKETT v. KESWICK. (a.)

Company — Prospectus — Director — Promoter — Shareholder—Contract by directors and promoters—Omission from prospectus—"Fraudulent" prospectus—Waiver clause—Measure of damages—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

An arrangement under which the promoters and directors of a company about to be formed agreed with a firm that, in consideration of the latter's underwriting 10,000 *shares in the company, the firm was to receive* 12,000 *vendor shares as commission therefor, but* 10,000 *shares were in fact for the use of the firm's name on the prospectus on their approving of the soundness of the undertaking, and, further, that the firm was to be appointed commercial agents of the company, whose registered office was to be located at its address, while a member of the firm was to go on the prospectus as chairman of the company, held to be a contract material to be disclosed in the prospectus within the meaning of the* 38*th section of the Companies Act*, 1867.

The 38*th section cannot be evaded by a "waiver clause" saying that "there may also be various trade contracts and business arrangements" in a case where such a contract as that mentioned above has not been disclosed in the prospectus.*

In refusing to give effect, as against a shareholder, to such a waiver clause and in holding that the prospectus by reason of the omission of a material contract is "fraudulent" within the meaning of the 38*th section, the court will measure the damages due to the shareholder by the difference between the amount paid by him for his shares and the actual value of the shares on the day after they were allotted to him.*

Greenwood v. Leather Shod Wheel Co., [1900] 1 *Ch.* 421, 48 *W. R. Dig.* 35, *followed.*

Action with witnesses.

The plaintiff Cackett, an architect residing at Newcastle-on-Tyne, claimed relief for non-disclosure in a company prospectus of a contract in breach of section 38 of the Companies Act, 1867, on the faith of which he had applied for shares which were allotted to him.

The defendants were William Keswick, a member of the firm of Matheson & Co., of 3, Lombard-street, London, E.C., who since its incorporation had been chairman of the board of directors of the Panuco Copper Co. (Limited); Samuel Watkin Carlton, a metal merchant, the vendor to the company, and also one of the directors; and Edmund Cook Wheater, a stockbroker in Newcastle.

The last two defendants had been engaged in the formation and promotion of the company.

The company was incorporated on the 24th of May, 1899, with a capital of £500,000 divided into shares of £1, and with the object of acquiring copper mines situated at Monclova in the Republic of Mexico.

In the same month a prospectus was issued to the public, as the plaintiff alleged, by the defendants, inviting subscriptions for 333,334 shares, in which Mr. Keswick and Mr. Carlton were named as directors and the firm of Messrs. Matheson & Co. were described as commercial agents to the company.

The prospectus, after setting forth the objects of the company, and extracts from reports of experts showing the probability of successful working of the mine and the prospect of large profits, proceeded as follows: "The directors with other underwriters have guaranteed the subscription of part of the company's capital and will receive a commission from the vendor for so doing. The following contracts have been or will be entered into: An agreement dated the 8th of February, 1899, and made between the Panuco Copper Mining Co. of the one part and Samuel Watkin Carlton of the other part, under which the vendor agreed to purchase the mine and other property to be acquired by this company. An agreement also dated the 8th of February, 1899, and made between the same parties as the last-mentioned agreement extending the time fixed for the completion thereof. An agreement dated the 10th of March, 1899, and made between the said Samuel Watkin Carlton of the one part and the said Edmund Cook Wheater of the other part, providing for the division of the profits of the resale to this company.

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

An agreement between the said Samuel Watkin Carlton of the one part and this company of the other part, providing for the resale to this company at a profit. There may also be various trade contracts and business arrangements in addition to the before-mentioned agreement of the 3rd of January, 1898. As these contracts and arrangements and the above-mentioned underwriting agreements may constitute contracts within the meaning of section 38 of the Companies Act, 1867, applicants for shares shall be deemed to waive the insertion of the dates of and names of the parties to any such contracts, arrangements, or agreements, and shall accept the foregoing as a sufficient compliance with section 38 of the Companies Act, 1867, or otherwise."

By the form of application for shares accompanying the prospectus it was provided that the applicant agreed with the company, as trustee for the directors and other persons liable, to waive any further compliance with section 38 of the Companies Act, 1867, than that contained in such prospectus.

The plaintiff, who was an architect residing at Newcastle-on-Tyne, on the faith of the prospectus, as he alleged, applied for 500 shares in the company on the 26th of May, and paid the full nominal value in cash.

The company did not prove successful, and an order for compulsory winding up was made on the 4th of April, 1900.

A dividend of 4s. a share had since been paid, but the plaintiff alleged that the assets would only be sufficient to pay a small further dividend.

After the winding-up proceedings had commenced the plaintiff discovered that on the 10th of March, 1899, the firm of Messrs. Saunders, Fielding, & Carlton, metal workers, in which the defendant Carlton was a partner, had written to Messrs. Matheson & Co. a letter in the following terms:

"Messrs. Matheson & Co., 3, Lombard-street. 10th of March, 1899. Dear Sirs,—*In re* Pannco Copper Co.—We beg to confirm the following arrangement made with you to-day—namely, that in consideration of your underwriting 10,000 shares in the above company about to be formed, you are to receive 12,000 vendor shares as commission therefor. You are also to be appointed commercial agents for the company, and the registered offices are to be located at your address. It is further agreed that your Mr. Keswick will go on the prospectus as chairman of the company.—Yours faithfully, SAUNDERS, FIELDING, & CARLTON."

It was admitted that in pursuance of the contract contained in this letter Messrs. Matheson & Co. underwrote 10,000 shares, were appointed commercial agents of the company, whose registered offices were located at their address, and that they received 12,000 shares.

In view of the existence of this contract, the plaintiff contended that the statement in the prospectus as to the contracts entered into was misleading and untrue, and alleged that if he had known of the said contract, he would never have applied for shares. Accordingly, he claimed a declaration that the prospectus of the company was fraudulent on the part of the defendants, who knowingly issued the same without specifying the date and names of the parties to the contract contained in the letter of the 10th of March, 1899, and damages.

Swinfen Eady, K.C., Upjohn, K.C., and *E. W. Martelli*, for the plaintiff.—The arrangement described in the letter of the 10th of March, 1899, is a contract within the meaning of section 38 of the Companies Act, 1867,* and should have been disclosed in the prospectus: *Sullivan* v. *Metcalfe*, 29 W. R. 181. 5 C. P. D. 455; *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, 48 W. R. 35.

Rufus Isaacs, K.C., and *M. J. Muir Mackenzie*, for the defendant Keswick.—Before the letter of the 10th of March, 1899, was written, the defendant Wheater, on behalf of himself and the defendant Carlton, had invited and requested Matheson & Co. to undertake the duties and position of commercial agents to the company when it was formed. For undertaking this agency and its duties Matheson & Co. stipulated that the offices of the company should be at their address, that there should be paid to the firm £10,000 in fully paid up shares in the company, and that some member of the firm should be one of the directors. At the same time Matheson & Co. promised to underwrite 10,000 shares at a commission of 20 per cent. The letter of the 10th of March, 1899, was intended to embody and was understood by me to embody the terms of this arrangement, 2,000 shares being the 20 per cent. commission for underwriting and 10,000 shares being the amount stipulated for in reference to the commercial agency. I submit that this was the true nature of the transaction, and therefore it was not a contract material to be stated within the terms of section 38, not being a contract which would operate on the mind of any person proposing to apply for shares. It is not such a promotion contract as that which in *Greenwood* v. *Leather Shod Wheel Co.* the promoter Lambert made every effort to conceal. Assuming, however, that it was such a material contract, then, in the first place, it is a pure question of fact whether the plaintiff relied on the defective prospectus, and as to this he gave an incoherent answer. [FARWELL, J., here referred to the principle as to evidence laid down by Lord Halsbury in *Arnison* v. *Smith*, 37 W. R. 739, 41 Ch. D. 308.] And, secondly, I mainly rely on the "waiver clause" in the prospectus and submit that it operates so as to preclude me from any liability under this prospectus. The transaction was a trade contract or business arrangement within the express terms of the "waiver clause," and the fact of some inaccuracy in the "waiver clause" is not enough to prevent its operation. [FARWELL, J.—The "waiver clause," it is true, says that "there may be" such trade contracts; but are you not in this dilemma—that, if there were and you knew, the clause does not avail you; if there were not, there was nothing to avail?] As to the measure of damages, it does not follow from section 38 that because the non-disclosure be "fraudulent," therefore the plaintiff has suffered the damage which is the loss of the shares: see *Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469. I cannot be said to have been dishonest, and the prospectus was not fraudulent so far as I was concerned. [FARWELL, J.—I do not think personal

* Section 38 provides as follows: "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

dishonesty is necessary for the plaintiff's case, but it may prove that there was fraud under the Act, even though not *primâ facie*.] The "waiver clause" was not a tricky one as in *Greenwood* v. *Leather Shod Wheel Co.*

Neville, K.C., and *Daniel Jones*, for the defendant Carlton.—I adopt the defence of the defendant Keswick, but also say that I was out of the country from the 3rd of May to the 31st of May, and submit that the prospectus on which the plaintiff alleges that he relied was one issued in my absence and without my approval.

Younger, K.C., and *Pattullo*, for the defendant Wheater.—I make the same defence, but also say that I was not a director, and therefore am not responsible for the prospectus.

Cur. adv. vult.

FARWELL, J.—The plaintiff claims damages against the defendants for non-disclosure in the prospectus of a contract in breach of section 38 of the Companies Acts, 1867. The company in respect of which the dispute arises is the Panuco Copper Co., which was incorporated on the 24th of May, 1899, and is now in liquidation. The defendant Keswick was chairman of the board of directors. He is a partner in the well-known firm of Mathesons, and his firm have acted for many years as commercial agents for the Rio Tinto Co. and the Mountain Copper Co., and are well known and of high reputation in the copper trade. The defendant Carlton is also a metal merchant and a director of the company, and the defendant Wheater is a stockbroker in Newcastle. I find as a fact that both were promoters of the company. In January, 1899, the defendant Carlton obtained an option to buy the Panuco mine, and he and the defendant Wheater determined to combine to promote and form a company to purchase the mine from Carlton at a profit. With a view to ensuring success in their appeal to the public to take shares they desired to associate Mr. Keswick and the firm of Mathesons with their adventure, and some negotiations took place in February, which, however, came to an end on the the 24th of February, but, after some abortive negotiations with a Mr. Lazarus, Mr. Wheater saw Mr. Keswick on the 10th of March, 1899, and made an arrangement with him, which he reported to Carlton, and Carlton embodied it in a letter written and signed by him in the name of his firm and sent to Mathesons. The letter is as follows: "Messrs. Matheson & Co., 3, Lombard-street, the 10th of March, 1899. Dear Sirs,—Re Panuco Copper Co.—We beg to confirm the following arrangement made with you to-day—namely, that in consideration of your underwriting 10,000 shares in the above company about to be formed you are to receive 12,000 vendor shares as commission therefor. You are also to be appointed commercial agents for the company and the registered offices are to be located at your address. It is further agreed that your Mr. Keswick will go on the prospectus as chairman of the company.—Yours faithfully, Saunders, Fielding, & Carlton." No one now contends that this letter expresses the real bargain with precise accuracy. It is common ground that the whole 12,000 shares were not the commission for underwriting 10,000 shares; 2,000 only were attributable to this commission, and the balance of 10,000 is said by the plaintiffs to be for the use of the names of Mathesons and Keswick on the prospectus, and is said by the defendants to be remuneration for acting as commercial agents for the company. This contract was not disclosed in the prospectus. Now I desire to state clearly that I find no ground whatever for imputing to any of the defendants any fraudulent intention of or any scheme for concealing this contract. I think that its omission arose from an unfortunate misunderstanding between counsel and solicitor, due to some extent to the fact that the contract on the face of it appeared to be an underwriting contract only. But this is not sufficient to relieve the defendants from liability under the Act. The statute provides that the omission, with knowledge of their existence, of material contracts shall be deemed to be fraudulent—that is to say, it creates a new cause of action and imposes the civil penalties of actual fraud on omissions which are not actually fraudulent: see *Twycross* v. *Grant*. At common law the plaintiff in an action for deceit has to prove actual fraud (*Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337); at common law mere non-disclosure of facts, however morally censurable, will not support an action for deceit: *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377, at p. 403, per Lord Cairns. But the Act not merely makes non-disclosure a cause of action, but makes it a cause of action based on fraud not proved to exist but deemed to exist as a statutory fiction for the purpose of supporting the action. The first question is, did the plaintiff subscribe on the faith that there was no such contract as that on the 10th of March in existence because it was not stated in the prospectus? I apprehend that in this respect the same principles must apply to the omission of a material fact as apply to the insertion of an untruth in a prospectus. In the case of a positive statement the plaintiff's allegation is that such untruth was the inducing cause of his entering into the contract. It is, perhaps, not accurate to say that an omission is an inducing cause. The prospectus is in each case the inducing cause, in the one case because it does, in the other because it does not, contain something, so that in the case of a misstatement the plaintiff's allegation is that, if he had not been told, and in the case of an omission that if he had been told, so and so, he would not have subscribed. Now it cannot be enough for a man to swear that he would not have entered into the contract if he had known of something that was concealed from him. It is easy to be wise after the event, and many men can honestly persuade themselves, when a company has failed, that they would have been influenced by a circumstance which in all probability would have made no impression whatever on their mind when considering an investment or speculation. The test must be, Is the omission material? and if the court sees that the fact omitted is of such a nature that it might reasonably deter, or tend to deter, the ordinary investor from entering into the contract, this is sufficient. It is in great measure an inference of fact to be drawn by the court or a jury from the circumstances of the case. If a material fact is omitted from a statement put forward to induce a person to enter into a contract and he does enter into the contract on the faith of that statement, it is a fair inference that he would not have contracted if he had known of the fact, and that in this sense the omission induced the contract. As Lord Blackburn points out in *Smith* v. *Chadwick*, 30 W. R. 661, 9 App. Cas. 187, at p. 196, the plaintiff could not be called as a witness in his own behalf in the days when *Pasley* v. *Freeman*, 3 T. R. 51, was decided, and he must have succeeded, therefore, on the inference drawn from the circumstances of the case. It would, no doubt, be matter of comment if a plaintiff were not called nowadays to swear that the fact omitted would have deterred him from contracting, but neither his testimony or his absence is conclusive. This is perhaps only another way of stating that the generality of the terms of

section 38 must be limited, as pointed out by Thesiger, L.J., in *Sullivan* v. *Metcalfe*, 29 W. R. 181, 5 C. P. D. 455, at p. 461. "Every contract relating to the formation of a company, or to its capital, property, or business, when formed, or to the position, pecuniary or otherwise, in regard to the company or its promoters or vendors, of the directors or other officers of the company and which is material to be made known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing, is a contract within the meaning of section 38 of the Companies Act, 1867, and as such must be disclosed under the circumstances and to the extent which the section points out, provided that one of the parties to it is at its date, or subsequently becomes, a promoter, director, or trustee of the company." Now, in order to answer the question whether this contract is material or not, I have to determine what it really is. I am unable to accept the defendant's suggestion that it is a contract to act as commercial agents for the company in consideration of a payment of 10,000 shares. There was no company in existence which could so contract or which could ratify such a contract. No period or terms of agency are mentioned. If Mathesons had refused to act the company could have recovered nothing against them, and the measure of damages in an action by Carlton would have been on a totally different basis, and Carlton would have recovered for himself and not for the company. Further, the evidence does not support any such contract. Mr. Keswick was examined in the liquidation and his depositions are evidence against him, though not against the two other defendants. After stating his view of the bargain with Carlton in answers 18 and 19, he is asked (20), "What were you to give in return for that fee of £10,000?" and he answers, "We were to examine the prospectus, we were to look into the business of the company, we were to satisfy ourselves (which we did) that it was an undertaking that we could honourably attach our names to, and we were to locate and take charge of the business, have the directors' meetings in our office, find a board room, and so forth. For officers and staff there was a separate charge, which would have come in if the company had gone on." He was then asked (21), "The benefit for that was the attaching of your names to the prospectus, I suppose?" Answer.—"I do not know about that." Question 22—"By your name I mean your firm's name." Answer.—"That did not occur to me. We expect to be rewarded in commercial matters for what we do, and that was our fee for placing ourselves in that position." Mr. Keswick's evidence in the box does not differ from this. He stated in effect that Mathesons had to be remunerated for what they had to do in going over the prospectus, in undertaking the responsibilities, and in adopting the company. Mr. Carlton, in his examination before the registrar said, in answer to the question (770), "What were you giving them 10,000 shares for?"—"I understood from Mr. Wheater that he arranged that for taking the business up." (771)—"What do you mean by taking the business up?"—"Well, what shall I say? In being interested in taking it under their wing, a large financial house like that." And although he went on to state, that so far as he knew the whole 12,000 shares were for underwriting, this is not now seriously put forward, and in giving evidence before me Mr. Carlton said that he thought that Mathesons' name was important on the prospectus and would lead the public to subscribe, and that he was doing the best for his underwriters. Mr. Wheater, in his examination before the registrar, said (912), "Mr. Keswick or Mr. Macdonald said: 'If we allow our name to go on the prospectus, and if one of us becomes chairman, or if we have to find a chairman, we shall require a certain fee or a number of shares.'" With regard to this answer I desire to point out that in the office copy supplied there is a red ink note of correction or explanation on the opposite page, which is not signed or verified in any way or referred to in the memorandum signed by the witness, and I call attention to the irregularity. I have read the correction, and, as the result of the whole of the evidence that I have read and heard, I am convinced that the original answer is a correct statement of the facts, and that there is no ground for the correction, if it be authentic. I find as a fact that the consideration for the 10,000 shares was the agreement by Mathesons to take the company into their office, not merely to lend their name to it, for this might imply that they simply sold their name without more, and this would be unjust to them; it was to induce them "to qualify," as an expert witness would say. I give them credit for intending to satisfy themselves that the matter was sound before they allowed their name to be used, but the consideration was for taking the steps necessary to satisfy themselves and allowing their name to be used if and when they were satisfied. The agency was a part of the consideration moving to, not from, Mathesons. It was likely to be valuable to them. Carlton had tried to get Mathesons to give him 5,000 shares for giving up his claim to it in their favour. If the 10,000 shares had really been part payment for acting as commercial agents it ought to have been disclosed to the directors at the first meeting when Mathesons were appointed agents on terms to be arranged, but it was not mentioned. It is not suggested that the other matters mentioned in the letter of the 10th of March—namely, the promise of offices and the chairmanship, were in any way paid for by these shares. All these three matters were in fact dealt with as separate matters to be contracted and paid for by the company and the contract of the 10th of March was never mentioned to any member of the board. The existence of such a contract is, in my opinion, material for the consideration of an intending investor. He subscribes on the faith of Mathesons' name and on the well-founded assumption that they have looked into the matter and are so well satisfied with the venture as to take it under their protection. How can it be said that it cannot affect his judgment to know that Mathesons do not take the matter up simply on its merits, but because they have been paid to do so by the vendor, and that such payment, being in shares of the company, was necessarily dependent on the successful flotation of the company, and that such payment was made by the vendor out of his vendor's shares, so that the burden was in effect borne by the company itself? I cannot bring myself to doubt that "the careful man, disposed to invest in an undertaking," spoken of by Cockburn, C.J., in *Twycross* v. *Grant* (2 C. P. D., at p. 528), would think the difference very material between the support of Mathesons to a company on the ground of the merits of the company alone and such support on the ground of payment dependent on the existence of merits sufficient to induce the public to subscribe. If I employ an agent to advise me on the value of an estate that I think of purchasing, I should certainly consider it material to know that he was to be paid by the vendor for inspecting the estate a fee dependent on my purchasing. The next question arises on the waiver clause in the prospectus. I hold that all the defendants approved and authorized the issue of the prospectus dated the 27th of May or the 24th of May, and that the plaintiff subscribed on the faith of this prospectus. Mr. Neville, for Mr. Carlton,

endeavoured to show that the plaintiff could not have subscribed on any prospectus issued by Carlton's authority; but, in my opinion, the evidence of the plaintiff, coupled with and explained by the application form signed by him, and on which Rutherford's name appears, is conclusive that the prospectus seen by the plaintiff and on which he subscribed was that of the 27th of May, and this was knowingly issued by all the defendants within the meaning of the Act. The waiver clause is in these terms: "There may also be various trade contracts and business arrangements in addition to the before-mentioned agreement of the 3rd of January, 1898. As these contracts and arrangements and the above-mentioned underwriting agreements may constitute contracts within the meaning of section 38 of the Companies Act, 1867, applicants for shares shall be deemed to waive the insertion of the dates of and names of the parties to any such contracts, arrangements, or agreements, and shall accept the foregoing as a sufficient compliance with section 38 of the Companies Act, 1867, or otherwise." Now, as a matter of construction, is the agreement of the 10th of March a trade contract or business arrangement within the meaning of this clause? In my opinion it is not. The company were taking over as a going concern an open mine which was being worked in Mexico. One contract relating to taking the produce of the mine was mentioned in the prospectus. It is obvious that there might be many similar to it of which the directors could not be expected to know, and the collocation of the words shows that the draftsman was referring to contracts and arrangements similar to that specified. I have heard the evidence of counsel and solicitor as to the settlement of the prospectus, and assuming that counsel, who loyally took the burden on himself, is accurate in his recollection, and did really say that it was not necessary to mention this contract in the prospectus, it must, as his own contemporaneous opinion shows, have been on the ground that it was an underwriting contract, not that it was a trade or business arrangement. It was, I think, overlooked in the argument that counsel had the written document, which purports to give 12,000 shares for underwriting 10,000, before him, and not the oral evidence, which shows the true nature of the agreement, and he had himself written in an express reference to underwriting contracts. Further, I do not think that it lies in the mouth of the defendants consistently with honesty to say that they knew of and intended the contract of the 10th of March to fall under the head of trade contracts and business arrangements when they stated not that "there are" but that "there may be" such contracts. In the view that I take of the construction of the clause it is hardly necessary for me to consider the other point argued, but as it has been argued, I desire to say that I agree with Romer, L.J.'s, statement in *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch., at p. 431: "Assume that there was a contract by the plaintiff not to take advantage of the Act, how can you bind him when you state in your prospectus that there 'may be' other agreements when you knew there were? In your case you are a promoter knowing of this contract, and yet you put in a misleading statement that there 'may be' other agreements. That surely, is not a case in which you can say there is a waiver." A man who desires to take advantage of a waiver clause must state the facts fairly. If he states that there may be contracts, he intends it to be inferred that he knows of none. It is immaterial whether he intended to deceive or not when he made the statement, but if the element of unfairness is requisite, it is found when he insists that its effect is to make the other contracting party give up something of the existence of which the assertor knew and the other contracting party was ignorant. As I read the judgments in *Greenwood's case*, the decision and the reasons given for it involve that the statutory rights under section 38 can be waived, that any waiver obtained by unfair dealing or trickery is void, that the person said to have waived must have sufficient information of what he was waiving, and that apart from fraud, the same principles apply to waiver clauses as are applicable to ambiguous or misleading statements in conditions of sale or releases. I should add that the question of damages, which Mr. Isaacs argued last as a separate point, is really the same as the question of materiality that I have already disposed of. As Lord Blackburn says in *Smith* v. *Chadwick*, 9 App. Cas., at p. 195: "Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon those representations, he shows damage—if he did not, he shows none." There was some little misunderstanding about the measure of damages, and as this is a test action I think that it would not be right to hold Mr. Isaacs to his admissions Mr. Eady very properly leaves the matter to me, and I hold that the measure of damages is the difference between the amount paid by the plaintiff for his shares and the actual value of the shares on the day after they were allotted to the plaintiff. In the present case I must depart from the usual rule to which Lord Bowen, when sitting in the Court of Appeal, said that the Chancery Division ought to adhere, and on which I have always acted—viz., that it is as necessary, in the absence of a prior order of the court or agreement between the parties, for the plaintiff to prove the amount of damages that he has suffered as it is to prove every other part of his case, and I direct an inquiry what was the real value of the shares on the day after they were allotted to the plaintiff, and I refer to the judgments of the Lords Justices in *Peek* v. *Derry*, as showing the basis on which the inquiry is to proceed. There will be a declaration of the defendants' liability, and the defendants must pay the costs of the action.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Clayton & Gibson*, Newcastle-upon-Tyne; *Stephenson, Harwood, & Co.*; *Nicoll, Son, & Jones*; *Neish, Howell, & Macfarlane.*

1903, 1 Ch. 612.

Chan. Div. Farwell, J. } July 6, 11, 1901.

BATY v. KESWICK. (a.)

Company—Prospectus — Director — Promoter — Underwriter—Contract by directors and promoters—Omission from prospectus—Materiality—Careful investor —Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

In order that a shareholder may obtain relief under section 38 *of the Companies Act,* 1867, *for non-disclosure in the prospectus of a material contract he must show that he applied for his shares on the faith of that prospectus, and that such prospectus had been "knowingly issued" by the promoters and directors of the company before he acted upon it.*

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

An underwriter who pays attention to nothing in the prospectus but the names of the directors will not be considered by the court as a careful investor in determining the materiality of a contract not disclosed in the prospectus.

Action with witnesses.

The circumstances of this action were the same as those of *Cackett* v. *Keswick* (reported *ante*, p. 10), save in so far as appears from the judgment of his lordship set out below.

The action was heard immediately afterwards, and before his lordship gave judgment in *Cackett* v. *Keswick*.

By arrangement the defendants' evidence in the former action was taken as given in this action also, and, after the examination of the plaintiff Baty, who had underwritten certain shares in the company and claimed relief similar to that claimed in the former action, submissions were shortly made by

Swinfen Eady, K.C., *Upjohn, K.C.*, and *E. W. Martelli*, for the plaintiff;

Rufus Isaacs, K.C., and *M. J. Muir Mackenzie*, for the defendant Keswick;

Neville, K.C., and *Daniel Jones*, for the defendant Carlton; and

Younger, K.C., and *Pattullo*, for the defendant Wheater.

Cur. adv. vult.

FARWELL, J.—In this action also the plaintiff seeks to recover damages for non-disclosure of the same agreement of the 10th of March, 1899, in the prospectus, but the circumstances of the case are different. It has been arranged that the defendants' evidence in the former action should be taken as given in this action also, but it is necessary to state some facts that were not relevant to the former case. During the month of March the prospectus was in course of preparation, and was settled by counsel in consultation on the 11th of March. On the 13th, however, a difficulty arose as to title, and Mr. Keswick refused to go on until this was cleared up. A clause to meet the difficulty was settled by counsel and was printed in a draft prospectus, but Mr. Keswick declined to authorize the issue of any prospectus until the difficulty was cleared up. As I have found in the other action, the actual prospectus, dated the 27th of May, was not approved and authorized for issue or issued before the 24th of May, 1899. On the 13th of March, 1899, the plaintiff met a friend of his, a Mr. Ainslie, who mentioned the Panuco Co. to him and took a prospectus out of his pocket and gave it to him to read. He was attracted by the names of Mathesons and Keswick on the front sheet, and he told me in the box that he did not remember reading anything about contracts. I find this expressly as a fact, because the shorthand note shown to me is inaccurate in this respect, and is inaccurate also in the statement of what passed on Mr. Neville's proposing to cross-examine. I read my note. "I don't remember reading anything about contracts," and this is correct. The plaintiff went on to say that he remembered noticing the names of the directors, that Ainslie asked him if he would do some underwriting, and that he went a little later on the same day to Wheater's office and signed the underwriting agreement for 250 shares, and gave a cheque for £62 10s. On the 28th of March the plaintiff was informed by letter that the directors had decided not to issue the prospectus before Easter, and his money was returned to him, but on the 8th of April he again signed a cheque for the amount and also an application for the 250 shares which he had underwritten. The plaintiff, who gave his evidence very fairly, said that he thought that he did not send his cheque and application until some days after, and this is probably correct. I cannot fix the exact date on which they were sent, but it was before the end of April; nor is it clear when he received the acceptance of his underwriting, but in the view that I take of the case it is not material. The plaintiff is suing on the 38th section and not otherwise, and he has to bring his case within the words of that section. That section provides that any prospectus not specifying a material contract "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus," *i.e.*, the prospectus knowingly issued. But the plaintiff signed his underwriting agreement and application for shares before any prospectus had been issued to the public, as he must have known, because the agreement mentions the prospectus as a document to be issued in the future. He signed his application on the 8th of April on a form referring to a prospectus dated — April, and he says that he did not alter or authorize anyone else to alter the April in the print to the 27th of May, and the alteration was made after he signed. Now, when the Act of Parliament says "knowingly issued," I hold that it means intentionally issued to the public. This is the view taken by Cockburn, C.J., in *Twycross* v. *Grant*, 25 W. R. 701, 2 C. P. D. 469, at p. 540, where he says: "Now there is nothing in the Act to indicate the sense in which the term 'issue' is used. I think it must be taken to mean the making the prospectus public, after its adoption, with a view to inviting persons to take shares and become members of the company. I agree in thinking that it must be taken to refer to an official publication, authorized by those who at the time have the government of the company, which in this instance would be the directors. It would otherwise not be the prospectus of the company." The plaintiff has to show that he acted on the faith of a prospectus, and that such prospectus had been knowingly issued before he so acted, in order to bring himself within the section. Suppose the authorized prospectus of the 27th of May had disclosed a contract which was not disclosed in the earlier proof on which the plaintiff acted, could he possibly succeed under this section? The Act was not intended and is not expressed in such a manner as to impose the very serious consequences of disobedience to its provisions on persons engaged in settling prospectuses in respect of copies not authorized for publication but shown to friends or speculators, not as members of the public but by way of anticipation of the public, and in order to induce them to co-operate with the promoters in placing the shares with the public. If such persons are deceived they have certain rights in law or equity, but they cannot get the benefit of this statute. This is sufficient to dispose of the plaintiff's case, but there is another ground on which I hold that he fails. I hold that he has failed to prove that he subscribed on the faith that there was no such contract as that of the 10th of March in existence, because it was not stated in the prospectus and that such omission was material. I will not repeat the statement that I have already made in *Cackett* v. *Keswick* (*ante*, p. 10) of my view of the principles applicable to this question, but I find as a fact that the plaintiff acted on the faith of the directors' names and that he never read the contract clause in the prospectus and attached no importance to it. I observed that, when he was cross-examined as to the identity of the prospectus that he had seen, he did not turn over the page but looked simply at the list of directors.

He had no idea whether the very special clause inserted in one proof to meet the difficulty as to title was or was not in the proof that he saw, and I am convinced that he individually attached no weight to anything but the directors' names. And when I come to draw the inference of fact mentioned by Lord Blackburn, and to which I have already adverted, the considerations that affect the careful man, disposed to invest in an undertaking, are very different from those that affect the underwriter, who when he underwrote "thought that the public was going to take the thing up and that he would get his 20 per cent. without being liable to take any shares at all." (I am quoting the plaintiff's evidence.) The investor wants a sound concern, the underwriter wants an attractive prospectus. I do not say that the underwriter supposes or desires that there should be any misstatement or concealment, but it is obvious that his interest is that the public should be induced to subscribe, and a long list of disclosed contracts which might be satisfactory to the careful investor would be deterrent to the speculator. I do not forget that the plaintiff's commission was payable in shares, but I think that this is not sufficient to lead me to infer that he is to be regarded as the careful investor for the purpose of considering what facts may fairly be deemed likely to affect his judgment It may well be that an underwriter, knowing of such an agreement as that of the 10th of March purported to be—*i.e.*, that another underwriter was to get a much larger commission than himself, would refrain from underwriting, but this would not be on account of the detriment to the company but by reason of the inequality of the commission. The contract of underwriting with the promoter is wholly distinct from the contract with the company to take shares, and different considerations apply to the materiality of facts according as they affect the one or the other. The action fails and must be dismissed with costs.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Clayton & Gibson*, Newcastle-upon-Tyne; *Stephenson, Harwood, & Co.; Nicoll, Son, & Jones; Nelsh, Howell, & Macfarlane.*

K. B. Div.
(Ridley and Bigham, JJ.) June 21, 1901.

NUNN & CO. *v.* TYSON.
JANE TYSON, *Claimant.* (*a.*)

Married woman—Liability to costs—Separate estate—Restraint on anticipation—Claim by wife to goods seized for husband's debts—"Proceedings instituted"—County Court Rules, 1889, *ord.* 27, *rr.* 1, 2, 4 (a)—*Married Women's Property Act*, 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2.

A married woman by notice in writing directed to the sheriff or high bailiff claimed certain goods levied on for her husband's debts under process of a county court. The high bailiff, in whose possession the goods were, thereupon took out an interpleader summons, and at the trial of the interpleader issue the claimant failed to establish her claim.

Held, that the proceedings were "instituted" by her within the meaning of section 2 of the Married Women's Property Act, 1893, *and therefore that the court had jurisdiction to order her to pay the costs so incurred out of her separate estate subject to a restraint on anticipation, and to enforce payment thereof by the appointment of a receiver.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Appeal by the plaintiff company in an action from a decision of the learned judge of the Herefordshire County Court, refusing to make an order against the claimant Jane Tyson to pay the costs of an interpleader issue, in which she was the plaintiff and had failed to establish her claim, under section 2 of the Married Women's Property Act, 1893.

The plaintiff company had obtained judgment in the county court against the claimant's husband and had put in execution on certain goods believed to be the debtor's property.

The claimant thereupon made a claim to the goods in writing as required by ord. 27, r. 1, of the County Court Rules, which claim was duly addressed and sent to the registrar of the county court, who was also the high bailiff.

The high bailiff thereupon took out an interpleader summons and under ord. 27, r. 4 (*a*), of the County Court Rules the claimant furnished particulars of her claim, whereby she claimed the return of the goods and £50 damages against the company and the high bailiff.

The summons came on for trial and the plaintiff failed to make out a title to the goods, and judgment was accordingly given against her.

Section 2 of the Married Women's Property Act, 1893, provides that: "In any action or proceeding now or hereafter instituted by a married woman, or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint upon anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Under that section the company applied to the county court judge for an order for payment of the costs of the proceedings out of the property of the claimant which was subject to a restraint upon anticipation and for the appointment of a receiver, but the learned judge refused to make such an order on the ground that it was not a case in which proceedings had been instituted by the claimant within the meaning of the section above cited.

H. Herford, for the appellants.—The proceedings were "instituted" by the claimant within the meaning of section 2 of the Married Women's Property Act, 1893, as the notice of claim to the high bailiff was the foundation and commencement of the interpleader proceedings, and was a proceeding instituted by her. The county court judge was therefore in error when he held that neither the claim for goods nor that for damages was a proceeding "instituted" by her within the meaning of the Act, and that the interpleader proceedings were instituted by the high bailiff. *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376, 43 W. R. Dig. 110; *Hood Barrs* v. *Heriot* (*No.* 3), 45 W. R 507, [1897] A. C. 177; and *Moran* v. *Place*, 44 W. R. 593, [1896] P. 214, relied on by the respondent, are not cases in point. The two first merely decide that an appeal brought by a married woman in an action in which she was the defendant was merely a step in an action already instituted, not by her, but by the plaintiffs in the court below. *Moran* v. *Place* is distinguishable because the entry of a *caveat* was merely the giving of a warning to communicate with the *caveator* before allowing any probate proceedings to be instituted.

He also cited *Temple* v. *Temple*, 63 L. J. Q. B. 556.

A. Houston, for the respondent.—A "proceeding instituted" by a married woman within the meaning of the Act must mean a step taken in court and does not include an act done out of court. It must be

something in the nature of the issuing of a writ as pointed out by Lopes, L.J., in *Hood Barrs* v. *Cathcart*, as the words convey the idea of "an action commenced or proceeding initiated." The decision given in *Moran* v. *Place* covers the present case. The inevitable effect of entering a *caveat* is that the executors have to bring an action. The notice served by the claimant is not equivalent to a writ in detinue for the return of the goods, for the lady could have got them by reason of the abandonment of the execution if the execution creditors had been satisfied that the real ownership of the goods was vested in her.

THE COURT allowed the appeal.

RIDLEY, J.—I think the learned county court judge has come to a wrong conclusion in this case. The conclusion I have come to after having heard the arguments is that the institution of the proceedings did not commence with the taking out of the summons by the high bailiff, but commenced with the notice sent by the claimant. The case of *Hood Barrs* v. *Heriot* does not seem to me to conclude this case, for all that decision really decides is that a defendant who unsuccessfully appealed against a decision did not thereby "institute" proceedings. In *Moran* v. *Place*, relied on by the respondent, it was held that a woman who had entered a *caveat* in respect of a will had not thereby instituted proceedings and was not liable for the costs, but there the lady claimed nothing. She merely asked that if anything was done to set up the will she should have notice. The instituting of the proceedings there was what was subsequently done. Here, however, Mrs. Tyson claimed the goods as her property and gave the high bailiff notice to that effect. If the execution creditor had admitted her claim, she would have obtained possession of the goods and the notice of her claim to them would have been the step—the initiation—of the process by which she established her right to the goods. Clearly, therefore, by this act she instituted proceedings to establish her claim, and the section applies. It cannot be said that the summons, which had to be taken out because the execution creditor opposed the claim, was the instituting of the proceedings. For these reasons it seems to me the county court judge should have made the order for costs out of the lady's separate estate, as asked for, and this appeal must therefore be allowed.

BIGHAM, J.—I am of the same opinion. The sole question is whether a married woman who made a claim to goods seized under an execution against her husband instituted a proceeding within the meaning of section 2 of the Act of 1893. I think it is only necessary to state the facts to demonstrate that she did. The lady could only make her claim to the goods in one way—namely, by taking proceedings under the county court rule, which prescribes that a written notice of the claim must be given to the officer in whose custody the goods are. The claimant gave such a notice; with what object did she give it? Clearly, that she might be able, in case of need, to proceed to establish her claim, which, when established, would enable her to get goods then in the custody of the law officer to answer her husband's debts. To get the goods for herself was the object she had in view. Matters, however, did not stop there. An interpleader summons was issued by the high bailiff and served upon the execution creditors for the purpose of enabling them to contest the interpleader issue in which the claimant was to be the plaintiff. Then, before the trial, the claimant served particulars of her claim, as required under ord. 27, r. 4 (*a*). If the claimant had succeeded at the trial of the issue, could anyone have said that she had not instituted the proceedings? No such suggestion could be made. It makes no difference that she failed at the hearing to establish her title, for she failed in a proceeding instituted by her in order to get relief in the county court. I am therefore clearly of opinion that the case falls within the section.

The authorities that were cited to us have really no application to the case. In *Hood Barrs* v. *Heriot* a married woman had brought an unsuccessful appeal in an action not instituted by her, and it could not be contended with success that she had instituted a proceeding within the meaning of the section, although Lord Herschell, in his judgment, regretted that the section was so framed that it was not possible to give the respondent the costs of the unsuccessful appeal. I think we should be putting too narrow a construction on the section if we were to hold in the present case that no proceeding had been instituted by the claimant.

Appeal allowed.

Solicitors for the appellants, *E. W. Reeves*, for *Pickin & Sedgwick*, Berkhampstead.

Solicitors for the respondent, *Philpot & Morrell*, for *Morrell & Son*, Oxford.

Court of Appeal.

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) — July 8, 22, 1901.

In re NEW'S SETTLEMENT.
LANGHAM *v.* LANGHAM. (*a*.)

Trustee—Shares in company—Proposed reconstruction of company—Exchange of shares in old company for shares in proposed company—Unauthorized investment—Jurisdiction of court to authorize trustees to hold unauthorized investment.

Although as a rule the court has no jurisdiction to sanction the performance by trustees of acts not expressly authorized by the terms of the trust instrument, yet if it is desirable or essential to the interests of all parties that the trustees, in the case of an emergency which may reasonably be supposed not to have been foreseen or anticipated by the author of the trust, should do some act not ordinarily within their powers, then (especially where the trust estate consists of a business or shares in a mercantile company) the court has jurisdiction in a proper case to sanction such acts on behalf of all concerned.

Appeal from Cozens-Hardy, J., in chambers.

David New, under the terms of a settlement dated the 21st of October, 1875, and a deed-poll dated the 31st of August, 1877, transferred into the names of John Langham and Henry Edward Hunt one hundred and ten shares of the nominal value of £100 each, fully paid, in the Wollaton Colliery Co. (Limited) upon trust either to permit the whole or any of the said shares to remain in their actual state of investment, or at any time or times at the discretion of the trustees or trustee for the time being to sell the same or any of them and invest the moneys produced thereby in or upon any of the public stocks or funds or Government securities of the United Kingdom or India, or any colony or dependency of the United Kingdom, or in stocks of the Bank of England, or upon the debentures or debenture or guaranteed or preference stocks or mortgages of any company in

(*a*.) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

the United Kingdom paying dividends on its ordinary shares or stocks at the time of investment or on freehold, copyhold, or leasehold securities in England, with power to vary the same, and to pay the income of one equal share to Martha Ann Langham for life with remainder to her children, and to pay the income of the other equal share to Alice Flude Stafford for life with remainder to her children, with certain remainders over.

The settlor died in the year 1878, and the said H. E. Hunt died on the 24th of July, 1900, leaving the said John Langham, the plaintiff in this action, sole surviving trustee.

Martha Ann Langham and Alice Flude Stafford both survive; six of the children of the said Alice Flude Stafford were infants.

The said shares remained standing in the names of both trustees, together with a sum in cash representing some debentures in the said company which were allotted in 1892 by way of bonus and which were paid off in the year 1901.

The said Wollaton Colliery Co. had been incorporated in the year 1875 with a capital of £105,000 divided into 1,050 shares of £100 each.

By the articles of association a restriction was placed upon the sale of the shares to persons other than existing shareholders.

The company proved most successful. From 1896 to 1898 (inclusive) the company paid interest upon the shares at the rate of 10 per cent. per annum; in 1899 12½ per cent., and in 1900 25 per cent. and bonuses amounting to 25 per cent. From time to time large sums had been expended out of profits in the improvement and development of the property of the company.

It was therefore deemed desirable in the interests of the shareholders to reconstruct the company and recapitalize it at a higher figure, at the same time enabling it to raise a further sum by debentures. Under the proposed scheme the shareholders would be entitled to ten £10 preference shares fully paid, ten £10 ordinary shares fully paid, and a £100 debenture in exchange for each £100 share in the old company. The agreement to carry the reconstruction into effect was made conditional on the concurrence of all the shareholders of the old company. No restriction was placed by the articles of association of the proposed company on the sale of its shares.

The summons asked that the plaintiff as holder of such shares might be authorized to ratify the reconstruction agreement and hold the shares in the new company. It also asked whether the plaintiff as such trustee might retain the said shares and debentures in the proposed company permanently, and if not, for what period he might hold them.

On hearing the summons Cozens-Hardy, J., considering himself bound by the authorities, refused to make any order except as to costs.

Haldane, K.C., and *Peterson*, for the plaintiff.—It is essential to the interests of the beneficiaries that the trustee should be allowed to sanction the reconstruction. The shares are of a large denomination, and owing to that fact, the high rate of interest paid upon them, and the restriction upon their sale, they fetch a lower price than they are really worth. The other shareholders have it in their power to wind up the company compulsorily, and buy up the shares subject to this trust. Such a sale would entail a heavy loss. The trustees are empowered under the terms of the settlement to sell the shares. By sanctioning the reconstruction the trustees will be put in a position to sell and get the best price for the trust property. The evidence is clear that the scheme would be beneficial for the *cestuis qui trustent*.

They cited *In re Morrison*, 49 W. R. 441, [1901] 1 Ch. 701; *In re Crawshay*, 33 SOLICITORS' JOURNAL 126, 60 L. T. Rep. 357; *Brook* v. *Mostyn*, 13 W. R. 115, 2 De G. J. & S. 373; *West of England Bank* v. *Murch*, 31 W. R. 467, 23 Ch. D. 138; Palmer's Company Precedents, Part I. (7th ed.), 606.

R. J. Parker, for every beneficiary *sui juris*.

Manning, for every beneficiary not *sui juris*.

Cur. adv. vult.

July 22.—The judgment of the Court (RIGBY, COLLINS, and ROMER, L.JJ.) was delivered by

ROMER, L.J.—As a rule the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorized by its terms. The cases of *In re Crawshay*, decided by North, J., and *In re Morrison*, decided by Buckley, J., are instances where the court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorize. But in the management of a trust estate, and especially where that estate consists of a business, or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstance arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be essential, for the benefit of the estate and in the interest of all the beneficiaries, that certain acts should be done by the trustees which in ordinary cases they would have no power to do. In a case of this kind which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the court, and the court, in a proper case, would have jurisdiction, to sanction on behalf of all concerned such acts on the part of the trustees as we have above referred to. By way merely of illustration we may take the case when a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale, in such a case the court would have jurisdiction to authorize, and would authorize, the trustees to postpone the sale for a reasonable time. It is of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the court, has been constantly exercised, chiefly in chambers. Of course the jurisdiction is one to be exercised with great caution, and the court will take care not to strain its powers. It is impossible, and no attempt ought to be made to state or define all the circumstances under which, or the extent to which, the court will exercise the jurisdiction, but it need scarcely be said that the court will not be justified in sanctioning every act desired by the trustees and the beneficiaries because it may appear beneficial to the estate, and certainly the court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the court must be considered and dealt with according to its special circumstances. As a rule these circumstances are better investigated and dealt with in chambers. Very often they involve matters

of a delicate and private nature, the publication of which is not requisite on any good ground and might cause great injury to the trust estate.

With these general observations we pass to the cases now before us. The circumstances and the evidence have been considered by us; we do not think it is necessary to refer to them in detail. We need only say that they relate to a prosperous limited company whose shares are fully paid up, and to a condition of affairs that have arisen which makes it desirable in the interests of all shareholders that by their consent the company should be reconstituted by the company being wound up and a new company formed to take over its assets. The new company is to be like the old company except that the capital is larger and that the new company will have power to issue debentures. The shares in the old company will be represented by fully paid up shares and debentures in the new company. Every shareholder who is *sui juris* agrees to the scheme. But some shares are held by trustees who wish the sanction of the court to their assenting on behalf of beneficiaries not *sui juris* or not in existence, the other beneficiaries agreeing. We understand that Cozens-Hardy, J., was himself satisfied that the course proposed to be adopted by the trustees was one which, if it could be, should be sanctioned by the court. We think, under the circumstances of the case, that the court has jurisdiction to sanction, and ought to sanction, the proposed acts of the trustees.

But the evidence should be supplemented so as to make clearer the points urged in the course of the argument before us as to the importance of further capital being provided by the proposed reconstruction of the company, the issue of debentures by the new company and the difficulties that will arise if the trustees are obliged to stand aloof and to take no part in any reconstruction. Then in the cases where the trustees are not by the terms of the trust instrument authorized to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the court for leave to further retain the shares and debentures they will obtain under the scheme of reconstruction, if they desire to retain them beyond one year from the time the reconstruction is carried out.

Appeal allowed.

Solicitors, *Taylor, Hoare & Pilcher*, for *Hart & Dickens*, and for *Parr & Butlin*, Nottingham.

High Court of Justice.

Chan. Div. Kekewich, J. — June 14, 19, 1901.

In re REDMAN.
WARTON *v.* REDMAN. (*a.*)

Friendly society—Policy assignable only by way of nomination—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 15—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 56, 57.

A policy issued by a society constituted under the Friendly Societies Acts, 1875 *to* 1896, *cannot be assigned except by nominating some person to receive the moneys payable under it as provided by the Acts.*

Caddick *v.* Highton, 47 *W. R.* 668, *followed.*

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

Adjourned summons.

At the date of the death of the testator, J. H. Redman, he was the holder of two policies of assurance on his life issued by the Brighton and Sussex Mutual Provident Society in 1876 and 1881 respectively, the amount of each policy being £100.

The insurance was expressed in each policy to be subject to the rules of the society, which provided, *inter alia*, that any member thereof not under the age of sixteen might by writing under his or her hand, delivered at or sent to the registered office of the society, nominate any person (with certain exceptions) to receive any moneys payable by the society on the death of such member not exceeding £100.

In July, 1900, the testator deposited the policies, together with certain title deeds, with the solicitors of Mrs. E. B. Frost as security for a loan from her of £100.

The present summons was brought in an action by a creditor, in which judgment for administration was given on the 19th of November, 1900.

The summons asked for a declaration that the moneys representing the proceeds of the two policies, which had been paid into court, formed part of the testator's personal estate.

Mrs. Frost claimed that the debt due to her from the testator was payable in priority out of the proceeds of the policies, but it appeared that no nomination of her by the testator as the person to receive these moneys as required by the rules of the society had ever been executed.

G. B. Freeman, for the executrix.—The policy has not been validly assigned to Mrs. Frost, because the only mode in which this can be done is by nomination as provided by the Friendly Societies Acts, 1875 (ss. 15, 27), and 1896 (ss. 41, 56, 101). This is shown by the decisions in *Bennett* v. *Slater*, 47 W. R. 82, [1899] 1 Q. B. 45, and *Caddick* v. *Highton*, 47 W. R. 668.

Eastwick, for Mrs. Frost.—Nomination is but one among several modes of assigning such policies as are in question in the present case. This is shown by the whole current of legislation: see Friendly Societies Act, 1875, ss. 8 (1), 15, 18, 28 (1). The policies were not intended to be only for the benefit of the widow and children of the assured, but to form part of his property. *Caddick* v. *Highton* does not support the proposition for which it is cited. Therefore it is submitted that the assignment is valid.

G. B. Rooke, for general creditors, adopted the argument put forward on behalf of the executrix.

G. B. Freeman replied.

KEKEWICH, J.—Seldom, if ever, do I venture to express an opinion that a case which does not appear in the Law Reports ought to have been reported, but in this case I am compelled to do so with respect to the case of *Caddick* v. *Highton*. If that case had been a decision of my own I should not have ventured to say that it ought to have been reported. It was heard by Phillimore, J., in the year 1899. It appears to have been fully argued by eminent counsel on both sides, and the judgment, which was apparently not written, but delivered at the close of the arguments, bears upon the face of it evidence that full consideration was given to the arguments addressed to the court. The case is reported in 68 L. J. Q. B. 281 and in 80 L. T. Rep. 527. Both reports are full; they are almost, though not entirely, on the same lines, and it is mainly on account of the discrepancy between them that I regret that the case has not found its way into the Law Reports.

The point for which the case had been cited is that Phillimore, J., is said to have held that policies

created under the Friendly Societies Acts of 1875 and 1896 are not assignable otherwise than by nomination as provided by the Acts. The point, which was distinctly raised in argument, was not a bye-point, and what was said by the learned judge cannot possibly be treated as *obiter dictum*, or as not necessary for the purposes of the case. Mr. Lush, for the plaintiff, is reported in the Law Times (and the report in the Law Journal is to the same effect) to have contended that "policies under the Friendly Societies Acts come under the general law, and are assignable by deed under the Policies of Assurance Act, 1867; the plaintiff is therefore entitled as executor of the assignee." In answer to that Mr. Asquith is reported as saying that "under the Friendly Societies Acts, 1875, s. 15, and 1896, ss. 56 and 57, policies are not assignable otherwise than by nomination as provided by the Acts." The point, therefore, was distinctly before the learned judge, and according to the two reports to which I have referred he decided it quite plainly and without hesitation or qualification. The reason why I am dwelling upon this is that Mr. Eastwick has pointed out that the learned judge referred to the bargain between the parties, and about that, there is a question upon the language of the reports which have been referred to. In the Law Times the learned judge is made to say this: "I am of opinion that such a policy cannot be assigned, and that the agreement between the society and the person assuring is the bargain which is set out in rule 17 of the society's rules." The rule is set out in the report, as also in the report in the Law Journal, but in that report the learned judge is made to express himself somewhat differently: "The first point is an extremely difficult one, and upon it my opinion is in favour of the defendants, the society. I do not think that policies can be assigned. I think that the bargain is the bargain expressed in rule 17." According to the report in the Law Journal, though he notices the bargain in the rules, he does not connect it so immediately with the point of law as to make the point of law depend on the bargain. In the report in the Law Times he connects them as though the two depended upon each other, and this is important because I have here no similar rule. I have studied the reports, and I do not think that Phillimore, J., meant that the rule affected the conclusion at which he had arrived. I regard him as deciding the neat point that a policy effected under the Friendly Societies Acts is not assignable otherwise than by nomination under those Acts.*

I observe, however, that the case is reported also in 15 Times L. R. 182. The report is shorter than the other two, and the rule of the society is not set out, but the reporter has neatly and usefully expressed the conclusion of the judge in these words: "Phillimore, J., held that the intention of the Legislature to be gathered from the above sections was that these policies should not be assignable except in the manner laid down in the statutes, and that from motives of public policy they should not be otherwise alienable." That is no doubt a mere paraphrase of what the learned judge said, the other reporters having given his words more fully; but it seems to me to express exactly what Phillimore, J., intended to decide. He did, no doubt, refer to *Bennett* v. *Slater*, not on this particular point, but on another with which I am not now concerned. I think I am right in saying that the point was a new one when it first came before Phillimore, J. He decided it conclusively nearly two and a-half years ago. What is my duty? The matter is of great importance to friendly societies and their members, and to others who may have dealings with them. I think on the whole it is better for me not to go further and not to say that I agree or disagree with the decision in *Caddick* v. *Highton*. I must not be understood in any way to express an opinion of my own. I find here an express decision on the point before me, and I think it is my duty simply to follow that decision.

Declaration asked for granted with costs; leave to appeal given.

Solicitors, *Keith & Humphries; Black & Moss*, for *Nevinson & Barlow*, Malvern; *Rooke & Sons; Champion, Sons, & Hart*, Brighton.

* The report of *Caddick* v. *Highton* in the WEEKLY REPORTER (47 W. R. 668) does not appear to have been brought to the attention of the learned judge; but that report confirms the view which the learned judge takes of the decision in *Caddick* v. *Highton*, and clearly shows that Phillimore, J., decided that case expressly on the ground that by reason of the statutory provisions of the Friendly Societies Acts, a policy effected under them was not assignable otherwise than by nomination in the manner laid down by those Acts; and that he did not base his decision on the fact of there being any special bargain created by the terms of rule 17 in that case.

Chan. Div. } July 16, 17; Aug. 10, 1901.
Byrne, J. }

In re HAEDICKE AND LIPSKI'S CONTRACT. (*a.*)

Vendor and purchaser—Stipulation that "the vendor's title is accepted by purchaser"—Leaseholds—Onerous and unusual covenants and provisos—Rescission—Return of deposit with interest.

The fact that a contract for sale contains a clause, "the vendor's title is accepted by the purchaser," does not exempt the vendor from disclosing matters which it is his duty to disclose, and the purchaser will in such case, in the event of non-disclosure, be entitled to rescission and a return of his deposit with interest.

On a sale of leaseholds it is the duty of the vendor to disclose onerous and unusual covenants in the leases under which the property is held.

Summons.

This was a purchaser summons under the Vendor and Purchaser Act, 1874, asking for a declaration that two leases, under which the premises agreed to be purchased were held, contained unusual and onerous obligations, covenants, and conditions of which the applicants had no notice at the time of entering into the said contract; for a rescission of the contract and a return of the deposit with interest thereon, and the costs of investigating the title.

The facts of the case were as follows: By an agreement bearing date the 12th of December, 1900, and made between Jenny Haedicke of one part and E. Lipski and N. Brill of the other part, Lipski and Brill agreed to purchase ten leasehold houses in St. Leonard-street, Bromley-le-Bow, for the sum of £1,475. The vendor thereby acknowledged the receipt of the deposit and agreed to leave part of the purchase-money on mortgage on the terms therein mentioned, and the agreement contained the following clauses:

"The vendor's title is accepted by the purchasers, who agree to pay all costs of the transaction.

"The purchase is to be completed on or before the

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

24th of January, 1901, when the purchasers will be let into possession of the rents, all outgoings to be apportioned on the date of completion."

The leases under which the property was held were not produced to the purchasers before the signing of the contract, nor was any information given to them as to their contents.

In addition to the usual covenants the leases under which the premises were held contained covenants on the part of the lessee:

Not without the lessor's licence to erect fresh buildings on the land demised, nor to make any alteration in the structural plan or elevation of the messuages and buildings thereby demised or in any of the party walls or in the principal or bearing walls and timbers.

Not to carry on or permit upon said premises, or any part thereof, any trade or business, but to use the said messuages and all buildings for the time being standing on the said demised ground strictly as private dwelling-houses or for private use and occupation only, and not to do or permit on the premises any spoil, waste, or destruction, or any act or thing which might be or become a nuisance or annoyance to lessor or neighbourhood; to deliver to lessor or his solicitor an extract of all assignments of the property containing dates, description of premises, term of years, and names and addresses and description of parties, specifying parties in whom the legal estate was vested, and to produce every assignment for registry within twenty-one days, and pay a fee of 10s. 6d. in respect of every such assignment.

The leases contained a proviso for re-entry on non-payment of rent for twenty-one days or on breach of covenant.

By the first of their requisitions the purchasers objected to the vendor's title on the ground that the abstracted leases contained various unusual covenants and onerous obligations of which no notice was given to them when the contract was entered into, and the purchasers claimed the right to rescind the contract, to a return of the deposit with interest, and the payment of their costs relating to the investigation of title.

The vendor replied to the objection: "The contract provides as follows: The vendor's title is accepted by the purchasers."

Stewart Smith, for the purchasers.—The purchasers had no opportunity of ascertaining the nature of the covenants in the leases before entering into the contract. These covenants are of an unusual character, and it was the duty of the vendor to disclose them. A purchaser has a right to be informed of the state of his vendor's title: *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523; *In re White and Smith's Contract*, 44 W. R. 424, [1896] 1 Ch. 637.

Alexander K.C., and *E. Ford*, for the vendor.—The mere fact that covenants are onerous or unusual is not of itself an objection to the title: *In re Davis and Cavey*, 37 W. R. 217, 40 Ch. D. 601; *In re Higgins and Hitchman's Contract*, 30 W. R. 706, 21 Ch. D. 95. The contract provided that the vendor's title should be accepted by the purchasers, and the fact that the purchasers signed this contract is a bar to the relief claimed.

Stewart Smith replied.

Certain points were raised in argument which his lordship thought could not properly be decided on a vendor and purchaser summons.

Cur. adv. vult.

BYRNE, J.—The substantial point raised by the applicant is that the property, which consists of ten leasehold houses, is subject to onerous and unusual covenants contained in the leases under which they are held, and to provisos for re-entry on breach of any of the covenants. I am of opinion that the leases do contain covenants which, in the absence of special stipulation or condition in the contract would entitle a purchaser to say that a good title has not been shown, inasmuch as the applicants were not informed and did not know that the leases contained any unusual covenants, nor was there afforded to them any opportunity of seeing the leases prior to signing the contract. It is, I think, now well established that whether the sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases: *Reeve* v. *Berridge; In re White and Smith's Contract*. Undoubtedly, also, a purchaser may bind himself by a contract to accept a bad title, as, for example, if he chooses to contract to take such title "as the vendor has." In the present case the contract, which is very short, runs as follows, omitting the more formal points; it refers to the ten leasehold houses with sixty years unexpired let to weekly tenants at sums therein mentioned, and after providing for the purchase-money, and acknowledging the receipt of a deposit of £75, proceeds: "The vendor's title is accepted by the purchasers who undertake to pay all the costs of this transaction. The purchase to be completed on or before the 24th day of January, 1901, when the purchasers will be let into possession of the rents, all outgoings to be apportioned on the day of completion." The point is whether the stipulation "The vendor's title is accepted by the purchasers," precludes them under the circumstances from insisting that a good title has not been shown. I am not aware that the effect of the precise words used in the present case has ever been the subject of decision, although there have been cases where the effect of somewhat similar words has been discussed. It appears to me that, starting with the proposition that the vendor is bound to disclose the existence of such onerous covenants as exist in the present case, or at least to afford the purchaser an opportunity of examining the lease for himself, it requires more than a condition couched in such terms, as in the present case, to bind the purchaser to take the title. As was said in *Bousfield* v. *Hodges*, 33 Beav. 90, at p. 94: "A purchaser is only bound by his acceptance of the title, so far as he is made cognizant of it, and if anything is kept back by the vendor, he is not as to that bound by his acceptance"; and in the case of *Jenkins* v. *Hiles*, 6 Ves. 646, which was referred to in *Bousfield* v. *Hodges*, Lord Eldon says, at p. 655: "Where the vendor is plaintiff, if the rule is founded on a principle of conscience, and requiring all possible security to be given to the purchaser, the court will at least take care that when it is contended that the defendant has waived his right to a reference, it shall be clear that there was no surprise upon him, and that there has been a full and fair representation as to the title upon the part of the plaintiff, not merely that representation which a conscientious man would make after due diligence, but that which a conscientiously diligent man would make. But when from fraud or surprise on the part of the plaintiff there has been deficient information, the court will take care that a defendant shall never be surprised by the effect of a submission made upon want of a full information." Lord Eldon was dealing there with a case for specific performance, but the same principles as to the necessity for full disclosure apply here. I think that the purchaser has a right to assume that where a condition in the terms of that

under discussion is inserted, the vendor has disclosed what it is his duty to disclose, and that the condition must be read as precluding objections only on that footing. It appears to me that in this case the purchasers are entitled to succeed, and although not without some hesitation, I think I may also, as in *In re Hargreaves and Thompson's Contract*, 34 W. R. 708, 32 Ch. D. 454, order the return of the deposit with interest, and the costs of investigation of title.

Judgment for the applicant.

Solicitors, *J. Howard Smith; Emanuel & Simmonds.*

Chan. Div. Buckley, J. July 23, 24, 25, 1901.

ATTORNEY-GENERAL *v.* THE ESHER LINOLEUM CO. (LIMITED). (*a.*)

Highway—Public footpath—Land appropriated as a private carriage-way—Extent of dedication—Presumption.

Where there is a public right of footway across land, and a certain amount of the surface of the land lying alongside the course of the public footpath has been devoted to traffic, although only private traffic, then primâ facie *the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even although only to private traffic.*

The owners of a rectangular piece of land ending at the River Mole, along which there ran a public footway, entering at the south-east corner and leading out at the north-west corner to a footbridge over the river, had appropriated the land for a private carriage-way. They took no steps to prevent the public who were using the footway going over any part of the land they pleased, although they (the owners) subsequently exercised certain acts of ownership over it.

Held, that it would be presumed that the whole of the land had been dedicated to the public for the purposes of the footway, and that the subsequent acts of ownership were not sufficient to rebut that presumption.

Action.

The question in this case was whether the defendants as owners of the soil of a piece of land at Esher were entitled to inclose part of it, or whether there was a public right of footway over it.

The land in question was a rectangular piece of land some 200 yards in length, and varying in width from about fifty-five feet at one end to forty feet at the other, bounded on the south by the London and South-Western Railway, on the north by a wall upon the the south side of linoleum mills and premises belonging to the defendants for part, and by other buildings and premises for the rest of its length, and on the west by the River Mole.

About 100 feet from the river there was a gate in the wall leading to the mill.

In coming to the land from Esher you passed under the line of railway by a road which ran from south to north, and directly you emerged from the archway the roadway turned to the left towards the west, and thus came to the land in question.

This land, as has been mentioned, extended to the river, and was used as a carriage-way to the defendant's mill, and at the river the road as a carriage-way came to an end.

Across the Mole there was a footbridge leading from the north-west corner of the land, and there was a public footpath over this bridge.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The rest of this end of the land was fenced off from the river.

In order, therefore, to enter the land from Esher, and leave it by the footbridge, you had to enter it at the south-east corner and leave it by the north-west corner.

The railway was made in or about 1835 and the railway company had put up a hedge and post and rail fence and made a ditch along the railway. It was not disputed that there existed an ancient public right of footway through the archway under the line and over the rectangular piece of land and across the bridge, and that it existed at any rate before the carriage-way was made.

On the title deeds of the defendants the rectangular piece of land was called a "roadway," at any rate from as early as 1873.

Coming from the archway there was a made footway over the land—made in comparatively recent times—and in former years a track on the south side. The defendants alleged that the public footway—coming from the east—was along the southern side of the land by the side of the railway until nearly opposite the gate to the mill, and that then it crossed over the land in a slanting direction towards the gate, and ran along the northern side by the south wall of the premises of the defendants up to the bridge. This would leave a piece of land more or less triangular, bounded on the south by the railway, on the west by the river, and on the north and east by the alleged line of footway.

This alleged line of footway had, however, never been fenced in, and the public had not been obliged to keep to it by the owners of the land.

At the beginning of 1900 the defendants enclosed this triangular piece of land by erecting an iron railing around it.

Upon their refusing to remove the railing the Attorney-General, at the relation of the Urban District Council of Esher and the Dittons, brought this action for an injunction to restrain the defendant company from interfering with the use of the public highway, alleging that the public had a right of footway over every part of the rectangular piece of land including the enclosed triangular piece.

In proof of their right to enclose, the defendants alleged various acts of ownership done upon the inclosed land by themselves and by their predecessors which will be found referred to in the judgment.

Macmorran, K.C., H. Terrell, K.C., and *E. S. Ford,* for the plaintiffs.

Astbury, K.C., and *George Henderson,* for the defendants.

The cases of *Reg.* v. *United Kingdom Electric Telegraph Co.* (*Limited*), 3 F. & F. 73; *Brownlow* v. *Tomlinson*, 1 Man. & Gr. 484; and *Grand Surrey Canal* v. *Hall*, 1 Man. & Gr. 392, were cited in the arguments.

BUCKLEY, J.—The question I have to decide is, I think, a pure question of fact; but in determining the question of fact I am bound to proceed upon certain legal presumptions. In the first place I presume that the public right of footway existed before the private right of carriage-way existed. In the second place it seems to me that where you have a public right of footway across land, and you find a certain amount of surface of land lying along the course of the public footpath devoted to the traffic, even if it be private traffic, then *primâ facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even if it be private traffic.

In all these cases of right of way it is necessary to

remember that the thing to be established always is dedication, not user. A highway is not acquired by user. You cannot acquire a right of public way under the Prescription Acts. If you want to acquire a right by prescription you must go back to the time of Richard I.—to a time before legal memory. What you have got to find is dedication. In most of these cases dedication is proved by user. But user, is the evidence, to prove dedication; it is not user, but dedication, which constitutes the highway. Therefore what you always have to investigate is, whether the owner of the soil did or did not dedicate certain land to the use of the public. Where you find a certain amount of land laid out for the purposes of traffic, even though it be private traffic, and there be along the same line a right of public footway, it seems to me that in the absence of evidence to the contrary I ought to presume that the landowner dedicated, for the purpose of all traffic, and not private traffic only, so much of it as he devoted to traffic in fact. I have asked, and I am told that really there is little or no authority upon the question; it seems to be new; except that in *Surrey Canal Co.* v. *Hall*, 1 Man. & Gr. 392, I find Maule, J., stating this (p. 406): "It seems to me that the circumstance of the bridge being originally erected as a carriage-way for the accommodation of a considerable number of individuals, inasmuch as the company must either have permitted the bridge to be used indiscriminately, or have put themselves to great expense in employing some person to see that those passing had a right to do so, furnishes a strong reason why they should have intended to dedicate the bridge to the public." The facts in that case were that the bridge was built to accommodate a private right of carriage-way. Over the same line of country there existed a public right of footway. After the bridge was erected the public did come there with carriages, and the owners did not raise any objection. What was the proper inference from that state of facts? The owner of the soil might of course have posted someone there to see that no one with a carriage passed unless he was entitled to a private right of carriage-way. He did not do so. Why did not he do so? Because it was not worth his while to discriminate between one and the other. And you have the *animus dedicandi* that he meant the public to come there if they liked. So here it appears to me that I ought to apply the same principle. When the owner of the soil devoted the rectangular strip to traffic of some kind, and there was the public right to pass along the same line of country he might, if he had been so minded, have kept the public to a particular line. He might have enclosed the footway between hurdles if he could have done so consistently with the carriage-way, or he might have paved part of the way and said, "You must walk upon that part and not depart from it," and he might have put a servant there, and made everybody who was on foot go on that particular line. If he does nothing of the sort, if in point of fact he devotes that surface to traffic of some kind, then I think that the proper presumption is that he intended the public, who are entitled to access to some part of that piece of ground, to have a right to go all over that piece of ground. *Primâ facie* that is a dedication to the public as a footway of all the surface which he devoted to traffic going to the cottages. If that be right, the next question to ascertain is, Did the owner of the soil devote the whole of this rectangular strip, including the triangular piece, to the purposes of a roadway? The defendants say, No. I think the answer is short. It rests upon the documents. Now in all the documents, beginning with the agreement of 1873, you find this piece of land, including the triangular piece, described as a "road." The agreement of 1873 has a plan, and the plan shows the site of the land in question coloured green as extending up to and over the River Mole. The schedule describes it as "Part of roadway No. 46 containing," and then the acreage is left blank. No. 46 included the triangular piece in question. This plan is found repeated in the deed of the 14th of September, 1880, and the description of No. 46 as part of the roadway is found there again. The deed of the 15th of September, 1880, the day after that conveyance, reproduces the same plan, colouring No. 46 in the same way, and treating it exactly as it was treated in the previous deeds. So that there can be no question looking at those documents but that the defendants did appropriate as a road the triangular piece in question. That triangular piece, therefore, was devoted to purposes of traffic. If I am right in what I have said it follows that, as from the moment that the owners of the soil devoted it to purposes of traffic, and thereafter never interfered with the public going over the bridge and going where they pleased over the land so appropriated to traffic, I ought to presume that the owners of the soil intended to dedicate the same soil to the persons who used the public footway. So far, therefore, it seems to me that the plaintiffs have made out their case, that over this piece now enclosed there was a right in the public on foot to pass and repass.

But then upon the facts the defendants will say that something has been established to the contrary. In the first place they have sought to show that there was more or less—I think it is rather less than more—a formed footpath which after you crossed the bridge kept to the mill wall till it reached the mill gate, then went to the south over to the railway, and then continued on the south till you reached the archway, and that that is the way. It appears to me that that evidence is of very little weight. A great number of persons who use this way would be the defendants' workmen, and that accounts for a well-worn way from a point nearly opposite the mill gate on the south to the mill gate on the north. But such repairs as were done by the defendants—and perhaps they were the only persons who did repairs—such repairs were not confined to that footpath. As holes were worn in the triangular piece of land the defendants filled them up from time to time in the same way. It seems to me that that accounts for very little indeed.

Then certain acts of ownership are relied upon by the defendants (who certainly were the owners of the soil), such as that they went there and cut turf to repair a lawn which there was inside the mill yard. That seems to me to have been a very trivial matter, some ten or twelve turfs taken; but whether less or more, if they did not interfere with the public passing and repassing, that was an act which the defendants as owners of the soil had a right to do. They had a right to go there. They had a right to the turf. Then it was said that they warned off some gipsies who came and wished to camp there; that they told a local preacher who came and preached there one day that he must not come again, and he did not. Those were all acts perfectly competent to them to do as owners of the soil, and were not inconsistent with the existence of a public right of way over this land. Then there are two things which are a little more definite, and they are these. One is that when the South-Western Railway Co. were repairing their bridge over the river, they brought some heavy timbers and put them on this land, and they left some three or four large baulks of timber there for some time—for some weeks, I believe. Well, the evidence is that the defendants' manager at that time gave the

company leave to put timber there imagining that it was going to stay there for a short time, but that it did stay much longer than he expected. They did put some timber there for some time, and of course that formed an obstruction to the highway during such time as it was there, and it is sought to say that the defendants exercised an act of ownership on the soil claiming it as their's against any right of the public by giving leave to the company to do that. [His lordship next referred to the erection of posts for drying linen on the ground some twenty years before the trial, and continued:] As a result of the evidence I do not doubt that somebody dried linen there for a short time, and that there was some sockets at one time put there for the posts. Those acts really come to very little indeed. If there was a public right of highway once established, any obstruction of that by the owner of the soil would not destroy the right of highway. Once a highway always a highway. Acts done at the time when this roadway was made might be used to negative dedication, but when once you get dedication, a subsequent act by the owner of the soil in breach of the rights of the public comes to nothing; and these acts are subsequent to 1880 or thereabouts. Now the documents show a road at any rate as early as 1873, and I should infer from the facts that it was probably formed about 1835, when the railway was made or shortly afterwards. These acts of ownership of the soil therefore seem to me quite insufficient to displace the conclusions of fact at which I have arrived.

I think, therefore, that I ought to infer as a fact that the owners of the soil appropriated this piece of ground for purposes of traffic at the latest in 1873, and probably many years before that, and that from the time when it was appropriated for the purposes of traffic, although it was private traffic, the public were allowed in the exercise of the public right of footway to use such part of that surface as they thought proper; and if so, that is dedication to the public. I hold, therefore, that the plaintiffs have a right of footway over the triangular enclosed piece, and that they are entitled to succeed in the action.

Injunction granted.

Solicitor for the plaintiffs, *C. M. Barker.*

Solicitors for the defendants, *Wilson & Sons.*

Chan. Div. } July 31, 1901.
Joyce, J. }

AFLALO AND COOK *v.* LAWRENCE & BULLEN (LIMITED). (*a.*)

Copyright—Encyclopædia—Contributor and publisher—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 18.

The copyright in articles contributed to an encyclopædia and paid for by the publisher, where there is no special agreement as to the copyright between contributor and publisher, and no special circumstances in the nature of the work or in the terms of the employment, is in the author and not in the publisher.

In the year 1896 the plaintiff Frederick George Aflalo conceived a scheme for the compilation of a work to be called "The Encyclopædia of Sport," and submitted the same to the defendants, a firm of publishers, with a view to their undertaking the publication of it.

The work was to consist of articles, arranged alphabetically, relating to various branches of sport, contributed and signed by persons well known in connection with the various subjects.

The defendants agreed to adopt the scheme, and on the 10th of July, 1896, an agreement in writing was entered into between the plaintiff F. G. Aflalo and the directors of the defendant company, which provided:

(1) That the said directors should publish and bear all costs of publishing a work to be entitled "The Encyclopædia of Sport."

(2) That in the preface to the said work a statement should be made to the effect that the scheme of the book had been suggested by the plaintiff F. G. Aflalo.

(3) That the directors should pay the plaintiff F. G. Aflalo a fee of £500 for his editorial services, to be paid as therein mentioned.

(4) That the directors should reimburse the plaintiff F. G. Aflalo for expenses incurred by him for postage, such expenses not to exceed the sum therein mentioned.

(5) That the plaintiff F. G. Aflalo should write without further fee 7,000 words of the special articles, and contribute all the unsigned articles that might be required.

(6) That the directors should supply an assistant to the plaintiff F. G. Aflalo throughout the progress of the work.

(7) That the plaintiff F. G. Aflalo should be entitled to pursue his other literary work in so far as it should not interfere with the due performance of his editorial duties; and

(8) That should the directors consider it advisable to discontinue publishing the encyclopædia before Part X. had been completed they would pay to the plaintiff F. G. Aflalo the sum of £250 in all, subject to the condition that the stoppage of the work was not caused by his own action.

The encyclopædia was published in parts, and was ultimately completed in the year 1899 under the part editorship of the plaintiff F. G. Aflalo, who in accordance with the terms of the agreement contributed to the Encyclopædia a signed article entitled "Sea Fishing."

Shortly before the date of the above-mentioned agreement the plaintiff F. G. Aflalo arranged with the plaintiff Charles Henry Cook (well known to anglers under the name of "John Bickerdyke") for the latter to contribute signed articles for the encyclopædia on the subject of angling. Under this arrangement the plaintiff C. H. Cook contributed three articles which were published in the encyclopædia, entitled respectively "Coarse Fish," "Pike," and "Trout."

The defendants paid the plaintiff C. H. Cook for the said articles at a certain rate per thousand words.

The plaintiffs F. G. Aflalo and C. H. Cook were severally registered as proprietors of the copyright of the articles so contributed by them.

In the year 1900 the defendants, without the consent of either of the plaintiffs, published an abridged edition of the Encyclopædia of Sport which they entitled "The Young Sportsman." This publication consisted mainly of such articles from the "Encyclopædia of Sport" as were of interest to youthful sportsmen, but it also contained a small amount of fresh matter. Amongst the articles taken from the "Encyclopædia of Sport" were the above-mentioned articles contributed by the two plaintiffs.

The plaintiffs thereupon commenced this action, and asked for an injunction to restrain the defendants from publishing or selling "The Young Sportsman," and for damages.

The defendants' contention was that inasmuch as they were the registered proprietors of the copyright in the "Encyclopædia of Sport," the plaintiffs had

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

no copyright in the said articles, and they counterclaimed for a declaration to that effect and for an order to expunge the plaintiffs' entries of copyright in the Book of Registry, and also for damages.

Hughes, K.C., and *R. J. Parker*, for the plaintiffs.—Under the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 3, the copyright in any book is *primâ facie* the property of the author. The word "book" is defined by section 2 of the Act as "Every volume, part, or division of a volume." Special provision, however, is made for the case of an encyclopædia by section 18 of the Act. That section provides as follows: "Where any publisher or other person shall . . . project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and . . . shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall . . . be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, &c., . . . the copyright in every such encyclopædia, &c., . . . and in every volume, part, essay, article, and portion so composed and paid for shall be the property of such proprietor, &c., . . . who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act. . . ." The only reported case on an encyclopædia is that of the *Bishop of Hereford* v. *Griffin*, 16 Sim. 190, in which an injunction was granted against the separate republication by the publisher of an article written for the Encyclopædia Metropolitana. There is an essential difference between considerations applicable to an encyclopædia and those applicable to a catalogue. In the former each article has a separate value of its own, quite apart from the other portions of the book. Where the articles have no separate value, the necessary implication arises that the copyright is intended to be in the publisher: *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459. No harm is done to an encyclopædia by the separate publication of isolated articles. If it is not unreasonable to suppose that the author intended to retain the copyright, and there being no express agreement as to the matter, he must be held to have retained it.

They also cited *Walter* v. *Howe*, 29 W. R. 776, 17 Ch. D. 708; and *Lamb* v. *Evans*, 41 W. R. 405, [1893] 1 Ch. 218.

Younger, K.C., and *T. L. Gilmour*, for the defendants.—We submit that the effect of the agreement of the 10th of July, 1896, was to make the plaintiff F. G. Aflalo the servant of the defendants for the purpose of editing the work, and contributing signed articles to the extent therein provided and all the unsigned articles: see *Lamb* v. *Evans*, [1893] 1 Ch., at 233. Short of express agreement everything is in favour of the inference that the publishers intended to acquire the copyright. There is nothing to show that the contributors had any intention of making any reservation to themselves. Further, "The Young Sportsman" consists, with three exceptions, exclusively of matter contained in the encyclopædia. The articles that so appear are in no way abridged. It amounts, therefore, to no more than a new edition of the encyclopædia, which the publishers had a perfect right to produce.

JOYCE, J., after reading section 18 of the Act, said: I have here to apply to the facts before me the provisions of an Act which are perfectly clear. It is true that the courts in considering cases where the publication was of a peculiar nature or where there were special terms in the employment of the person contributing the articles, have determined that it is not necessary to the acquisition of the copyright by the publisher that it should be so stipulated specifically and in terms. Here, seemingly, there is an encyclopædia of the nature mentioned in the Act of Parliament. Nor, as to Cook, is there any term or circumstance in the mode of his employment by which the court can infer anything to alter the ordinary circumstances applicable to such a case. That is to say, there is nothing to lead the court to infer that it was the intention of the parties that the copyright should be in the publisher.

As regards Aflalo, the circumstances are, if anything, rather in his favour. In addition to editing the work, he agreed to write signed articles to the extent of 7,000 words without extra fee, and all the unsigned articles that might be required. I therefore decide the case on the short ground that there is no special circumstance in the nature of the work or in the terms of his employment that leads one to infer that the copyright was intended to be in the publisher. But it is not for me to determine whether Aflalo and Cook can in any way republish the articles contributed by them to the encyclopædia.

His lordship granted the injunction asked for, and ordered an inquiry as to damages.

Solicitors, *Field, Roscoe, & Co.; Dixon, Elkin, & Dixon.*

K. B. Div. (Bigham, J.) — May 9; June 15, 1901.

ROYAL EXCHANGE ASSURANCE CORPORATION v. SJOFORSAKRINGS AKTIE-BOLAGET VEGA. (*a.*)

Insurance (Marine)—Time policy—Continuation clause—"Should the vessel be at sea or abroad on the expiration of this policy"—Policy for time exceeding twelve months—Invalidity—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 92, 93.

A policy of marine insurance on a ship expressed to be for and during a period of twelve months contained a clause which provided that if the ship was at sea or abroad at the expiration of the policy, it was agreed to hold the vessel covered by the policy until arrival at the port of final destination. A loss occurred upon a homeward voyage after the expiration of the twelve months. In an action on the policy,

Held, that the policy was one for time exceeding twelve months, and therefore invalid under section 93 of the Stamp Act, 1891.

Semble, *if a loss had occurred before the expiration of the twelve months, it could have been recovered under the policy.*

The rule that the law applicable to the construction of a contract is the law of the country where the contract was made, is based on the intention of the parties; where, therefore, the circumstances of the case clearly show that the parties intended otherwise, the courts of this country will not apply the law of the country where the contract was made in construing the contract.

Action in the Commercial Court tried without a jury.

The plaintiffs' claim was for a total loss under a policy of reinsurance.

By a policy dated the 20th of October, 1898, and

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

subscribed by Gray, Dawes, & Co., underwriters, the steamship *Merrimac* was insured for £4,200 "for and during the space of twelve calendar months commencing at noon on the 18th of October, 1898, and ending at noon on the 18th of October, 1899." The policy contained at the foot the words: "Including printed clauses as attached." Attached to the policy was a printed slip headed, "Elder, Dempster, & Co. Time Clauses," and containing several clauses, one of which was as follows: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a *pro rata* daily premium to the within."

By a policy dated the 24th of October, 1898, Gray, Dawes, & Co. reinsured £1,050 of the risk underwritten by them with the plaintiffs for the same period as the original policy against total and constructive total loss only. The policy was expressed to be "a reinsurance of Gray, Dawes, & Co.'s, underwriters, subject to terms, *pro rata* returns, continuation, valuation, clauses, and conditions of the original policy or policies, and to pay as may be paid thereon."

The plaintiffs reinsured with the defendants, a Swedish company, £750 of the £1,050 reinsured by them. The policy was expressed to be "a reinsurance to the Royal Exchange Assurance Corporation," and contained the following clause impressed from a rubber stamp: "Subject to the same clauses, terms, conditions, continuations, &c., that do or shall attach to the original policy and/or policies, and to pay and/or receive as may be paid and/or received thereon, anything herein to the contrary notwithstanding. All claims and/or losses payable in London. In the event of claim the Vega Co. agree and undertake to pay upon the claim note of the Royal Exchange Assurance Corporation stating such claim to have already been settled by same. In case of any dispute under this policy the Vega Co. agree to be bound in all things by the jurisdiction and decision of the English Law Courts." Written in the margin were the words: "Continuation clause as per original policy." The policy was for the same period as the original policy and was against total loss and/or constructive total loss only.

During the currency of the policies *The Merrimac* sustained heavy damage and put into Quebec for temporary repairs, the intention being to bring the vessel home to be permanently repaired. She sailed from Quebec on the 25th of October, 1899, and in the course of the voyage home was totally lost.

The policy sued upon was not stamped, but the plaintiffs were prepared to pay the necessary penalty if the policy was one which could legally be stamped after execution.

The Stamp Act, 1891, s. 92 (1): For the purposes of this Act the expression "policy of sea insurance" means any insurance (including reinsurance) made upon any ship or vessel. . . .

Section 93 (1): A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance; (2) No policy of sea insurance made for time shall be made for any time exceeding twelve months; (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.

Section 94: Where any sea insurance is made for a voyage and also for time . . . the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

Joseph Walton, K.C., and *A. H. Chaytor*, for the plaintiffs.—There are two questions to be considered. First, whether the provisions of the Stamp Act apply to the policy sued on, it being a contract made in Sweden. Secondly, assuming that the Stamp Act does apply, is the policy one which can be stamped after execution upon payment of the penalty provided by the Act? With regard to the first question, it is submitted that so far as relates to the mere form of the contract, as distinguished from its construction, it must be governed by the law of Sweden; and if it is valid in form according to Swedish law, which it is, it can be enforced in this country although the requirements of the Stamp Act as to contracts of sea insurance may not have been complied with. The Stamp Act, unlike the Statute of Frauds, which is a statute of procedure (see *Leroux* v. *Brown*, 1 W. R. 22, 12 C. B. 801), by section 93, affects in terms the validity of the contract. That section cannot apply to a Swedish contract: *Bristow* v. *Sequeville*, 5 Exch. 275; *Gueprate* v. *Young*, 4 De G. & Sm. 217; *Branley* v. *South-Eastern Railway Co.*, 12 C. B. N. S. 63, 10 W. R. C. L. Dig. 75. The next question is whether the policy is one which can be stamped or whether the effect of the continuation clause in the original policy, which is incorporated into the policy sued on, is to render the policy invalid on the ground that it is a time policy for a period exceeding twelve months. The policy may be regarded as both a policy for time, *i.e.*, twelve months, and a policy for voyage, the *termini* of the voyage being the place where the ship is at noon on the 18th of October, 1899, and the port of final destination. So regarded the policy comes within section 94. Or the document may be treated as containing two separate policies for time. The law does not prohibit the making of several contracts for sea insurance together covering more than twelve months. It only says that each contract must be "expressed in a policy." The continuation clause itself constitutes a contract, and it is expressed in a "policy." It is immaterial that there is another contract written on the same piece of paper.

Scrutton, K.C., and *T. Mathew*, for the defendants, took no part in the argument.

Cur. adv. vult.

June 15.—BIGHAM, J.—The only question which I have to deal with in this case is as to the admissibility in evidence of the policy sued on. The facts so far as material to this question are that by a policy effected on the 20th of October, 1898, and subscribed by Gray, Dawes, & Co., underwriters, a ship called *The Merrimac* was insured for the space of twelve calendar months, commencing at noon, the 18th of October, 1898, and ending at noon, the 18th of October, 1899. The policy was on an ordinary Lloyd's form, and it contains at the bottom in writing the words "including printed clauses as attached." Attached to the policy was a printed slip headed "Elder, Dempster, & Co. Time Clauses." One of those clauses, number 7, is as follows: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a *pro rata* daily premium to the within." The amount of the policy was £4,200. That is a policy which is clearly an English contract and one governed exclusively by English law. Subsequently the plaintiffs reinsured for Gray, Dawes, & Co. a part of that risk—namely, £1,050. That reinsurance purported on the face of policy to be "a reinsurance of Gray, Dawes, & Co.'s, underwriters, subject to terms, continuation, valuation, clauses, and conditions of the original policy or

policies and to pay as may be paid thereon." That policy was also on an ordinary Lloyd's form, and is an English contract governed exclusively by English law. These two policies being in existence, the plaintiffs effected a third policy reinsuring with the defendants a part of the risk, £750, which they had already reinsured. The defendants are a foreign company with a head office in Sweden, and are a corporation constituted according to Swedish law. Their business is to insure marine risks. They have an agent in London who solicits business, and who, having obtained offers of business, submits them to the defendants in Stockholm, and the defendants accept or reject the business as they think fit. In the former case they issue a policy. In the present case the agent in London submitted to the defendants the reinsurance of the plaintiffs. The defendants accepted it, and issued the policy now sued on. This policy was also on a form which, for all practical purposes, is the same as a Lloyd's policy. The reinsurance was for the same period as the original policy, and in the margin there were written the words, "Continuation clause as per original policy." The policy also contains the following memorandum which is not to be found in the other policies. [His lordship read the clause set out above.] The document was executed according to the law of Sweden by the defendants. When the twelve months expired *The Merrimac* was in Quebec. She was said to have been seriously damaged. Her owner decided to have her brought home under temporary repairs. She sailed from Quebec after the twelve months had expired, and was lost on the voyage. The defendants were of opinion that they were not bound by their policy to undertake the risk involved in bringing the ship home in that condition, and therefore they defended this action.

The plaintiffs at the trial tendered in evidence the policy effected with the defendants. It is not stamped, and the question to be decided is whether it ought to be admitted in evidence, and, if so, on what terms as to penalty or otherwise. The Stamp Act, 1891, by section 14, provides that a judge shall take note of any omission or insufficiency of the stamp on any instrument chargeable with duty, if produced as evidence; and if the instrument is one which may be legally stamped after execution, then, on payment of the duty and of the penalty, it can be received in evidence. Sub-section 4 of that section provides that, save as aforesaid, an instrument executed in the United Kingdom, or relating, wheresoever executed, to any matter or thing done or to be done in the United Kingdom, shall not be given in evidence, except in criminal cases. Those provisions are general provisions, applicable to all documents. Then there are certain provisions relating exclusively to documents of sea insurance. By section 92 the expression "policy of sea insurance," for the purposes of the Act, means, *inter alia*, "any insurance (including reinsurance) upon any ship or vessel." Section 93 is as follows: "(1) A contract for sea insurance shall not be valid unless the same is expressed in a policy of sea insurance. (2) No policy of sea insurance made for time shall be made for any time exceeding twelve months. (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months." The words "if it be a time policy" must be read into the section before the words "is made for a period, &c." It is, therefore, perfectly clear that a policy made for more than twelve months is not valid.

The first question is whether the policy sued upon is a policy for more than twelve months. I am of opinion that it is a policy for more than twelve months. It is true that the risk might possibly not continue beyond the twelve months, because the vessel might be in a home port at the expiration of that period. But the mere fact that the risk would only extend beyond the twelve months in certain events does not prevent the policy from being one for more than twelve months. It was suggested that the document might be regarded as a contract for two insurances, one for twelve months and one for a voyage, and that on payment of the penalty mentioned in section 95 of the Act the document was admissible in evidence to prove an insurance of the vessel on a voyage from Quebec to the United Kingdom. In my opinion that contention is not sound, for if it were there would be in the same policy two contracts—one, a time policy, to which no implied warranty of seaworthiness attaches; the other, a voyage policy, to which such a warranty does attach. Moreover, the voyage is not specified; its termini are not mentioned. There is, therefore, no specification of the risk insured within the meaning of section 93, sub-section 3. It is clear that a voyage policy which does not specify the termini of the voyage is not a valid policy. The risk must be defined in the policy. If it is a voyage policy, the commencement and end of the voyage must be stated, though it is not necessary to specify the particular route to be taken, nor the ports of call. So in the case of a time policy the date of the commencement and of the end of the risk must be given. For these reasons I am of opinion that the document cannot be regarded as containing two insurances, one for time and one for a voyage. Nor can it be regarded as two separate policies for time—that is to say, one for twelve months and another for an indeterminate time commencing at the end of the twelve months and finishing no one knows when. It is one contract for more than twelve months, and, therefore, invalid within the meaning of the statute. I do not decide that it is not a good policy for twelve months. If a loss had occurred within the twelve months the policy could probably, on payment of the penalty, have been given in evidence against the defendants. It would in such a case have been competent for the court to reject the continuation clause altogether, as being a separate part of the contract which was not good in law. I agree with what was said by Willes, J., in *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235, at p. 250: "Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." It is not necessary to decide the point in this case, but I think that this policy was a good policy for twelve months, though not for longer.

Then it was said that, even if the policy is invalid according to the English law, it is nevertheless admissible in evidence because it ought to be construed by Swedish law. No doubt the rule is that the law applicable to the construction of a contract is the law of the country where the contract was made, but that is only because in the absence of anything to the contrary the court assumes that such was the intention of the parties. If it clearly appears from other circumstances that the parties intended otherwise, the courts of this country do not apply the law of the country where the contract was made. The law on this point was fully dealt with in *In re Missouri Steamship Co.*, 37 W. R. 696, 42 Ch. D. 321, which is an authority for the proposition which I have just laid down. Here the circumstances show an intention that the contract shall be governed by

English, not Swedish, law. It is a reinsurance of a reinsurance of an original insurance effected in England, and although executed in Sweden it was in every business sense made in London. It is drawn up on a form similar to Lloyd's form, and it contains a clause that all claims and losses are payable in London, showing that the contract is to be performed in this country, and the defendants agree to be bound in all things by the jurisdiction and decision of the English courts. In the face of these facts there can be no doubt that the parties intended that the contract should be construed and dealt with as an English contract. But, even assuming that the contract ought to be interpreted with reference to the law of Sweden, in my opinion it cannot be admitted in evidence. The statute makes the contract invalid. That does not mean that it is illegal or immoral. It means no more than that it cannot be put in suit. The document is shut out because it would be contrary to our procedure to admit it: see *Leroux* v. *Brown*. The policy cannot be stamped at all, and cannot be admitted in evidence. The plaintiffs, therefore, cannot make out their case. It is only right to mention that the point was not taken by the defendants; they did not desire to take it, nor did they argue it.

Judgment for the defendants.

Solicitors for the plaintiffs, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the defendants, *Waltons, Johnson Bubb, & Whatton.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Phillimore, JJ.) } May 14; June 13, 1901.

POLL (*Appellant*) *v.* DAMBE (*Respondent*). (*a.*)

Ship—Seaman—Merchant Shipping Acts—Offences—Persuading seaman to desert from foreign ship—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 236, *sub-section* 1.

By section 236, *sub-section* 1, *of the Merchant Shipping Act*, 1894, *it is provided that "if a person by any means whatsoever persuades, or attempts to persuade, a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding ten pounds."*

Held, that the above sub-section applies only to British ships, and does not make it an offence to persuade a seaman to desert from a foreign ship.

This was a case stated by the stipendiary magistrate for the county borough of Cardiff.

At a petty sessions at Cardiff an information was preferred by Auguste Dambe, the respondent, under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), against George Poll, the appellant, for that he on the 25th of December, 1900, did unlawfully persuade a seaman, named Johannes Pilder, to desert from his ship, called *The Lennox*.

The information was heard on the 4th of January, 1901, when the magistrate convicted the appellant.

Upon the hearing of the information the following facts were proved:

The respondent was the master of the Russian ship *Lennox*, which at the time alleged in the information was lying at the West Dock at Cardiff. The said ship was not registered or owned in the United Kingdom, and was not a British ship, but a foreign ship.

On the 25th of December, 1900, Johannes Pilder, who was then a foreign seaman lawfully engaged on *The Lennox*, met the appellant Poll, a boarding master living at Cardiff. At this interview the appellant persuaded Pilder to desert from *The Lennox* and to join another ship, where he would receive better wages.

Pilder did then desert from *The Lennox*, and on the following day was taken to the railway station at Cardiff by the appellant, who, after providing him with a ticket, saw him leave the station in a train for Bristol in the company of five other sailors and an agent of the appellant.

Pilder was subsequently, on the 1st of January, 1901, arrested on a warrant as a deserter from *The Lennox*.

On the part of the appellant it was contended that the learned magistrate had no jurisdiction to hear and determine the case, the offence being charged in respect of a foreign seaman engaged on a foreign ship, and by sections 260 and 261 of the Merchant Shipping Act, 1894, Part II. of the Act (under which head the section creating the offence is classed) is restricted in its application to those ships mentioned therein—viz., sea-going ships registered in the United Kingdom, and sea-going British ships registered out of the United Kingdom. That the words "his ship" contained in section 236 are not general so as to make the section applicable to a foreign ship, and for this reason the case was not governed by *Reg.* v. *Stewart*, 47 W. R. 445, [1899] 1 Q. B. 964, which was decided on section 111, a section prohibiting crimping. That in order to make section 236 applicable to the ship *Lennox* the Russian Government should have availed itself of the provisions of section 734 of the Act.

On the part of the respondent it was contended that section 236 applies to foreign ships, that the words "his ship" in that section are as the words "any ship in the United Kingdom" in section 111, and that as both sections are classified under Part II. of the Act the case was governed by *Reg.* v. *Stewart*.

The learned magistrate was of opinion that the contention of the respondent was right, and convicted the appellant.

The question for the opinion of the court was whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law.

Bailhache, for the appellant.

H. Sutton, for the respondent.

The arguments fully appear in the written judgment of the court.

Cur. adv. vult.

June 13.—The judgment of the court was read by PHILLIMORE, J.—This is a case stated by the stipendiary magistrate for Cardiff, and upon it we have to determine whether it is an offence under the Merchant Shipping Act of 1894 to persuade in England a foreign seaman to desert from a foreign ship while such ship is lying in an English port. The language of section 236, sub-section 1, is as follows: "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding £10." By section 742 "seaman" includes every person (except masters, pilots, and apprentices, duly indentured and registered) employed or engaged in any capacity on

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

board any ship. The language of the Act is thus wide enough to cover this case; but it is contended on behalf of the appellant that Part II. of the Merchant Shipping Act, in which this section is found, applies only (except in certain specified places) to British ships, and the word "ship" in section 236 must be read as meaning British ship. Section 236, making it criminal to persuade desertion, may be looked upon as supplementary to the earlier sections, which make desertion itself punishable. They are sections 221 to 224, both inclusive, and section 238. Sections 221 to 224 are in equally general terms, and they follow upon section 220, which contains express words limiting its own application to the crews of British ships; there is, therefore, some ground for supposing that sections 221 to 224 were not intended to be so limited. The sections as to the application of Part II. are sections 260 to 266, both inclusive. By section 260 this part "shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom, and to the owners, masters, and crews of such ships," with certain qualifications as to lighthouse vessels, yachts, and fishing boats, which are dealt with in sections 262 and 263. By section 261 this part shall, unless as aforesaid, apply to all sea-going British ships registered out of the United Kingdom, and their owners, masters, and crews in respect of certain specified matters, one of which is discipline. It will be important to note that this specification of details occurs only in the sections which deal with British ships registered out of the United Kingdom, and that there is the same arrangement in section 109 of the Act of 1854, which in substance corresponds with the two sections 260 and 261 of the Act of 1894. This is not unimportant in view of some observations of Blackburn, J., in the case of *Leary* v. *Lloyd*, 3 E. & E. 178, 9 W. R. C. L. Dig. 82. Section 264 enables colonial Legislatures to adopt any provisions of this part which do not otherwise apply, and section 265 provides for the case of an apparent conflict of laws "in any matter relating to a ship or to a person belonging to a ship." This section would meet the case of a conflict between the laws of different parts of his Majesty's dominions; but it might have a wider application in the case of any sections of Part II. of the Act which apply to foreign ships. Section 266 is not material to this case. It is clear, therefore, that as a general rule this part of the Act is not to apply to foreign ships—that is to say, it is not to be enforced against foreign ships, or owners of foreign ships, or persons on board foreign ships, or as to matters done or to be done on foreign ships. But it does not, therefore, necessarily follow that it does not apply to persons who have deserted from foreign ships or to English subjects who in England have abetted such desertion. A formidable argument, however, against the application of the section as to desertion to deserters from foreign ships is derived from section 238. By this section, where it appears to the Crown "that due facilities are or will be given by the Government of any foreign country for recovering and apprehending seamen who desert from British merchant ships in that country," the Crown may by Order in Council direct that this section shall apply, and where it applies and a seaman deserts when within any of the King's dominions from a merchant ship belonging to a subject of that country, "any court, justice, or officer that would have had cognizance of the matter if the seaman had deserted from a British ship shall, on application of a consular officer of a foreign country, aid in apprehending the deserter," and may "order him to be conveyed on board his ship or delivered to the master. . . ." It is said that it is only under this section that deserters from foreign ships can be dealt with by an English court, and also that this section would be unnecessary if the general provisions of sections 221 to 224 applied to foreign as well as British ships. The third sub-section of section 238 inflicts a penalty for harbouring or secreting a deserter who is liable to be apprehended under this section. This is said to overlap the second sub-section of section 236. There is no sub-section in section 238 corresponding with sub-section 1 of section 236, under which the information in the present case was laid. The weight of this argument is to a certain extent lessened by the consideration that the Act of 1894 is a consolidating Act and includes, not only the Act of 1854, but several other Acts. Section 238 is a re-enactment of the Foreign Desertion Act, 1852 (15 & 16 Vict. c. 26), an earlier Act than the Act of 1854. It may well be that the Act of 1854 did make that of general application which had only limited application by the Act of 1852; and in some respects the special provisions of the Act of 1852, as reproduced in section 238, are different from the general provisions in the Act of 1894. Still, in our opinion, having regard to terms of section 221, the general sections as to deserters, 221 to 224, do not apply to cases which come, or may come by the operation of an Order in Council, under section 238. The procedure is different; the seaman to whom section 222 applies is to be conveyed on board his ship, not by warrant of the court, but by the master or certain other persons, with or without the assistance of a police-constable, and may require to be taken before a court to be dealt with according to law. More complicated provisions are applied to cases under section 223. But under section 238 there is to be a warrant under which the man is to be conveyed on board his ship and when the warrant has been issued the seaman apparently has no direct right to have recourse to the court which issued it. The penalty for harbouring is different, and in section 238 there is a significant proviso to which we have not yet referred excepting the case of a seaman who is a slave. There is no such proviso in sections 221 to 224. We therefore come to the conclusion that sections 221 to 224 apply only to British ships, and that the offence of desertion from a foreign ship is punishable only under section 238 and when that section has been applied by Order in Council. Similarly, we must hold that the offence of harbouring a deserter from a foreign ship comes, if at all, under sub-section 2 of section 238, and does not come under sub-section 2 of section 236. Holding this, can we hold that sub-section 1 of 236 applies in respect of foreign ships? We think it is impossible so to hold. The words "seaman" and "ship" in sub-section 1 must have the same limited meaning as the same words in sub-section 2. This view is in accordance with the decision of the Court of Queen's Bench in the year 1860 in the case of *Leary* v. *Lloyd*, 3 E. & E. 178, upon the parallel section (257) of the Act of 1854. We have, however, not held ourselves concluded by that decision, but have reconsidered the matter upon the following grounds: First, that case was only argued on one side; secondly, Blackburn, J., who delivered the judgment of the court, seems to have thought that there was something special in the section about discipline limiting this application, though possibly not the application of the other section in the other part of that Act, to British ships, and we think this is not so; thirdly, we think the case of *The Milford*, 6 W. R. 554, Swa. 362, was not brought to the notice of the court. Now the case of *The Milford* is certainly an authority for not restricting Part III. of the Merchant Shipping Act, 1854, to British ships. Dr. Lushington, in dealing with the

argument that the 109th section of the Act of 1854 restrained the application of section 191, says: "The language then used, however, is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which extend to show that the court should not apply section 191 to foreign masters and seamen." This observation is perfectly general, and the authority of Dr. Lushington on shipping Acts was so high that it is unfortunate that *The Milford case* was not brought before the Court of Queen's Bench before it decided *Leary* v. *Lloyd*. It should be added that the law as decided in the *Milford case* has been accepted ever since, and that the remedies given were, and those of the corresponding section (section 167, sub-section 1) of the Act of 1894, always are afforded in proper cases to masters of foreign ships. On the other hand it may be said that Dr. Lushington's judgment may well be supported on other grounds, and that he relied upon other grounds as well. The decision may rest upon the ordinary rule as to the application of the *lex fori*. Again, the effect of section 191 was to enable the master to sue in the Admiralty Court and thereby to obtain process *in rem* against the ship. By the ordinary maritime law as administered in other countries he had this right always, just as a seaman had. The English law had been exceptional in denying him this remedy and in denying it to him because of a point of internal jurisdiction. When section 191 brought the maritime law of this country into line with that of other countries it would have been absurd that the anomaly thus removed for municipal cases should have been left for foreign ones. These considerations certainly effect the weight of *The Milford* as an authority in the present case. On the other hand, the cases of *Cope* v. *Doherty*, 6 W. R. 695, 2 De G. & J. 614, and the class of cases represented by *The Zolverein*, 4 W. R. 555, Swa. 96, show that there were other parts of the Merchant Shipping Act, 1854, which our courts have declined to hold to be applicable to foreign ships. We do not, however, decide this case upon the ground that no sections in Part II. of the Act of 1894 apply to foreign ships. We agree with our brethren Darling and Channell in the case of *Reg.* v. *Stewart* that there may be acts done in relation to foreign ships which when done by English subjects in England come as much under the penal provision of the Merchant Shipping Act, 1894, as if they were done in relation to English ships. We think that the case they had to deal with was one of such cases. We ground our decision upon the fact that this part of the Act (Part II.) contains a special provision for the case of desertion from foreign ships, and has thus shown that its general provisions are limited to desertion from British ships. We hold, therefore, the appellant was not liable to conviction under section 236 of the Merchant Shipping Act, 1894, and that the appeal must be allowed with costs.

Appeal allowed.

Solicitors for the appellant, *Riddell & Co.*, for *J. H. Jones*, Cardiff.

Solicitor for the respondent, *Hier Jacob*, for *H. M. Rees*, Cardiff.

Prob. Div. & Adm. Div. Admiralty. } July 29, 1901.

"THE VERITAS." (*a.*)

Admiralty—Salvage—Subsequent damage—Maritime liens—Priority of claims.

Maritime liens are either liens arising ex delicto *or liens arising* ex contractu *or* quasi ex contractu. *Liens arising* ex delicto *take precedence over prior liens arising* ex contractu. *Liens arising* ex contractu *must, in general, rank in the inverse order of the attachment of the* res. *The right of salvage may, but does not necessarily, arise out of contract. Salvors, from the time of rendering salvage services, are practically in the same relative position as a creditor who has obtained a lien strictly* ex contractu, *but while taking precedence over prior claims* ex contractu *and prior salvages, yet their claims ought to be postponed to subsequent damage claims, and even if the damage may not have given rise to a maritime lien, but only to a right to proceed* in rem, *nevertheless that right is enforceable in priority to salvage claims and for all practical purposes in cases where damage comes last the position of the injured party, so far as regards claims arising prior to the damage, is much the same whether one has a lien or only a right of process. Moreover, the right to arrest a ship to obtain reparation for damage done by her is not affected by prior claims against her from hypothecation which create interests in her along with those of her owners. A salvage claim is but, as it were, a hypothecation to secure the reward to the salvors for services rendered, and that reward ought not to be recovered against the* res *to the detriment of a claimant in respect of subsequent damage.*

The facts and arguments arising in this case sufficiently appear from the judgment set out herewith.

Carver, K.C., and *Batten* appeared for the owners, master, and crew of the steam tugs *Prairie Cock* and *Sea Cock*.

Aspinall, K.C., and *Maurice Hill*, for the Mersey Docks and Harbour Board.

Bailhache and *W. S. Glynn*, for the owners, master, and crew of *The Caledonian*.

BARNES, J., in delivering a considered judgment, said: There are three motions in this case for payment out of court of certain sums out of the proceeds of the Norwegian steamship *Veritas*, which amount to £927 5s. 2d., now in court. The motions are made in these circumstances. In October last year *The Veritas*, laden with a cargo of ice for Liverpool, was in distress outside the Mersey, and salvage services were rendered to her by the steamship *Caledonian* by which she was brought into and anchored in the Mersey. The services of the tug *Prairie Cock* were then engaged, and while that tug was being made fast to *The Veritas* a collision occurred between *The Veritas* and the steamship *Devonian*, in consequence of which *The Veritas* began to fill, and salvage services were rendered to her by the tugs *Prairie Cock* and *Sea Cock*, with the result that she was brought to a place alongside the dock wall to the south of the Liverpool landing-stage. From this place she drifted against the said stage, doing damage to the boom and other connections of the stage, and sank, and her cargo of ice perished. She was removed by the Mersey Docks and Harbour Board under the powers conferred upon them by the 11th section of their Act of 1874. The board had also the right to detain her in respect of the said damage under

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

the 94th section of their Act of 1858. On the 15th of October an action was instituted in this court by the owners, masters, and crews of the said tugs against *The Veritas* in respect of the salvage services rendered by them, and on the same day she was arrested in the said suit. The board intervened in that suit, and on the 19th of October an order was made by consent for the release of *The Veritas*, the interveners undertaking to furnish the plaintiffs with an account of receipts and expenditure in dealing with the wreck under their statutory powers and to lodge the overplus in court to the credit of the action, to abide further order, without prejudice to liens, rights, or priorities of any claimants on *The Veritas* or proceeds of sale. The vessel was accordingly released, and afterwards sold on the 23rd of October by the board, and, after deducting the expenses of the board, the net proceeds amounted to the sum of £927 5s. 2d., which was brought into court to the credit of the said action. On the 23rd of November an action was instituted in this court against the proceeds of *The Veritas* by the owners, master, and crew of *The Caledonian* in respect of the salvage services rendered by them, and on the 7th of December a caveat against the payment out of court of the said proceeds was entered in the first action on behalf of the last plaintiffs, who afterwards intervened in the first action, though not until after judgment was obtained in it. On the 14th of January, 1901, judgment was obtained by the plaintiffs in the action in respect of the salvage by *The Prairie Cock* and *Sea Cock* in the sum of £320 and costs, without prejudice to claims on the fund in court, and reserving all questions of priorities. On the 29th of April, 1901, judgment was given for the plaintiffs in the action in respect of the salvage by *The Caledonian* for £400 and costs, all questions of priorities being reserved. On the 8th of February, 1901, an action was instituted in this court by the said board against the said proceeds in respect of the damage done to the said stage, in which the plaintiffs in the two salvage actions intervened, and on the 1st of July, 1901, judgment was given for the plaintiffs for £600 and costs, all questions of priorities being reserved. The owners of *The Prairie Cock* and *Sea Cock* appeared at the hearing. By their defence as interveners they had raised, *inter alia*, the question of whether or not the damage sustained by the board was due to the negligence of those on board *The Veritas*, and the judgment appears to have proceeded on the ground of such negligence being found by the court, and no point was raised before me that this was not so. [His lordship then read the terms of the formal judgment in the board's action, and proceeded:] It is to be observed that all these judgments were conditional, and as the funds are still in court the claims have to be dealt with on their respective rights to priority: see *The Africano*, 42 W. R. 413, [1894] P. 141. A collision action was also tried between *The Devonian* and *The Veritas*, in which *The Devonian* was, on the 7th of February, 1901, held to blame for a bad lookout, and *The Veritas* also to blame on the ground that the tug *Prairie Cock*, while alongside of her, was exhibiting only underway lights and had not a second masthead light for towing: see the report of the case, 49 W. R. 665, [1901] P. 221. The board claims to have a maritime lien on the said proceeds for their damage and to take priority over the salvors. This claim is disputed by both of the salvors. *The Prairie Cock* and *Sea Cock* claim to have priority over the damage claim and over the claim of the prior salvors. The first salvors claim to have precedence over the second, and dispute the right of the second to claim salvage in the circumstances. These rival claims give rise to some questions of general importance and considerable difficulty, which were very well argued by counsel before me. The first question to determine is with regard to the claim of the board. It was first urged by the salvors that the board had waived any right against *The Veritas* and the proceeds by selling *The Veritas* under the powers conferred by the said Acts. This point was principally made by *The Prairie Cock* and *Sea Cock*, who were parties to the said consent order, though the owners of *The Veritas* and *The Caledonian* were not. The answer to the point appears to be that the board have recovered judgment against the said proceeds in their action to which both sets of salvors had become parties by intervening, and that the judgment is binding and conclusive, at any rate so far as it establishes a right on the part of the board to proceed for their damage against the said proceeds: see *Ballantine* v. *Mackinnon*, [1896] 2 Q. B. 455, as to the effect of such a judgment. Every possible point appears to have been raised in the defence put in on behalf of the tugs, but in their rejoinder these interveners withdrew their defence except as to the question of priorities, and stated that they were willing that the board should have judgment for £600 against the said proceeds. The judgment reserved the question of priorities. Further, as showing that the board had not waived any right it may have to proceed against the fund, it is to be observed that in selling under the powers aforesaid the board do not extinguish the claimants' claims altogether against the proceeds, but hold the same subject to such rights as could be enforced against the *res*. By the said 11th section of the Act of 1874 they are to render the overplus (if any) to the person or persons entitled to the same. This sale would not affect such rights as the salvors have against the proceeds, and there seems to me to be nothing inconsistent in the board also being allowed to enforce by proceedings against the proceeds any rights which they may have in respect of damage done by *The Veritas* to their property, and, although they had an option to detain the wreck until their damage was paid or a deposit made for the same, that appears to be only an additional right, and if not exercised that does not prevent the board from enforcing by action any claim they may have to recover for the damage done to the stage and its connections. The case of *Barraclough* v. *Brown*, 8 Asp. M. L. Cas. 290, 46 W. R. Dig. 64, which was cited, does not apply in my opinion. That case was dealing with a liability only imposed by the Act referred to in the case. The second point raised by the salvors was that the board had not a maritime lien for their damage. That the board had a right to proceed *in rem* under the 7th section of the Admiralty Court Act, 1861, is clear, and the judgment in favour of the board was no doubt under this section: see *The Beta*, 6 Moore P. C. N. S. 56; *The Uhla*, L. R. 2 A. & E. 29*n*; *The Sylph*, L. R. 2 A. & E., p. 24, 16 W. R. Adm. Dig. 17; *The Malvina*, Lush. 493, 10 W. R. Adm. Dig. 28; *The Merle*, 2 Asp. M. L. Cas. 402, 23 W. R. Dig. 216, so far as it deals with the said section and the judgments in *The Zeta*, [1893] A. C., p. 485. The judgment in favour of the board must at least have proceeded on this ground, though it would not necessarily proceed on the ground that there was a maritime lien for damage. It was argued by counsel for the salvors that although the board might have a right to proceed *in rem*, yet they had no maritime lien for the damage. As the damage came last in this case, it is very questionable if it matters whether the board had a maritime lien or not, because, the board having a right to proceed *in rem* for their damage, the question rather is whether the salvors' claims are to have

precedence of the right of the board to enforce payment of the damage done by *The Veritas*. I deal with the salvors' rights later on. However that may be, in my opinion if it be material to decide the point (the case was argued as if it were), as the law now stands the board had a maritime lien for the damage. The question is one upon which a great deal of argument may be expended, but the ground is now mostly covered by authority. Is was decided in *The Bold Buccleugh*, 7 Moore P. C. 267, that a maritime lien arises in the case of damage done by one ship to another in favour of the injured party. [His lordship then read passages from the judgment delivered by Sir John Jervis in that case, and continued:] That the reasoning in that case is not strictly correct is shown by more recent decisions where it has been held that there may be rights to proceed *in rem* without a maritime lien—*e.g.*, *The Heinrich Bjorn*, 11 App. Cas. 270, 34 W. R. Dig. 179, where it was held that there is no lien on a foreign ship under 3 & 4 Vict. c. 65, s. 6, for necessaries; *The Two Ellens*, 20 W. R. 592, L. R. 4 P. C. 161, no lien for necessaries under section 5 of the Act of 1861; *Westrup* v. *Great Yarmouth Steam Carrying Co.* (*Limited*), 38 W. R. 505, 61 L. T. Rep. 714, no lien for towage. In all these cases a proceeding *in rem* lies. [His lordship then read a passage from p. 143 of Dr. Brown's work on Civil Law, published in 1802, and continued:] I do not know of any English case earlier than *The Bold Buccleugh*, in which the doctrine that collision gives rise to a lien is to be found: see the notes collected by Mr. Marsden at p. 187 of the fourth edition of his work on Collisions at Sea. The growth of the idea of maritime lien is also referred to in the President's judgment in *The Dictator*, [1892] P. 304, 41 W. R. Dig. 4. The decision in *The Bold Buccleugh* has, however, whether righty founded or not, been now acted on for fifty years, and in the case of *Currie* v. *McKnight*, [1897] A. C. 97, at p. 105, 45 W. R. Dig. 153, Lord Watson made the following remarks. [His lordship then read the passage from Lord Watson's judgment, and continued:] So far these observations relate to damage in collisions between ships, but the principle seems to be substantially the same so far as regards damage done by a ship which if done on the high seas would formerly have been within the jurisdiction of the Admiralty Court—see *The Sara*, 14 App. Cas. 209, 37 W. R. Dig. 167, and Lord Herschell's judgment in *The Zeta*, where after examining the cases he came to the conclusion that it is impossible to maintain the proposition that the word "damage" was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships. Under the 7th section of the Act of 1861 the court has jurisdiction over any claim for damage done by any ship, and therefore, has jurisdiction over this claim by the board, even if it be said that the damage in question was not done on the high seas. Some of the cases I have already referred to above are in point. In my opinion, it follows from the decision in *The Bold Buccleugh* that there is a maritime lien for this kind of damage if it had occurred on the high seas, and it seems to follow that it was intended the law should be the same as to damage done by a ship elsewhere, and, therefore, whether the damage in question was done in the body of a county or not is immaterial, and I need not enter into that question. This is the manner in which the 6th section of the 3 & 4 Vict. c. 65, has been regarded so far as damage received by a ship in the body of a county is concerned: see *The Bold Buccleugh*, where the collision occurred in the River Humber; the judgment of Lord Bramwell in *The Heinrich Bjorn*, 11 App. Cas., at p. 282; and the judgment of Lord Halsbury in *The Sara*, 14 App. Cas., at p. 216. It is not, in my opinion, inconsistent with these views that, while there is a lien on a ship for the damage done by her, there may be no lien in favour of an injured ship in cases like *The Zeta*, where the reasons which have led to the recognition of a lien on a ship are not applicable. The next and, in my opinion, the real question in the case is whether the claim of the board has precedence over the prior lien of the salvors. That salvors have a lien was not disputed. In the cases for a very long time past when a lien for salvage is spoken of it is always treated as if there was no question but that there is a maritime lien for salvage. It is probably natural that the idea of this lien should have developed more readily than that of a lien for damage. There is no reported case so far as I am aware in which the question has been raised and considered whether a lien for damage takes precedence of a prior lien for salvage or not. There is, however, the passage from Lord Watson's judgment in *Currie* v. *McKnight* which I have quoted above. It is possible that Lord Watson had not fully considered this point, but his judgments are always so full of learning and care that I do not think he would have expressed himself in these terms if he had felt any doubt about the matter. All the text writers to whose works I have been referred give the precedence to the claim for damage: see Williams and Bruce (2nd ed.), p. 80; Maude and Pollock's Merchant Shipping, by Baron Pollock and Bruce, J., (4th ed.), p. 619; Maclachlan on Merchant Shipping (6th ed.), pp. 740, 741; Coote's Admiralty Practice, 1868, p. 138; Abbott on Shipping (13th ed.), p. 871, by Bucknill, J., and Mr. Langley; and Admiralty Jurisdiction and Practice in County Courts, by Dr. Raikes and Mr. Kilburn, p. 123. I have referred to several American text-books, but cannot find any discussion of the point in them. In some of the works I have mentioned the following cases are cited: *The Aline*, 1 W. Rob. 111; *The Benares*, 7 Notes of Cases Supplement, 50; *Cargo ex Galam*, B. & L. 181; *Attorney-General* v. *Norstedt*, 3 Price 137, but none of these cases appear to me to be in point on the proposition in question for which they are cited. There is therefore this consensus of English text writers, and no case to be found in which damage has ever been postponed to prior salvage. It would seem clear that maritime liens may be divided into two classes—first, liens arising *ex delicto*, and, secondly, liens arising *ex contractu* or *quasi ex contractu*. It is almost obvious that liens of the latter class must in general rank against the fund in the inverse order of their attachment on the *res*. They are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests. Thus in the present case (subject to a point which will be dealt with hereafter) the second set of salvors are preferred to the first because the first share in the later benefit conferred on the common subject of the liens. It is also clear that liens arising *ex delicto* take precedence over prior liens arising *ex contractu*. The reasons for this are pointed out by Dr. Lushington in *The Aline*, 1 W. Rob. 111, at p. 118. The principal one appears to be that the person having a right of lien *ex contractu* becomes, so to speak, a part owner in interest with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests, whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come

first; otherwise the injured party might be unable to satisfy his claim out of the *res* without paying off prior claims which arise in such circumstances that the claimants may be considered to have chosen to run the risk of subsequent events affecting their claims. It has even been held that the maritime lien for damage takes precedence of the lien of the seamen for wages earned by them since a collision: *The Elin*, 31 W. R. 736, 8 P. D. 129. It was argued before me that salvage claims were not on the footing of claims arising *ex contractu*, and that on grounds of public policy they should have precedence over subsequent damage claims. The right to salvage may, but does not necessarily, arise out of contract. As the late Lord Hannen said: "It is a legal liability arising out of the fact that property has been saved that the owner of the property, who has had the benefit of it, should make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered nto any contract on the subject": *The Five Steel Barges*, 15 P. D. 142, at p. 146, 38 W. R. Dig. 192. To this may be added that salvage is not governed merely by a regard to benefit received, but also on grounds of public policy by a due regard to the interests of commerce and humanity. At the same time the right to proceed against the *res* is to obtain payment of the reward given for services rendered, and the salvors have had the option of rendering their services, and in deciding to render them are in a position to consider the risks they may run in recovering their reward, and whether or not it is advisable to render the services. From the time of rendering the services they are practically in the same relative position as a creditor who has obtained a lien strictly *ex contractu*, and, while taking precedence over prior claims *ex contractu* and prior salvages, in my opinion the considerations I have referred to show that their claims should be postponed to subsequent damage claims, and in my judgment it is in the best interests of careful navigation that this should be so. I can see no satisfactory ground on which the claims of an injured party should be postponed to the claim of one who seeks to obtain a benefit for prior services rendered to what is in this court commonly spoken of as the "wrongdoing vessel." Such principle as can be applied and general considerations are in my judgment the other way, and even if the damage in this case did not give rise to a maritime lien but only to a right to proceed *in rem*, it seems to me that the latter right should be enforceable in priority to the salvage claims. For all practical purposes in a case where the damage comes last the position of the injured party so far as regards claims arising prior to the damage is much the same whether he has a lien or only a right of process. I may sum up these remarks thus: There is a right to arrest a ship to obtain reparation for damage done by her which is not affected by prior claims against her arising from hypothecations, which create interests in her along with those of her owners. The right was no doubt enforced by the High Court of Admiralty before the doctrine was entertained in the case of *The Bold Buccleugh* that there was a maritime lien for damage, and as regards such prior claims the right aforesaid would not seem to depend on the existence of a maritime lien for damage. A salvage claim may be regarded as if there had been a hypothecation to secure the reward to the salvors for services rendered, and that reward ought not to be recovered against the *res* to the detriment of a claimant in respect of subsequent damage. The matter is of importance when it is not possible or convenient to proceed against the owners personally, and it would be unreasonable and inequitable to satisfy out of the *res* a claim for a reward for prior salvage services which the salvors elected to render in preference to a claim in respect of damage done. The last point to deal with is that relating to the claims of the salvors *inter se*. Unless there is something to prevent the principles aforesaid from applying the claim of the tugs is to be preferred to that of *The Caledonian*. But counsel for the latter vessel contended that in consequence of the decision in the case of *The Devonian* the claim of *The Prairie Cock* could not have precedence over that of *The Caledonian*, and that as *The Sea Cock* belongs to the same owners as *The Prairie Cock* the claims of *The Sea Cock* so far as her owners are concerned also could not have precedence. To succeed in this contention it was practically admitted that it must be shown that the owners of *The Prairie Cock* and *The Sea Cock* and the master and crew of the former could not recover salvage against *The Veritas*. But the tugs have recovered judgment for their services in their suit, the question of priorities only being reserved, and the owners, master, and crew of *The Caledonian* did not raise any objection in that suit to the plaintiffs therein recovering judgment. They did not intervene until after judgment, although they had previously entered a caveat against payment out of the proceeds. The judgment appears to conclude them now. The ground upon which it was sought to make out the point for *The Caledonian* was by applying the decision of the court in the case of the collision between *The Devonian* and *The Veritas* that *The Veritas* was to blame by reason of the wrong exhibition of lights on her tug, *The Prairie Cock*. I do not consider it necessary to examine the said decision at any length. It is sufficient to notice that there was no finding that the absence of the second masthead light in fact contributed to the collision, and unless it did the fact that *The Veritas* was held to blame under section 419, sub-section 4, of the Merchant Shipping Act, 1894, does not appear in the circumstances to make the tug guilty of negligence which caused the collision so as to deprive the tug of the right to salvage for subsequent services when the vessel was being moved with the object of beaching her. As the control rested with the pilot of *The Veritas*, whatever were the strict statutory obligations, it would have been rather hard, in the circumstances, to hold the tug responsible to the tow for negligence as between the tug and tow. I need not, however, go into this question any further, owing to the finding of the court being as above stated, and the fact that the judgment was recovered by the tugs without any objection by *The Caledonian*. The result is that, in my judgment, the claim of the Mersey Docks and Harbour Board comes first; then the claim of the tugs; and lastly that of *The Caledonian*; and payment out must be made accordingly.

Solicitors, *Thompson & McMaster*, Liverpool, for the tugs; *Rowcliffes, Rawle, & Co.*, for *W. C. Thorne*, Liverpool, for the Mersey Docks and Harbour Board; *Hill, Dickinson, & Co.*, for *The Caledonian*.

Court of Appeal.

From Chan. Div.
Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 5.

PEPIN v. BRUYÈRE. (a.)

Conflict of laws—Domiciled foreigner—Unattested will — Leaseholds — Administration with will annexed —Lex rei sitæ—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 9.

The will of a foreigner domiciled abroad, though valid according to the lex domicilii, *and though admitted to probate in England, will not pass the beneficial interest of leaseholds in England unless executed in accordance with the formalities required by the Wills Act.*

Decision of Kekewich, J. (48 *W. R.* 671, [1900] 2 *Ch.* 504), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported 48 W. R. 671, [1900] 2 Ch. 504).

The action was set down for argument on the following question of law: Whether the beneficial interest of Charles Villette, a domiciled French subject, in a leasehold house in England passed by virtue of his unattested will to the defendant Charles Larnaude, the specific legatee thereof, or whether the testator died intestate as to his beneficial interest in the said house.

For the purpose of this question the facts were agreed as follows:

Charles Villette was a French subject having his domicil of origin in France, and at the respective dates of his will and death he was domiciled in France. At those dates he was beneficially entitled to four-fifteenths of a leasehold house in Bond-street, the said four-fifteenths having been demised for a term of forty years (perpetually renewable upon the payment of a fine) to F. B. Garnett, by whom they were held in trust for Villette.

On the 15th of May, 1890, Villette made in France a holograph will in the French form and language whereby he appointed the defendant E. P. Bruyère his universal legatee upon condition that he satisfied certain legacies therein mentioned and paid the testator's debts, and among the legacies comprised in the will was a specific bequest to the defendant Lanaude of the four-fifteenths of the house in question.

The will was not attested but it was valid by the law of France. The testator died in Paris on the 24th of September, 1895.

On the 5th of February, 1897, letters of administration with the will or a translation thereof annexed of the personal estate of the testator were granted out of the Principal Registry of the Probate Division in England, to the defendant Bruyère.

The plaintiffs represented the next-of-kin.

Kekewich, J., held that the leaseholds being part of the soil of England, and therefore as much an interest in land as if they were freehold, were not disposed of by a will which did not comply with the formalities prescribed by the Wills Act, and this notwithstanding the will had been admitted to probate in England.

The specific legatee appealed.

Mackay (*Warrington, K.C.*, with him), for the specific legatee.

P. O. Lawrence, K.C., and *Jason Smith*, for the next-of-kin.

VAUGHAN WILLIAMS, L.J., said: The question raised in this case is whether leasehold property can be treated as personalty so that the domicil of the testator will govern the disposition of the beneficial interest in such leaseholds. In my opinion the judgment of Kekewich, J., was right. Speaking for myself it does not seem to me to be necessary to go further than the case of *Freke* v. *Lord Carbery*, 21 W. R. 835, L. R. 16 Eq. 461, the head-note of which is as follows: "The validity of a testamentary disposition of an English leasehold is governed by the law of England and not by the law of the testator's domicil." The whole basis of the judgment of Lord Selborne in that case is that although a leasehold is a chattel interest for testamentary purposes it must for the purpose of disposition be treated as land and be governed by the *lex loci*. As I have already said I do not think it necessary to go farther than the case of *Freke* v. *Lord Carbery*, but I will call attention to the case of *Duncan* v. *Lawson*, 37 W. R. 524, 41 Ch. D. 394, which seems to cover the present case. In that case Kay, J., said: "But the *lex loci* governs the devolution of *immobilia* in case of intestacy, just as it does of freehold property . . . The executor is merely the hand to effect the distribution of personal estate. As to the persons entitled under the distribution to succeed to the undisposed-of leaseholds, the *lex loci* must govern or it would practically have no effect at all. The matter is more clear if you take the case of an absolute intestacy, where no executor has been appointed. As to English leaseholds the Probate Court in England would in that case be called in to appoint an administrator. No doubt such administrator would be chosen from the next-of-kin according to English law, and it would be his duty, subject to the satisfaction of the testator's debts, probate duty, and the like, to distribute the leaseholds among the persons entitled. At this stage of the proceeding the *lex loci* must determine, independently of the testator's domicil, to whom such distribution must be made." It is quite plain that Kay, J., in that case assumed everything that is necessary to decide the present case. The case of *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123, is also almost identical with the present case. See what a strong case that was. There the will of a domiciled Frenchman was held bad because it did not follow French law, but although bad as to personalty it was held to be good as to leaseholds, because it complied with the *lex loci rei sitæ*. Nothing could be stronger to show that a lease is immovable property, and subject to the *lex loci*. Warren, J., in that case said: "How does the law stand as regards the leaseholds, the immovable personal estate in Ireland? Mr. Jarman's opinion was that this species of property was governed by the *lex loci* in the same manner as lands held for a freehold tenure. It appears from the note to Jarman that later text writers did not concur with Mr. Jarman. But the matter does not depend on the views of text writers, for in *Freke* v. *Lord Carbery*, Lord Selborne decided that testamentary dispositions of an English leasehold are governed by the law of England—*i.e.*, the *lex loci rei sitæ*, and not by the law of the testator's domicil. *In re Gentili*, Ir. Rep. 9 Eq. 541, this court acted on the same principle." The decree in that case which is set out in the report, makes the point even still more clear. The appeal, therefore, fails.

ROMER and COZENS-HARDY, L.JJ., agreed.

Appeal dismissed.

Solicitors, *Baker & Nairne; Herbelet.*

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) Aug. 9, 1901.

STEAMSHIP BALMORAL CO. (LIMITED) v. MARTEN. (a.)

Insurance, Marine—General average—Policy on ship valued at £33,000—Ship found of the value of £40,000—Liability of underwriters.

The plaintiffs insured their ship Balmoral *with the defendant and other underwriters, the value of the ship by agreement being put at £33,000.*

During the currency of the policy The Balmoral *received certain salvage services in respect of which a salvage award was made in the Admiralty Court against the ship, freight, and cargo, and certain general average expenses were also incurred.*

In a salvage action the value of the ship was proved by her owners to be £40,000, and the average adjusters accepted that figure as the contributory value of the ship for the purpose also of the general average. The shipowners sought to recover from the underwriters the whole of the ship's proportion of the salvage and of the general average contribution.

Held, on appeal, affirming the decision of Bigham, J., 49 *W. R.* 137, [1900] 2 *Q. B.* 748, *that the underwriters were liable only to pay thirty-three-fortieths of the £40,000, the proportion which the value in the policy bore to the actual value on which the statement had been made.*

Appeal by the plaintiffs from a judgment of Bigham, J., in an action to recover a loss under a policy on the plaintiffs' ship *Balmoral* subscribed by the defendant and others, underwriters at Lloyd's.

The facts and arguments sufficiently appear from the considered judgments of the court.

Joseph Walton, K.C., and *D. C. Leck*, for the plaintiffs.

Pickford, K.C., and *Scrutton, K.C.*, for the defendant.

The judgment of the Master of the Rolls was read by

STIRLING, L.J.—In this case the plaintiffs insured their ship with the defendant for the sum of £33,000, the ship in the policy being valued at the agreed sum of £33,000. During the time covered by the policy an average loss was sustained which, taking the ship at its real value of £40,000, and not at its agreed value of £33,000, amounted to the sum of £56, and a salvage award had also to be paid by the plaintiffs, which amounted to the sum of £472, taking the ship at its real value of £40,000, and not at its agreed value of £33,000. The question is whether the plaintiffs can recover from the defendant upon this policy the whole of either of these two amounts. Bigham, J., has held that they cannot, and I think for the reason hereafter given that Bigham, J., is right. It is not denied that his judgment is in accordance with the practice in vogue in this country, when a ship is valued in a policy by agreement of the parties at less than its real value. I am aware that, if it be shown that a practice is erroneous, it is not binding upon me (*Atwood* v. *Sellar*, 27 W. R. 726, 28 W. R. 604, 4 Q. B. D. 342, 5 Q. B. D. 286, and *Svendsen* v. *Wallace*, 10 App. Cas. 404, 33 W. R. Dig. 200); and I also know that the practice in America is not the same as here. But what is it that the plaintiffs are seeking to do? They are carrying in upon a valued policy claims based not upon the agreed value between the parties of the thing insured—namely, upon a value of £33,000, but upon a value of £40,000. In my judgment, the agreed value, apart from fraud, is binding between the assured and the underwriter whenever a claim is made by the one against the other upon a valued policy, and it is not competent for the assured any more than for the underwriter to open the value agreed to in the policy. The underwriter's answer to the claim now made by the plaintiffs is this: My liability to you, by agreement between you and me, was to be based upon the ship insured being of the value of £33,000, no more and no less, and I am, therefore, not liable to pay claims based upon a value of £40,000. I think this is a good answer, and for these reasons I think the practice in existence in this country is correct, and that the judgment of Bigham, J., is right, and that this appeal should be dismissed, with costs.

VAUGHAN WILLIAMS, L.J.—In this case the ship *Balmoral* was insured for £33,000, and was valued in the policy at the same sum. During the currency of the policy a general average loss was sustained, and the salvage claim had to be paid by the owners under a salvage award for salvage services to the ship. The real value of the ship for the purpose of the salvage award and at the time of making up the average statement was taken to be £40,000. This value of £40,000 was agreed upon as the value of the ship between the owners and the salvors, the amount being a compromise to save the expense of a valuation. In adjusting the general average and salvage charges the adjusters took the contributory value of the ship at £40,000, but treated the general average and the salvage charge differently. They charged the whole of the salvage charges to the ship, but made the insurance for £33,000 pay only 33-40ths of the total share of the general average falling on the ship. The underwriters contended that they were only liable to pay salvage charges to the extent of 33-40ths, as the ship was valued in the policy at £33,000 and not at £40,000, and this action was brought to determine the extent of the liability of the underwriters. Mr. Danson, an average adjuster, gave evidence that there was a well-known practice amongst English underwriters that when a vessel was insured for a sum less than the contributory value upon which general average was adjusted or less than the amount at which the vessel was valued in a salvage action, the underwriters were only liable to pay in the proportion of the insured value to the contributory value or salvage value. The case is not free from difficulty. The policy is a valued policy on the ship. Both sides are agreed that as between the underwriters and the shipowners, the parties to the policy, the policy value cannot be opened, but each side says that the other is making a claim inconsistent with the valued policy. The shipowners say that according to the terms of the policy the ship is between themselves and the underwriters a fully-insured ship, and that the underwriters cannot consistently with the policy maintain that the ship is only insured to the extent of 33-40ths, or that the shipowners are their own insurers to the extent of 7-40ths. On the other hand, the underwriters say that they insured the ship on the basis of the ship being worth £33,000, and that the shipowners have no right to ask them to pay on the footing of the ship being worth £40,000. Bigham, J., decided in favour of the contention of the underwriters, chiefly on the ground, I think, of Mr. Danson's evidence, which proved undoubtedly that there was a well-known practice in England amongst underwriters and average adjusters whereby, if the policy value of the ship is less than her contributory value adopted in the average adjustment, or less than the amount at which the ship was valued in a salvage

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

action, the same proportionate rebate is made upon the average assessment against the ship when indemnity is sought against the underwriters, unless otherwise provided in the policy. In my judgment it is necessary, in order to arrive at a decision between these respective contentions, to ascertain the nature of the claim of the insured owner in cases where there has been either a general average sacrifice or payment of general average contribution, or payment of the whole or a contributory share under a salvage award. In each of these cases the claim of the insured owner is a claim for a loss by perils of the sea; either something has been sacrificed to avert a peril for the benefit of all or salvage has been paid for the benefit of all. But there is an obvious difference in the links of the chain of cause and effect between a case where masts have been sacrificed or cargo jettisoned to avert a peril of the sea, and a case where the loss consists of the sum which has to be contributed, so as to distribute the burden of the general average sacrifice or the burden of the salvage award. In the former case a part of the ship or cargo has been lost by voluntary sacrifice necessitated by perils of the sea, whereas in the latter case it is impossible to say what loss there has been until the general average contribution has been adjusted or until the salvage award has been made and the burden of it distributed. It is argued that this difference affects the nature and measure of the loss as between the underwriters and the insured owner, and also affects the right of the insured owner to recover from the underwriters the whole of the loss by perils of the sea without reference to contribution from other owners who have had the benefit of the sacrifice, leaving the underwriters to get a contribution from such owners by virtue of subrogation. To a certain extent this is, I think, plainly true. Losses for which underwriters are liable without any adjustment and losses for which underwriters are liable only after adjustment differ in two respects. The former can be recovered as particular average losses, which the latter generally cannot. The former losses fall within the rule in *Dickenson* v. *Jardine*, 16 W. R. 1169, L. R. 3 C. P. 639, in which it was decided that, in a case of jettison of goods entitling the cargo-owners to general average contribution from the owners of the ship, the insured cargo-owner is entitled to recover from the underwriters the whole amount insured without having first collected the contribution to which he was entitled from the ship and other owners of cargo, and that the underwriters, having paid the cargo-owner, would be entitled to stand in his place with respect to general average contribution, whereas losses for which the underwriters are only liable after adjustment clearly cannot be sued for until after adjustment, and then only to the extent of the insured owners' share of liability according to the statement of the average adjusters. The decision of Barnes, J., and of the Court of Appeal in *The Mary Thomas*, [1894] P. 108, seems to make it clear that underwriters are only liable for general average expenditure after adjustment, and to the extent of the contribution due according to the average statement from the insured owner of ship, cargo, or freight, as the case may be, and *The Mary Thomas* seems also to establish that *Dickenson* v. *Jardine* has no application to such a case. *The Mary Thomas*, however, is not conclusive as to the case of salvage in the strict sense of the word. It is not conclusive as to salvage by a volunteer independent of agreement, for it will be seen that in *The Mary Thomas* the operations after the stranding were done under the orders of the master, just as in the present case the work by *The Gamecock* was done under the master's orders. In all these cases the liability of the underwriters is simply to recoup the insured owner his share of expenditure incurred by the master for the benefit of all. I think, however, that even in the case of salvage proper the liability of the underwriter is only to pay the share of the salvors' remuneration awarded against the owner whom he has insured from loss by perils of the sea. The outcome of all this is that neither in a case of general average contribution nor in the case of salvage proper is the underwriter a guarantor of the contributions due under the average statement, or the salvage award, from the other owners interested, but still the loss by ship in having to pay salvage is not a loss dependent on the salvage being for the benefit of owners other than the shipowner: see Arnould on Marine Insurance (3rd ed.), pp. 728-9. It is a direct loss by the peril of the sea, which the salvors are entitled to recover from each owner to the extent that their volunteer services have benefited him. The liability does not seem to me to arise out of the equities of the owners *inter se* or out of the Rhodian Law. To that extent the liability of the shipowner or the cargo-owner or other owner, as the case may be, to pay his share of salvage remuneration differs from his liability to pay his share of general average loss, and resembles a loss by jettison. Salvage, however, is generally not expressly named in marine policies, but it is to be remembered that the liability of the underwriters does not depend on the words of the policy, but upon salvage being made by the law of the land or the general law maritime a direct and immediate consequence of perils of the sea. Assuming that salvage is a partial loss of a ship by perils of the sea, which can only be recovered after the liability of the ship has been determined by the award of the court fixing the share of liability, and that the underwriters can in no case be subrogated to the rights of the insured owner, and that therefore so much of the judgment in *Dickenson* v. *Jardine* has no application, yet there remains the question how far the underwriters can resist payment of the share of salvage which the ship has had to pay. It is a loss by the perils of the sea. The ship had had to pay that amount. *Primâ facie* the underwriters are bound to indemnify the shipowner against this loss. What is it that gets rid of this *primâ facie* obligation? The suggestion is that it is got rid of by the fact that the full value of the ship has been agreed in the policy at £33,000, and the salvage award has been based on a value of £40,000. It is said that this agreement estops the owner as a party to the policy from enforcing against the underwriters any indemnity against a loss based on a value inconsistent with that value. Secondly, it is said that the rule in cases of partial loss is to ascertain the proportion of the contribution of the ship to the total salvage expenditure according to the values and amounts on which the liability of the ship has been fixed by the court which disposed of the salvage action, and that then the liability of the underwriters will be the same proportion of the policy value. It may be that this is a convenient rule of thumb, but it is not the logical outcome holding the parties to the policy to be bound by the figure of policy value; and it is to be recollected that the salvage valuation is based on the value of the damaged ship as salved, and the policy value is the value of the sound ship. In the case of *Irving* v. *Manning*, 1 H. L. Cas. 287, it appears by the opinion of the judges, delivered by Patteson, J., that the meaning of a valued policy is not that as between the parties to the policy the policy value shall for all purposes be taken to be the value of the ship, but only that for the purpose of ascertaining the amount of com-

pensation to be paid to the assured when the loss has happened the value shall be taken to be the sum fixed. The judges, having arrived at that conclusion, go on to approve the doctrine established by *Lewis* v. *Rucker*, 2 Burr. 1167, that on a valued policy of goods the amount to which the underwriters ought to be held liable for a partial loss is to be ascertained by computing such a proportion of the value in the policy as the difference between the price for which sound goods would have sold at the port of delivery and that for which the damaged goods actually sold bore to the price for which sound goods would have sold; and then Patteson, J., goes on to say: "But the extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy" (see pp. 305, 306). This is not the way in which losses by actual damage to the ship are measured for the purpose of ascertaining the *quantum* of the liability of the underwriters. The underwriter has to pay the whole expense of repairs whether the policy value be high or low, less one-third for new work substituted for old, provided only such expenses do not exceed the total sum insured. Now ought salvage expenses to be measured against the underwriters on the basis of a partial loss of goods or on the basis of repairs? Apart from the established practice spoken to by Mr. Danson, I should have thought that the measure of the loss against which the underwriters had to indemnify the shipowner was the actual sum which the shipowner had to pay for salvage, and that this was so whether the valuation in the policy was above or below the actual value. Salvage expenditure is the sum which the shipowner had to pay to save the underwriters from a total loss. I does not seem to me to matter how that sum is arrived at. It is not in its origin a computation of the *quantum* of compensation which the underwriters have to pay the shipowner. It is a computation of the sum which the shipowner has to pay to save the underwriters from a total loss—*i.e.*, of the sum which the shipowner has to pay to save the ship from perils of the sea—and this is clearly a direct loss by perils of the sea. But the evidence seems to show that in the case of salvage claims covered by a policy of insurance the *Lewis* v. *Rucker* measure has been applied for a very long time, and with much hesitation I am concurring in affirming the decision of Bigham, J.

STIRLING, L.J., read a judgment arriving at the same conclusion.

The appeal was accordingly dismissed with costs.

Solicitors, *Lowless & Co.; Waltons, Johnson, Bubb, & Whatton.*

High Court of Justice.

Chan. Div.)
Cozens-Hardy, J.) Aug. 8, 1901.

LOWE *v.* ADAMS. (*a.*)

Landlord and tenant—Sporting rights—Licence—Notice of determination—Reasonable notice.

A landlord, by an agreement not under seal, dated the 14th of May, 1895, let sporting rights for a certain rent over his lands to two tenants, A. and B., for the term of one year, and by a subsequent letter, dated the 31st of December, 1895, agreed to a reduction of the "annual" rent. A. and B. continued to enjoy the shooting rights for six years, paying the rent agreed upon. Shortly before the sixth year was up A. and B. were, first verbally and subsequently by written notice, informed that the arrangement would be revoked as from the end of the sixth year. The landlord then let the shooting rights as from the latter date to C. exclusively. A. and B. however, insisted on exercising sporting rights over the lands, alleging that they should have had six months' notice of the determination of the tenancy. In an action brought by C. for an injunction to restrain A. and B. from shooting over the lands,

Held, that the rules, as to notice, applicable to a tenancy of corporeal hereditaments do not necessarily apply to incorporeal hereditaments, and that reasonable notice had been given.

On the 14th of May, 1895, B. J. H. Beridge agreed to let the shooting in White Ash Wood, Bocking, to Percy Adams and Thomas W. King for the term of one year from the 25th of March then last past to the 25th of March next following at a rent of £23 per annum.

The agreement was apparently not under seal, though there was a wafer opposite Beridge's signature.

On the 31st of December, 1895, Beridge consented by letter to the reduction of the rent from £23 to £21 per annum.

The defendants Adams and King exercised their rights under the agreement and paid the rent up to March, 1901.

On the 23rd of March, 1901, Beridge's solicitor wrote to the defendants informing them that Beridge intended "to revoke the licence you have for some time exercised in respect of the shooting. . . . Will you be good enough to understand that the said licence will be and is revoked as from the 25th day of March instant."

On the 23rd of May, 1901, Beridge demised the exclusive shooting rights over the White Ash Wood and other properties to E. A. C. Lowe from the 25th of March, 1901, at a yearly rent of £50, the lessee covenanting to keep at least one gamekeeper to preserve the game on the said lands.

Percy Adams and Thomas W. King continued to traverse the land and to employ a gamekeeper at their own cost to preserve the game. It was alleged that their gamekeeper interfered with Lowe and his gamekeeper, and the present action was brought for an injunction to restrain Adams and King, their servants and agents, from entering upon the lands and interfering with the exclusive shooting rights of Lowe. The question to be decided was whether sufficient notice had been given to Adams and King so as to determine their sporting rights.

Vernon Smith, K.C., and *Herbert Jacobs*, for plaintiff, argued that defendants held only a parol licence to shoot over the lands, and that such licence was revocable at any moment: *Rex* v. *Inhabitants of Hornden-on-the-Hill*, 4 M. & Sel. 562; *Wood* v. *Leadbitter*, 13 M. & W. 838; *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96, 45 W. R. Dig. 57; *Wilson* v. *Tavener*, [1901] 1 Ch. 578, 49 W. R. Dig. 89.

Eve, K.C., and *Martelli*, for the defendants, argued that there was a tenancy from year to year which could only be terminated by six months' notice in writing, in the absence of any agreement to the contrary. The letter of the 31st of December, 1895, was the equivalent of an agreement of which there had been part performance by the payment of the rent. The decision in *Wood* v. *Leadbitter* was upset by the case of *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

COZENS-HARDY, J., stated the facts, and proceeded: Now various points have been raised in argument upon which I do not think it necessary to express a decided opinion. Whether *Wood* v. *Leadbitter* is still good law, having regard to *Walsh* v. *Lonsdale*, is very doubtful. But the agreement of the 14th of May, 1895, was something more than a mere licence. It conferred a right to shoot and to carry away the game shot (*Fitzgerald* v. *Firbank*), and it was revocable at will. Assuming then that the defendants could not have been lawfully deprived of the enjoyment of their shooting rights before the 25th of March, 1896, what was their position after that day? The defendants contend that by payment of rent they became tenants from year to year, and were entitled to a six months' notice ending on the 26th of March, 1902. Now a general occupation of land was, so long ago as the Year Books, held to be an occupation from year to year, and the tenant could not be turned out without "reasonable notice" (*Doe d. Martin* v. *Watts*, 7 T. R. 83), and "reasonable notice" has been settled to be half a year's notice ending with the period at which the tenancy commenced. This whole doctrine seems to have owed its origin to the prevalence of a strong and natural feeling of the justice and good policy of allowing a tenant who has sowed to reap: Smith's Leading Cases (10th ed.), vol. 2, p. 126. But I am not satisfied that the rigid rules applicable to a tenant of corporeal hereditaments ought to be applied to the enjoyment of an incorporeal hereditament such as I have to deal with.

I assume in favour of the defendants that they are entitled to "reasonable notice," expiring on the 25th of March. If so, I think the verbal notice given in February, or, at the latest in the early part of March, at the end of the shooting season, was reasonable and sufficient. I do not feel bound to hold that in a case of this kind six months' notice must be given. It is not necessary to say whether the written notice of the 23rd of March was sufficient, or, indeed, whether any notice was required. It may well be that the proper inference to be drawn is that the landowner granted successive rights each year for a period of one year, ending on the 25th of March, and that no notice was necessary. The result is that, in my opinion, the plaintiff is entitled to the relief claimed in the action. The defendants must pay the costs of the action.

Solicitors for plaintiffs, *Griffinhoofe & Brewster*, for *E. D. Surridge*, Coggeshall.

Solicitors for defendants, *Morris & Bristow*, for *Harris, Morton, & Harris*, Halstead.

Chan. Div. } July 11, 24, 1901.
Cozens-Hardy, J. }

In re GUYTON AND ROSENBERG'S CONTRACT. (*a.*)

Will—Construction—Devise of "all my real estate"—Outstanding interests—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 26.

A. was owner in fee, subject to a lease of ninety-nine years, of certain property. A. also held a sub-lease of the same property for a term less by two days than the original lease. By his will he devised his real estate to B. and his leasehold estate to his executors.

Held, that the devise by A. of "all his real estate" passed all A.'s interest in the property which was his freehold, including his interest in the sub-lease.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

This was a vendor and purchaser summons taken out by the purchaser on the ground that one of the requisitions of title was not properly answered.

By an indenture of lease dated the 16th of November, 1820, certain freehold property in Ellen-street, in the parish of St. George-in-the-East, was demised to John Saunders for a term of ninety-nine years at a rent of £12 12s. annually.

In December, 1823, the leasehold interest in the said property was mortgaged to John Gibbins for the whole term less two days.

By indenture dated the 13th of May, 1842, Gibbins sold his interest in the leasehold premises to Matthew Rippingham free from all equity of redemption.

By indenture dated the 25th of August, 1848, the fee simple in the premises subject to the lease of November, 1820, was conveyed to M. Rippingham.

Under the will dated the 23rd of February, 1865, of M. Rippingham the fee simple and the interest created by the sub-lease of December, 1825, were devised and given to William Robert Roberts.

W. R. Roberts died in March, 1872, having by his will devised all his real estate to William Guyton, in fee simple, and his leasehold estate (with the exception of one house) to his executors.

By his will dated the 2nd February, 1881, William Guyton devised all his freehold estate to his trustees on trusts for sale, and also directed his said trustees to realize his residuary personal estate.

On the 29th of August, 1900, the trustee of the will of W. Guyton entered into an agreement for the sale to Michael Rosenberg of the interest of W. Guyton in the Ellen-street property.

It was objected by the purchaser that no title was shown in the vendors to the interest created by the sub-lease of the 9th of December, 1823.

J. M. Stone, for the purchaser.—From the will of W. R. Roberts it is clear that the leasehold property passes under the devise of leasehold estate and not under that of real estate, therefore the interest created by the sub-lease of December, 1823, did not pass with the real estate. Section 26 of the Wills Act, 1837, does not apply, and even if it did there is in this will a contrary intention. If this leasehold interest is touched all the other leasehold interests will be affected.

Counsel referred to the cases of *Wilson* v. *Eden*, 11 Beav. 237; *Butler* v. *Butler*, 33 W. R. 192, 28 Ch. D. 66; *In re Davison, Greenwell* v. *Davison*, 58 L. T. Rep. 304, 36 W. R. Dig. 228.

Peterson, for the vendors, referred to *Vallance* v. *Vallance*, 2 N. R. 229, 11 W. R. Ch. Dig. 117; *Matthews* v. *Matthews*, 15 W. R. 761, L. R. 4 Eq. 278; and *Moase* v. *White*, 24 W. R. 1038, 3 Ch. D. 763.

Stone replied.

COZENS-HARDY, J., stated the facts, and then continued: Now I think it is clear that section 26 of the Wills Act, 1837, does not help the vendors. I cannot hold that under the devise of "all my real estate" leaseholds are included when I find in the same will an express bequest of "all my leasehold estate." This is a "contrary intention" appearing by the will. It remains, however, to consider whether, under the language of this will, and having regard to all the surrounding circumstances, the devise to Guyton, which must be read as a devise of all his freehold property, did not include all the testator's interest in this property which was his freehold. Upon the whole I think this is the true view. It seems to me consistent with the judgment of Wood, V.C., in *Matthews* v. *Matthews*. The testator cannot have intended to split up this property into two parts when it had for many years been enjoyed and dealt with as a freehold

estate in possession. The devise passed all his interest in this property, which was his freehold, and not merely his freehold interest in this property subject to his leasehold interest therein. The result is that I must declare that the purchaser's objection is not well founded, and the purchaser must pay the costs of the summons.

Solicitors for the purchaser, *Stones, Morris, & Stone.*

Solicitors for the vendors, *Storey, Cowland, & Hill.*

Chan. Div. Buckley, J. — Oct. 29.

DAVENPORT *v.* MARSHALL. (*a.*)

Married woman — Marriage settlement — Covenant to settle after-acquired property—Judicial separation— "During the marriage"—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 25—*Infant—Repudiation.*

Property acquired by a wife after a decree of judicial separation does not fall within a covenant in a marriage settlement to settle property acquired "during the said intended marriage."

An infant who has executed a marriage settlement will not be allowed to repudiate it thirty years later upon the ground that she only became aware of its contents shortly before repudiation.

Special case.

By a marriage settlement in 1868, executed by the defendant, the intended wife, then R. L. Davenport, while still an infant, she and her intended husband covenanted with the trustees of the settlement that all real and personal property, if any, to which the defendant or her intended husband in her right "shall at any time during the said intended marriage become beneficially entitled in possession or reversion" (except certain articles mentioned and property under £100) should be transferred to the trustees of the settlement upon certain trusts.

The marriage took place the same day. There were three children, who were all of age and living at the date of the trial.

At the date of the settlement the lady was entitled to a reversionary interest in or a share of the estate of her maternal grandfather, which was held in trust for her upon the death of her mother, Mrs. Davenport.

In 1875 the defendant obtained a decree of judicial separation between herself and her husband.

In 1884 a new trustee of the settlement was appointed by a deed to which the defendant was a party.

In 1900 her mother, Mrs. Davenport, died, devising and bequeathing a moiety of the residue of her real and personal property to her daughter, the defendant, for her separate use.

Until the death of her mother the defendant did not elect to disaffirm the settlement, the contents of which (the special case stated) she had not at any time previously been informed or was aware of. She subsequently expressly repudiated it; and the said covenant in it.

The trustees of the settlement brought this action against the defendant claiming the funds to which the defendant had so become entitled, and a special case was presented to the court asking whether the settlement and the covenant were binding upon the defendant, and if so, whether the trustees were entitled, in the events that had happened, (*a*) to her share in the residuary estate of her grandfather, and (*b*) to the share bequeathed to her by her mother.

H. Terrell, K.C., and *S. Dickinson*, for the trustees.—It was manifestly too late, after thirty years, for the lady to repudiate the settlement: *Edwards* v. *Carter* [1893] A. C. 360. The property coming from the grandfather must fall within the covenant, as the lady was entitled to it at the date of the judicial separation, and section 25 of the Matrimonial Causes Act, 1857, does not apply: *Waite* v. *Morland*, 36 W. R. 484, 38 Ch. D. 135. The covenant operated as a conveyance for valuable consideration of the after-acquired property from its date. The covenant should have given it its natural and ordinary meaning, and not be restricted as suggested. The parties may choose to live together again, which shows that the marriage is still subsisting. In *Dawes* v. *Creyke*, 33 W. R. 869, 30 Ch. D. 500, the words "during coverture" are not the same as "during marriage" here.

Ingpen, K.C., and *J. K. Darley*, for the defendant.—The lady has repudiated the settlement almost immediately upon becoming aware of its contents, and that would be sufficient according to the decision of Chitty, J., in *In re Hodson*, 42 W. R. 531, [1894] 2 Ch. 421; but as Chitty, J., had not the decision in *Edwards* v. *Carter* before him, we cannot rely upon that decision. The covenant must be construed with reference to its objects, and be considered as only operating during coverture, and not after the husband is separated from the wife: *Dawes* v. *Creyke*; *Carter* v. *Carter*, L. R. 8 Eq. 551, 18 W. R. Dig. 124; *In re Edwards*, 22 W. R. 144, L. R. 9 Ch. App. 97.

They also referred to *In re Insole*, 14 W. R. 160, L. R. 1 Eq. 470.

BUCKLEY, J.—Two questions arise in the case—first,—whether the lady is bound by the settlement; and secondly, whether, if she is bound, certain funds are included in the covenant. The first question is entirely covered by the case of *Edwards* v. *Carter*. The defendant attained her majority thirty years ago. In 1884 she concurred in a deed appointing a new trustee of the settlement. After what was said by the learned lords in *Edwards* v. *Carter* she cannot now be heard to say that she was not aware of the contents of the settlement, and executed it without consenting to its provisions. In considering the second question, the facts are that at the date of the settlement, and therefore also at that of the judicial separation, she was entitled in reversion upon the death of her mother to a share in the estate of her grandfather. She was therefore "beneficially entitled in reversion" to this share, and it comes plainly within the covenant. She also became entitled under the will of her mother, who died in 1900, to one half of her mother's residuary estate. She was not entitled to this property until after the judicial separation. The question is whether that is property to which she became entitled "during the said intended marriage." In one sense it is such property since the marriage has not come to an end, as the parties may come together again. But is the marriage still existing within the meaning of the covenant. As to this the case of *In re Edwards* is a guide to us. There the Court of Appeal held that a covenant to settle after-acquired property only applied during coverture in the absence of expressions to the contrary. James, L.J., says: "The primary object of a covenant to settle after-acquired property of a wife is to prevent it falling under the sole control of the husband." In *Dawes* v. *Creyke* Bacon, V.C., held, to put it shortly, that from the time of judicial separation the wife was, under the Divorce and Matrimonial Causes Act, 1857, a *feme sole*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

as regards property coming to her, and that it was not included in a covenant to settle property acquired "during the coverture," as the period of separation was not part of the coverture. The intention of the covenant is to exclude the husband. If he is already excluded the reason for the covenant does not exist, and the covenant does not apply. I think, then, that the words "during the said intended marriage" mean during a coverture when there are existing the usual marital rights of the husband. I hold, therefore, that the property which devolved upon the defendant in 1900 does not fall within the covenant.

Solicitors, *Coleman & Knight.*

Chan. Div. } Oct. 26, 29.
Buckley, J. }

ANDERSON v. MIDLAND RAILWAY CO. AND HENRY WIGGIN & CO. (LIMITED). (a.)

Railway—Undue preference—Ultra vires—*Rights of shareholder — Injunction — Jurisdiction — Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 90 —*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.

A shareholder of a railway company cannot have an injunction to prevent the company carrying goods for a customer at a lower rate than the ordinary scale, upon the ground that it is ultra vires, *and enables other customers to claim reductions, and thus diminishes the profits of the company.*

Semble, *such an act, even if an undue preference, is not* ultra vires *the railway company.*

Whatever rights a railway company may have against a customer who has delivered goods to them for consignment under an alleged erroneous description bearing a lower rate of charge than the proper description, a shareholder in the railway company has none against the customer.

In this action the plaintiff was a shareholder of the defendant Midland Railway Co., and the second defendants, Henry Wiggin & Co. (Limited), were merchants at Birmingham, and customers of the railway company; and the action was brought by the plaintiff suing on behalf of himself and the other shareholders in respect of an alleged undue preference shown to the defendants Henry Wiggin & Co. (Limited).

The statement of claim alleged that goods carried by the Midland Railway which came under the class or description of "nickel" were subject to a higher rate of charge than goods which came under the class or description of "metal"; that the defendants Wiggin & Co. (Limited) had sent consignments of goods for carriage by the railway company which though properly coming under the class of "nickel" had been wrongly declared under the class of "metal," and that the lower rate of charge applicable to "metal" had alone been paid for the same; and that upon such erroneous declarations being notified to the railway company they took no steps to enforce payment of the proper rate of charge, but had permitted the defendants Wiggin & Co. (Limited) to continue to send goods by such incorrect descriptions, and to pay the lower rate of charge, thus giving them an undue preference; that the railway company's secretary had alleged that this was done under some special authority or arrangement, of the particulars of which the plaintiff had no knowledge.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Paragraph 10 was: "By reason of such preference other consignors are entitled to claim reductions of the charges to them, and the company and its shareholders are deprived of their legitimate profits. Such preference is *ultra vires* the railway company."

The plaintiff claimed on account of the transactions between the defendant companies, and of the charges made, an inquiry as to the amounts of the deficiency of payments, and payment to the railway company of these amounts, and an injunction to restrain the continuance of the transactions.

By their defences both defendants denied that any erroneous declarations had been made on goods carried at lower rates than their proper class. The defendant railway company also submitted that the statement of claim did not disclose any cause of action, and the defendants Wiggin & Co. submitted that it did not, as against them, disclose any cause of action, even if (which was not admitted) it did disclose one against the railway company.

Orders having been made under ord. 25, r. 2, that the points of law thus raised should be set down for hearing, these questions now came on before the court.

R. J. Parker, for the defendants Henry Wiggin & Co. (Limited).—If there is any illegality in the alleged conduct of the railway company, it is not in their carrying goods at the lower rate for this customer, but in charging a higher rate to others, who may recover back the excess: *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226, 17 W. R. H. L. Dig. 13; *Evershed* v. *London and North-Western Railway Co.*, 25 W. R. 411, 2 Q. B. D. 254; *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 11 App. Cas. 97, 34 W. R. Dig. 159; and *Phipps* v. *London and North-Western Railway Co.*, [1892] 2 Q. B. 229, 40 W. R. Dig. 213. And the remedy of these other customers is in the Railway and Canal Commission Court and not here, and is against the railway company. There is not such right of action against against the customer charged at the lower rate. And even if the shareholder has any rights against the railway company he has none against us.

Ingpen, K.C., and *Sargant*, for the Midland Railway Co.—The railway company are common carriers, who may charge what they like so long as they do not exceed the maximum allowed; hence, if the railway company had acted as alleged, their conduct would not be *ultra vires.*

Gatey and *Compston*, for the plaintiff.—The railway company is bound to treat all its customers alike both by section 90 of the Railways Clauses Consolidation Act, 1845, and by section 2 of the Railway and Canal Traffic Act, 1854. In charging one customer less than the proper scale they have acted unlawfully, and their conduct is *ultra vires*, and to the injury of its shareholders, who may have an injunction to prevent its continuance: *Maunsell* v. *Midland and Great Western (Ireland) Railway Co.*, 11 W. R. 768, 1 H. & M. 130; *Russell* v. *Wakefield Waterworks Co.*, 23 W. R. 887, L. R. 20 Eq. 474; *Ransome* v. *Eastern Counties Railway Co.*, 26 L. J. C. P. 91, 5 W. R. C. L. Dig. 230.

BUCKLEY, J.—For the purposes of the present question I must assume that the allegations of the statement of claim are true. With reference to the statements of paragraph 10, if other consignors are entitled by the acts of the company complained of to claim reductions, then those acts conferred rights on these other persons, and cannot be *ultra vires.* The pleader has pleaded himself out of court. Paragraph 12 says that Wiggin & Co. (Limited) are liable to account to the railway company for, and make good to them, the proper charges for all such consignments

in respect of which such false declarations as aforesaid have been made. That means either that when Wiggin & Co. (Limited) consigned the goods they entered into an implied contract to pay the proper charges, and that they are liable to pay them, or that they are liable to an action for damages for deceit. In either of these cases the right of action belongs to the railway company. Mr. Gatey admits that the plaintiff's only right of action is upon the ground that the act of the railway company is *ultra vires*. He says that under section 90 of the Railways Clauses Consolidation Act, 1845, and under section 2 of the Railway and Canal Traffic Act, 1854, the railway company must treat all customers alike. The former Act only applies where goods are carried between the same points of arrival and departure, but the operation of the later Act is wider, and any undue and unreasonable preference is a breach of it, for which the person aggrieved may go to the Railway and Canal Commission Court. But what is there in it which enables a shareholder of the company which is alleged to have committed a breach of it to ask to have the act of the company declared *ultra vires*. The breach (if any) gives no right to a member against the corporation; it is an act of which another customer of the railway company may complain before another court, and the relief which he can claim is not an injunction, but to recover back what he has paid more than the amount he ought to have been charged. This action could only have been properly brought (if at all) by the railway company; no cause of action is shown in the plaintiff.

Action dismissed.

Solicitors for the Midland Railway Co., *Beale & Co.*

Solicitors for Henry Wiggin & Co. (Limited), *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *Mathews, James, & Crosskey*, Birmingham.

Solicitors for the plaintiff, *Hamlin, Grammer, & Hamlin*, for *C. Dunn*, Leeds.

Chan. Div. } June 20, 1901.
Joyce, J. }

In re WALKER AND OAKSHOTT'S CONTRACT. (*a*.)

Vendor and purchaser—Title—Trust for sale—Leaseholds—Trustees assignees—Sale by sub-demise—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

It is not a proper exercise of their powers for trustees who hold leasehold property on trust for sale to sell it by way of sub-demise, as by so doing they do not get rid of the liability attaching to the lease.

Vendor summons under the Vendor and Purchaser Act, 1874.

The vendors were trustees of a settlement dated the 14th of September, 1883, under which deed they were given powers of sale and of granting leases of the freehold and leasehold land for any term not exceeding twenty-one years, or for the purpose of a building or repairing lease, ninety-nine years, or for a mining lease, sixty years.

The property which was the subject of these proceedings was leasehold, held under a lease dated the 26th of December, 1866, granted to Murray Gladstone for a term of ninety-five years from the 1st of December, 1866.

The trustees were assignees of this lease.

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

On the 13th of August, 1900, this property was put up for sale by auction in three lots numbered 11, 12, and 13.

The material conditions of sale were as follows: The third provided that the title of these lots was to commence with the lease of the 26th of December, 1866. The ninth provided that if these lots were sold to the same purchaser the sale should be carried out by an assignment of the lease, but if all the lots were not so sold the sale of each one of such lots (or of any two of them if two were sold to the same purchaser) should be carried out by the vendors granting to each purchaser an underlease of such one or two of the three lots as might be purchased by him for the residue of the term granted by the said lease except the last day thereof, at the apportioned rents stated in the particulars of sale for each such lot.

The conditions of sale did not disclose the fact that the vendors were trustees.

The respondent purchased Lots 12 and 13, and paid a deposit on purchasing. In his requisitions he objected that the proposed underlease was not a proper exercise of the power of sale and that the sale should be by way of assignment of the whole residue of the term at an apportioned rent with cross covenants and cross powers of distress. The vendors would not consent to this, but offered to assign the three lots to him subject to an underlease to the purchaser of the the third lot. This the respondent refused to accede to, and this summons was accordingly taken out by the vendors.

Warrington, K.C., and *C. G. Church*, for the vendors.—The transaction is in effect a sale and not a lease. This is a common conveyancer's device when leasehold property comprised in one lease is sold in lots so as to avoid an apportionment of the rent: *In re Webb, Still* v. *Webb*, 45 W. R. 170, [1897] 1 Ch. 144. *Evans* v. *Jackson*, 8 Sim. 217, is distinguishable, as in that case the trustees were not purporting to sell at all, but merely granting an underlease.

P. O. Lawrence, K.C., and *S. O. Buckmaster*, for the purchaser.—This is an underlease and not a sale, and the trustees have no power to grant an underlease: *Evans* v. *Jackson*. The distinction is one of substance as the trustees, being assignees of the lease, would get rid of the liability attached to it when they in turn assign it; but retain the liability, and so commit a breach of trust if they grant an underlease. This is a blot on the title. We ask for a rescission of the contract and for a return of the deposit with interest at 4 per cent.: *In re Higgins and Percival*, 57 L. J. Ch. 807, 37 W. R. Dig. 194.

Warrington, K.C., replied.

KEKEWICH, J.—The vendors are trustees selling leasehold property comprised in one lease under an ordinary power of sale, and they have adopted a device which has been found by conveyancers to be the best means of selling in lots leaseholds under those circumstances. As the counsel for the vendors pointed out, there is another mode of selling such property in lots—which is not so simple and has some inconvenience about it—viz., by means of the assignment of the lease to one of the purchasers subject to an agreement that he should grant underleases to the other purchasers at apportioned rents. The trustees have, however, adopted the alternative plan of retaining the term themselves and granting underleases to the several purchasers, a device which the industry of conveyancers has introduced, and which has been found to work well in practice. The objection has been taken, however, that here there is a power of sale only, and not one of granting long

underleases like this. The counsel for the purchaser has called to my attention that in this marriage settlement there is both a power of sale and a power of granting leases, but this power is limited to leases for twenty-one years only; and it has been argued that this transaction cannot come within the power of leasing, and I am asked to infer from that that it does not come within the power of sale. I am not impressed by that argument. It is my duty to examine the transaction and see whether it is a sale or not. In my opinion it is a sale for many purposes. The point was dealt with by Stirling, J., in *In re Webb, Still* v. *Webb*, which was a case of taxation of a bill of costs, and the learned judge had to consider whether costs could be charged according to the scale which applies to conveyances. He says: "Now the first question is, 'Can this transaction be treated as a conveyance within the meaning of Part II., Schedule I?' I answer, 'No; because it is not a conveyance in fee or for any other freehold estate.' Then is it a lease? In a sense, no doubt, it is a lease, but in effect it is a sale. It is described as a sale in the conditions of sale, and it is so described in the plaintiffs' bill of costs. It is a sale carried out by an underlease, which is a well-known conveyancer's expedient, where the property sold is held with other property under one lease, to avoid an apportionment of rent, about which there might be a difficulty with the superior landlord." This is a sale and not a lease in the sense in which those terms are distinguished one against the other. Nevertheless it is a lease in form, and unfortunately in one respect it is a lease in substance. The head lease was not granted to the vendors, and the result, therefore, is that they will be able to get rid of their liability if they assign the lease. If they do not do that they will remain liable. Here they will subdemise to each purchaser; they will take from each purchaser a covenant to observe the covenants in the head lease as regards the particular property which has been purchased by him, and they will also take a covenant to pay an apportioned rent, but they will remain liable as trustees and assignees for the payment of those rents and the performance of those covenants contained in the head lease by virtue of their privity of estate with the lessor under the lease. That seems to me to be an objection to the sale in this manner. I hold the transaction to be in fact a sale by way of sub-lease, but I cannot hold it to be a sale within their ordinary power of sale. It does not get rid of the liability which attaches to those trustees as assigns of the lease, and I do not think that they ought to keep themselves liable to the rents and covenants under the head lease, as regards which they have, of course, a right of indemnity against the estate. On that ground I regret to have to uphold the objection of the purchaser. From that point of view *Evans* v. *Jackson* has no application. What the Vice-Chancellor there held was that an express trust that executors should sell a house was inconsistent with a grant by them of a lease of the house. That case does not touch the point in this case. Now what is the relief which must be given? The purchaser has succeeded, and he asks for an order rescinding the contract and for a return of the deposit with interest at 4 per cent. from the time of payment, with the costs of the summons, including the costs of investigating the title. Counsel for the vendors took exception to that on the ground that it could not be done on a vendor summons. The purchaser's counsel referred me to a case of *In re Higgins and Percival*, in which Kay, J., considered this question on a vendor summons, and the vendor was held accountable for the return of the deposit together with interest and costs. Kay, J., went into the matter referred to the authorities and came to the conclusion that he had jurisdiction under the Vendor and Purchaser Act under the general words which enable the court to make whatever order it considers just. I shall follow that decision and make the same order.

Solicitors, *Walker & Pettitt; Hugh C. Godfray*, for *Oakshott, Baxter, & Chevalier*, Liverpool.

K. B. Div. (Mathew, J.) — Aug. 6, 7, 1901.

STEAMSHIP CARISBROOK CO. (LIMITED) v. LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE CO. (LIMITED). (a.)

Insurance (Marine)—General average—Charter-party—Voyage out and home—General average sacrifice on outward voyage—Liability of homeward freight to contribute.

A ship was chartered to proceed to Savannah and there load a cargo of cotton for carriage to the United Kingdom or Continent, freight being payable on the delivery of the cargo. The ship sailed for Savannah in ballast, and before arriving at that port a general average sacrifice of ship's materials was made. After being repaired a cargo was loaded at Savannah and delivered under the charter-party, freight being paid thereon.

Held, that the freight was liable to contribute in general average.

Williams v. London Assurance, 1 *M. & Sel.* 318, *followed.*

Action in the commercial list tried by Mathew, J., without a jury.

By a charter-party dated the 11th of September, 1900, the plaintiffs' steamship *Yestor* was chartered to proceed from this country to Savannah, where, having discharged her outward cargo, if any, she was to load from the charterers a cargo of cotton and to proceed therewith to a port in the United Kingdom or on the Continent where the cargo was to be delivered on the payment of freight.

On the 13th of September *The Yestor* sailed for Savannah in ballast as under the terms of the charter-party the vessel was entitled to do.

On the voyage a general average sacrifice of ship's materials was made.

The necessary repairs were executed at Savannah and the vessel subsequently loaded a cargo of cotton at Savannah as provided by the charter-party and then proceeded on her homeward voyage.

The cargo was duly delivered and freight paid in respect thereof.

The plaintiffs claimed in this action to recover the cost of the repairs as a loss by perils insured against under a policy of insurance on the ship made by the defendants.

The defence was that the loss was a general average sacrifice to which the plaintiffs were liable to make contribution in respect of the freight payable under the charter-party, and the defendants claimed to set off or deduct the amount of such contribution from the sum claimed in the action.

On behalf of the defendants evidence was given by certain average adjusters, that when a vessel sails in ballast under a charter-party to bring home a cargo it is the uniform practice of average adjusters to make the chartered freight contribute in general average.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Carver, K.C., and *D. Stephens*, for the plaintiffs.—Where a general average sacrifice is made on the outward voyage of a ship in ballast, the shipowner is not liable to contribute in general average in respect of the chartered freight payable on the cargo carried on the homeward voyage. The homeward freight was not being earned and was not at risk at the time of the sacrifice, the only object of which was to enable the ship to perform the outward voyage. *Williams* v. *London Assurance*, 1 M. & Sel. 318, which will be relied on by the defendants, is not really an authority in support of this view, for in that case the charter-party was for one entire voyage out and home, whereas here there are two voyages. The principle laid down in *Williams* v. *London Assurance* is disapproved of by Benecke in Principles of Indemnity in Marine Insurance, at p. 315; by Arnould on Marine Insurance (2nd ed.), at p. 956; Phillips on Insurance (3rd ed.), s. 1387. In *Potter* v. *Rankin*, 16 W. R. 1049, L. R. 3 C. P. 562, at p. 567, Willes, J., laid it down that under a charter-party for a round voyage the homeward freight is not earned during the outward voyage and consequently is not liable to contribute to a general average loss occurring on the outward voyage.

Joseph Walton, K.C., and *Mackinnon*, for the defendants.—From the time of the decision of *Williams* v. *London Assurance* the whole current of authority on this question, with the exception of the *dicta* of Willes, J., in *Potter* v. *Rankin*, is in favour of the defendants' contention: see Baily on General Average (1851 ed.), p. 99; *Moran* v. *Jones*, 5 W. R. 503, 7 E. & B. 523; the American case of *The Brig Mary*, 1 Sprague Adm. Cas. (Mass.) 17; Lowndes on General Average (4th ed.), p. 310. No question of general average was raised or argued in *Potter* v. *Rankin*, and the observations of Willes, J., on this point were merely *obiter*. *Williams* v. *London Assurance* is undistinguishable from this case and is decisive of it. Under the charter-party the chartered voyage began when the vessel sailed from this country, and the homeward freight then began to be earned and was therefore at risk when the sacrifice was made: see *Barber* v. *Fleming*, 18 W. R. 254, L. R. 5 Q. B. 59.

Carver replied.

MATHEW, J.—The question in this case is whether homeward freight under a charter-party ought to contribute to a general average sacrifice made on a outward voyage. I am of the opinion that under the circumstances the homeward freight must contribute. By the charter-party in question this vessel was chartered to go out to Savannah and bring home a cargo of cotton, and the freight was to be payable on the delivery of that cargo at the port or ports of destination.

The ship sailed on the voyage in question in ballast, and in the course of the voyage to Savannah she stranded and a general average sacrifice was made, to which, it is said, the homeward freight must contribute. Now there cannot be a question, to my mind, that the vessel while on the outward voyage was earning the homeward freight. The charter-party obliged her to go to Savannah and to bring the cargo home, and she was discharging that obligation when the disaster occurred. It happened, therefore, in the course of the voyage contemplated by the charter-party. The vessel eventually reached Savannah, took the cargo on board, brought it home, and became entitled to the freight. In that state of things it appears to me, both on principle and according to reason, that the homeward freight should contribute in general average, because everything points to the freight as the object for which the sacrifice was made. It was the owners' interest to secure the arrival of the ship at her port of loading to take her cargo on board, deliver the cargo, and receive the freight in consideration of the services rendered by the ship in going out and bringing the cargo home.

In the way of the plaintiffs' contention there is the case which has been so much discussed of *Williams* v. *London Assurance*. In that case there was a charter-party for a round voyage, out and home, the freight to be paid on the right delivery of the cargo at the homeward port. A disaster occurred in the course of the outward voyage, and the question was whether that freight should contribute to the general average sacrifice made in the course of the outward voyage on the same principle as is sought to be applied in this case. The contract was a contract under which the ship began to earn her homeward freight from the time that she sailed from the homeward port. The court held that the homeward freight ought to contribute in general average to the sacrifice which had been made in the course of the outward voyage. The principle of that case appears to me to be applicable to this one, but a distinction was sought to be drawn, and reference was made to certain comments by learned writers upon *Williams* v. *London Assurance*. The first writer to which I was referred was Benecke, who thought—he said no more than that—he thought, in discussing the case, that the distribution ought to be in respect of so much of the freight as was being earned in the course of the outward voyage. In other words that somebody should divide the single freight into two, and that one portion should be allocated to the homeward voyage, and the other portion to the outward voyage, and that the contribution should be in respect of the freight presumably being earned on the outward voyage—a highly inconvenient rule, it seems to me, to adopt; but that was his view. Arnould, following Benecke, suggests some difficulty about the case of *Williams* v. *London Assurance*. Phillips goes further than either, and advances a theory of his own as to how such a claim should be dealt with. It is noticeable, notwithstanding the high authority of Phillips, that in the case of *The Brig Mary* the American court followed *Williams* v. *London Assurance*.

Mr. Carver further relied upon a passage in the judgment of Willes, J., in *Potter* v. *Rankin* as a statement of the law, but I do not suppose that that learned judge intended by anything he said in that case to differ from, or to overrule, the authority of *Williams* v. *London Assurance*. The statement that he made with reference to the law on that occasion had no direct bearing on the question in controversy in the case; this point had not been raised, had not been discussed, and was not intended to be dealt with, and, therefore, I cannot accept that part of his judgment as a statement of the law which placed him in controversy with *Williams* v. *London Assurance*. If his judgment was to be accepted as a condemnation of that authority, it would certainly place any judge who had to elect between Lord Ellenborough and Willes, J., in considerable difficulty; but if that difficult position was reserved for me, I should come to the conclusion that the authority of *Williams* v. *London Assurance* remained unaffected by anything that may have been said in the later case.

On the other hand, Mr. Walton cited passages from the works of Baily and Lowndes, and he also relied on the case of *Moran* v. *Jones*, where the court recognized that the right way of dealing with a case of this sort is to make the freight to be earned under the charter-party contribute to a general average sacrifice though the goods were not in any peril. That appears to me to be a recognition of *Williams* v.

London Assurance, and a strong authority in favour of the defendants.

I do not comment upon the passages cited from Baily and Lowndes, because their evidence is of the same character as that which has been submitted to me by the various gentlemen familiar with, and of high authority on, this subject who have been called before me. They all speak of the course of business in dealing with cases of this sort. They do not seek to set up their course of dealing as average adjusters against the law, but the defendants are quite entitled to say that these gentlemen have for many years been acting upon this view of the law, and that their conclusions have never been questioned. The position of the regulations laid down by average adjusters among themselves is now clearly ascertained: see *Atwood* v. *Sellar*, 28 W. R. 604, 5 Q. B. D. 286. They endeavour to follow the law, and when the law decides that a regulation of theirs is not in accordance with authority, the regulation is accordingly altered, but, so long as the law has not spoken and has not decided, their customs are valuable as indicating the conditions upon which the particular contract was entered into.

I think that in this case it has been satisfactorily made out that the homeward freight ought to contribute, and therefore my judgment must be for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *Holman, Birdwood, & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

House of Lords.

From C. A. (England). July 22, 1901.

TAFF VALE RAILWAY CO. *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS. (*a.*)

Trade union—Action against trade union in registered name—Injunction—Picketing—Trade Union Acts 1871 *and* 1876 (34 *&* 35 *Vict. c.* 31; 39 *&* 40 *Vict c.* 22).

An action will lie against a trade union in its registered name.

Decision of the Court of Appeal, 49 *W. R.* 101, [1901] 1 *K. B.* 170, *reversed.*

Observations as to the legal position of trade unions and the liability of their funds.

Appeal from an order of the Court of Appeal (A. L. Smith, M.R., and Collins and Stirling, L.JJ.), 49 W. R. 101, [1901] 1 K. B. 170, reversing that of Farwell, J.

The action was brought against the Amalgamated Society of Railway Servants, Richard Bell, the general secretary, and James Holmes, the local secretary of the society, for an injunction to restrain them from watching or besetting, or causing to be watched or beset, the Great Western Railway Station at Cardiff, or the works of the plaintiffs, &c.

An application was made to strike out the name of the respondent society.

The whole question will be found dealt with in the judgment of Farwell, J., given below.

FARWELL, J.—The defendant society has taken out a summons to strike out their name as defendants, on the ground that they are neither a corporation nor an individual, and cannot be sued in a *quasi*-corporate or any other capacity. Failing this they contend that no injunction ought to be granted against them. I reserved judgment last week on these two points, because the first is of very great importance, and counsel were unable to assist me by citing any reported case in which the question had been argued and decided. Now it is undoubtedly true that a trade union is neither a corporation nor an individual, nor a partnership between a number of individuals; but this does not by any means conclude the case. A trade union, as defined by section 16 of the Trade Union Act, 1876, "means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." It is an association of men which almost invariably owes its legal validity to the Trade Union Acts, 1871 and 1876. In the present case the foundation of the argument that I have heard on behalf of the society is that it is an illegal association—an argument that would have more weight if the action related to the enforcement of any contract, and were not an action in tort. The question that I have to consider is what, according to the true construction of the Trade Union Acts, has the Legislature enabled the trade unions to do? and what, if any, liability does a trade union incur for wrongs done to others in the exercise of its authorized powers? The Acts commence by legalizing the usual trade union contracts, and proceed to establish a registry of trade unions, to give to each trade union an exclusive right to the name in which it is registered, to authorize it through the medium of trustees to own a limited amount of real estate, and unlimited personal estate "for the use and benefit of such trade union and the members thereof"; to provide that it shall have officers and treasurers, and to render them liable to account; to require that annual returns be made to the registry of the assets and liabilities and receipts and expenditures of the society; to provide that it shall have rules and a registered office, imposing a penalty on the trade union for non-compliance; and to permit it to amalgamate with other trade unions, and to be wound up. The funds of the society are appropriated to the purposes of the society, and their misappropriation can be restrained by injunction: *Wolfe* v. *Matthews*, 30 W. R. 838, 21 Ch. D. 194. And on winding up such funds are distributed amongst the members in accordance with the rules of the society: *Strick* v. *Swansea Tinplate Co.*, 35 W. R. 831, 36 Ch. D. 558. Further, the Act of 1871 contains a schedule of matters which must be provided for by the rules. The object and the limitations of that Act are stated by Sir George Jessel in *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482, as follows: "That Act, no doubt, was passed primarily with a view to preventing the treasurers and secretaries and officers of these societies from robbing them; that was the chief object. It was discovered that some of these men, abusing the confidence reposed in them, took advantage of the law which made these societies illegal, by appropriating their funds and property to their own use. That, no doubt, was one of the principal objects, and therefore the Act was passed to get at these men. Another object was this: there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or office, but it was not intended that the contracts entered into by the members of the society should be made legal contracts *inter se*, so that courts of justice should interfere to enforce them. If that had been intended the result would have been this, that an agreement between a number of workmen once entered into, compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced some portion of the workmen to a condition of something like serfdom and slavery. Of course the Legislature, by interfering, had no idea of doing anything of that sort."

But these limitations merely restrict the actual enforcement of trade union contracts by action or suit, and do not affect the question of the status of the association to which such members belong. Now although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalized it, and it must be dealt with by the courts according to the intention of the Legislature. For instance, a lease in perpetuity is unknown at common law, but such a lease granted by one railway company to another when confirmed by the Legislature becomes valid and binding —see Sir George Jessel's judgment in the *Sevenoaks, &c., Railway Co.* v. *London, Chatham and Dover Railway Co.*, 27 W. R. 672, 11 Ch. D. 625—nor can it be said for this purpose that the association is illegal, for the Legislature by sections 2 and 3 of the Act of 1871 has rendered legal the usual purposes of a trade union, and has further enabled the trade union to carry into effect those purposes by the provisions to which I have already referred. This is not a case of suing in contract to which the provisions of section 4 of the Act would apply; it is an action in tort, and the real question is whether on the true construction of the Trade Union Acts the Legislature has legalized an association which can own property and can act by agents by intervening in labour disputes between employers and employed, but which cannot be sued in tort in respect of such acts.

Now the Legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property. The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer—*qui sentit commodum sentire debet et onus* (see *Mersey Docks Trustees* v. *Gibbs*, 14 W. R. 872, L. R. 1 H. L. 93)—is as applicable to the case of a trade union as to that of a corporation. If the contention of the defendant society were well founded the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents, with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents. They would be at liberty (I do not at all suggest that the defendant society would so act) to disseminate libels broadcast, or to hire men to reproduce the rattening methods that disgraced Sheffield thirty or forty years ago, and their victims would have nothing to look to for damages but the pockets of the individuals—usually men of small means—who acted as their agents. That this is a consideration that may fairly be taken into account appears from the opinion of the judges given to the House of Lords in the *Mersey Docks case*, "and we cannot think that it was the intention of the Legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Katharine's Dock Co. for instance, of all recourse against it, and to substitute the personal liability of a harbour-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any." The proper rule of construction of statutes such as these is that in the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalized the existence of such irresponsible bodies with such wide capacity for evil. Not only is there nothing in the Acts to lead me to such a conclusion, but sections 15 and 16 of the Act of 1871, imposing penalties on the trade union, and sections 8 and 15 of the Act of 1876 point to a contrary intention; nor do I see any reason for saying that the society cannot be sued in tort in their registered name. Sections 8 and 9 of the Act of 1871 expressly provide for actions in respect of property being brought by and against the trustees, and this express intention impliedly excludes such trustees from being sued in tort. If, therefore, I am right in concluding that the society are liable in tort the action must be against them in their registered name. The acts complained of are the acts of the association. They are acts done by their agents in the course of the management and direction of a strike; the undertaking such management and direction is one of the main objects of the defendant society, and is perfectly lawful; but the society, in undertaking such management and direction, undertook also the responsibility for the manner in which the strike is carried out. The fact that no action could be brought at law or in equity to compel the society to interfere or refrain from interfering in the strike is immaterial; it is not a question of the rights of members of the society, but of the wrong done to persons outside the society. For such wrongs, arising as they do from the wrongful conduct of the agents of the society in the course of managing a strike which is a lawful object of the society, the defendant society is, in my opinion, liable.

I have come to this conclusion on principle, and on the construction of the Acts, and there is nothing to the contrary in any of the cases cited by the defendants' counsel. They were all cases relating to the limitation of the right of enforcing contracts to which I have already referred. It is true that in *Lyons & Sons* v. *Wilkins*, 47 W. R. 291, [1899] 1 Ch. 255, the name of the trade union was struck out as a defendant by Byrne, J.; but I have been supplied with a copy of the shorthand notes of this case, and I find that the point was not argued, the plaintiff's counsel not thinking it worth while to contest it; and, on the other hand, although the Court of Appeal in *Trollope's case*, [1895] 72 L. T. Rep. 342, 43 W. R. Dig. 95, affirmed

an injunction restraining libel by a trade union, I find that the trade union entered no appearance, and that the injunction went against them before Kekewich, J., in default of appearance, and his order was affirmed, nothing having been said about the society. The cases having the nearest analogy to the present are those like *Ruck* v. *Williams*, 6 W. R. 622, 3 H & N. 308, and *Whitehouse* v. *Fellows*, 9 W. R. 557, 10 C. B. N. S. 765, where unincorporated improvement commissioners and the trustees of a turnpike road respectively, sued under their respective Acts in the name of their clerk, were held liable in tort. I accordingly dismiss the society's summons with costs.

I have now to consider the question whether an injunction should be granted against the society in addition to that granted last week against Messrs. Bell and Holmes, and I am of opinion that it should. The objects of the society comprise promoting the settlement of disputes between masters and men by arbitration, or, failing that, by other lawful means, and of course a strike is perfectly lawful; the general management of the society is vested in an executive committee with power to represent the members in disputes about hours and wages; a protection fund is set apart out of the funds of the society for the more effectual protection of the labour and rights of members and for the better carrying on of any movement having that end in view, and in pursuance of its objects and powers. The society by their letter of the 20th of August signed by the defendant Bell informed the plaintiffs that they had decided to support the men in their action, and had instructed Bell to take charge of the movement with a view of bringing it to a conclusion, and that all further negotiations were to be dealt with through him. The defendant Bell was the general secretary and the defendant Holmes was the local organizing secretary of the society; they, as agents for the society, and on their instructions and for their benefit, put themselves in charge of the strike, and on the evidence that was read last week illegally watched and beset men to prevent them from working for the company, and illegally ordered men to break their contracts. I have already held that the society are liable for the acts of their agents to the same extent that they would be if they were a corporation, and it is abundantly clear that a corporation under the circumstances of this case would be liable—see, for example, *Ranger* v. *Great Western Railway*, 5 H. L. Cas. 72, at p. 86, where Lord Cranworth points out that, although a corporation cannot in strictness be guilty of fraud, there can be no doubt that if its agents act fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principle must prevail when the principal under whom the agent acts is a corporation. It is not a question of acting *ultra vires*, as in *Chapleo* v. *Brunswick Permanent Building Society*, 29 W. R. 529, 6 Q. B. D. 696, but of improper acts in the carrying out of the lawful purposes of the society. In such cases the principal, whether an individual or a corporation, or a body like turnpike trustees, is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. Granted that the principal has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he is answerable for the manner in which the agent has conducted himself in doing the business with which the principal has entrusted him: see *Barwick* v. *English Joint Stock Bank*, in the Exchequer Chamber, 15 W. R. 877, L. R. 2 Ex. 259. Therefore, if it is any longer necessary to grant an injunction, I grant an injunction against the defendant society in the same form as that granted last week against the other defendants.

The Court of Appeal, however, held that a trade union could not be sued as such, in its registered name (see 49 W. R. 101); and accordingly reversed the judgment of Farwell, J.

The plaintiffs appealed to the House of Lords.

Sir E. Clarke, K.C., and *Swinfen Eady, K.C.* (*Francis Williams, K.C.*, and *H. H. Gregory* with them), for the appellants.

Haldane, K.C., and *S. T. Evans, K.C.* (*T. B. Napier* and *Clement Edwards* with them), for the respondents.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—In this case I am content to adopt the judgment of Farwell, J., with which I entirely concur; and I cannot find any satisfactory answer to that judgment in the judgment of the Court of Appeal which overruled it. If the Legislature has created a thing which can own property, which can employ servants, which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement. I move your lordships that the judgment of the Court of Appeal be reversed, and that of Farwell, J., restored.

Lord MACNAGHTEN.—I am of the same opinion. Although I should be well content to adopt the judgment of Farwell, J., and the reasons he has given, I will venture to add a few words of my own, partly out of respect for the Master of the Rolls, from whose opinion I never dissent without the greatest hesitation, and partly in deference to the arguments of counsel, which before your lordships have ranged over a wide field, and, on the part of the respondents, have, I think, assumed a somewhat bolder tone than in the court below.

The case divides itself into two questions. One may be described as a question of substance; the other is rather a question of form.

Parliament has legalized trade unions whether registered or not. If registered, they enjoy certain advantages. The respondent society is a registered trade union. Subject to such control as an annual general meeting can exercise, the government of the society is in the hands of its executive committee, a small body with vast powers, including an unlimited power of disposition over the funds of the union, except so far as it may be interfered with by the annual general meeting or restricted by the operation of the society's rules, of which in case of doubt the executive committee is the sole authorized interpreter. Mr. Haldane pointed out, what is true enough, that the funds of the society were contributed for benefit purposes as well as for trade purposes, and warned your lordships that, if those funds were made answerable for the consequences of such acts as those complained of in the present case, the widow and the orphan might suffer in consequence of the ill-advised or illegal action of the executive of the union. At first sight that seems a plausible argument. But the truth is that all the funds of the society, for whatever purpose they may be collected, form a common fund. That, I believe, is the case with most, if not all, trade unions. If you take up the report of the Royal Commission on Trade Unions and turn to the statement accompanying the minority report, you will see that there was nothing on which the advocates of trade unions insisted more strongly or more firmly

than on the right of unions to employ the whole of their funds, if they chose, for the purpose of strikes and in connection therewith. "At present," say the authors of that statement, "the strength of the union and the confidence of its members simply consists in this, that it can, if so disposed, employ the whole of its funds in the support of the trade ends." An enforced separation of the funds of the union would be, they say, "arbitrary interference with the liberty of association," it would "paralyze the efficiency of the institution." The suggestion of such a proposal is "tantamount to a proposal to suppress unionism by statute."

The substantial question, therefore, as Farwell, J., put it, is this: Has the Legislature authorized the creation of numerous bodies of men capable of owning wealth and of acting by agents with absolutely no responsibility for the wrongs they may do to other persons by the use of that wealth and the employment of those agents? In my opinion Parliament has done nothing of the kind. I can find nothing in the Acts of 1871 and 1876, or either of them, from beginning to end to warrant such a notion. Nor, indeed, was anything of the kind contemplated by the minority of the members of the Royal Commission on Trade Unions, whose views found acceptance with the Legislature. In paragraph 4 of the minorty report they say: "It should be specially provided that, except so far as combinations are thereby exempted from criminal prosecutions, nothing should affect the liability of every person to be sued at law or in equity in respect of any damage which may have been occasioned to any other person through the act or default of the person so sued." Now, if the liability of every person in this respect was to be preserved, it would seem to follow that it was intended by the strongest advocates of trade unionism that persons should be liable for concerted as well as for individual action. And for this purpose it seems to me that it cannot matter in the least whether persons acting in concert be combined together in a trade union, or collected or united in any other form of association.

Then, if trade unions are not above the law, the only remaining question, as it seems to me, is one of form—how are these bodies to be sued? I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body. As regards this point, Mr. Haldane relied on the case of *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715; but *Temperton* v. *Russell*, as I have said before, was an absurd case. The persons there selected as representatives of the various unions intended to be sued were selected in defiance of all rule and principle. They were not the managers of the union, they had no control over it or over its funds. Their names seem to have been taken at random for the purpose, I suppose, of spreading a general sense of insecurity among the unions which ought to have been sued, if sued at all, either in their registered name, if that be permissible, or by their proper officers—the members of their executive committees and their trustees.

Mr. Haldane, indeed, was bold enough to say that if a wrong was committed by a body of persons acting in concert, who were too numerous to be made defendants in an action, the person injured would be without remedy unless he could fasten upon the individuals who actually did or were actually doing the wrong. Then he was asked what would he say to such a case as this: Suppose there were a manufactory belonging to a co-operative society unregistered and composed of a great number of persons (as there well might be but for the provision in the Companies Act making illegal an unregistered trading society consisting of more than twenty members), and suppose such a manufactory were poisoning a stream or fouling the atmosphere to the injury of its neighbours, might it do so with impunity? Mr. Haldane said, "Yes, unless you could pounce upon the individual offenders." It seems to me that this is a *reductio ad absurdum*. I should be sorry to think that the law was so powerless, and therefore it seems to me that there would be no difficulty in suing a trade union in such a case, if it be sued in a representative action by persons who would fairly and properly represent it.

The further question remains, May a registered trade union be sued in and by its registered name? For my part I cannot see any difficulty in the way of such a suit. It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members. The registered office is the place where it carries on business. A partnership firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And so, when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases by its registered name as a trade union, and does not say that the cases specified are the only cases in which it may so sued, I can see nothing contrary to principle or contrary to the provisions of the Trade Union Acts in holding that a trade union may be sued by its registered name.

I am, therefore, of opinion that the appeal should be allowed, and the judgment of Farwell, J., restored, with costs here and below.

Lord SHAND, whose judgment was read by Lord Macnaghten, said: I am also of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Farwell, J., restored, and an injunction granted against the respondents in the terms settled by his lordship.

The admirable judgment of Farwell, J., in whose reasoning I entirely agree, makes it unnecessary again to go over the provisions of the statutes of 1871 and 1876, particularly after what has been said by your lordships. I shall only add a few words in regard to the judgment of the Court of Appeal. It is true, as repeatedly stated, both by Farwell, J., and by the Master of the Rolls, that by neither of the statutes are trade unions, although registered, declared to be incorporations, which would as a consequence give them a right to sue and render them liable to be sued in the society's name. It is equally true, as the Master of the Rolls observes, that the right to sue and liability to be sued may be conferred by statute, either expressly or by implication. In the words of the learned Master of the Rolls, enactments "must be found either express or implied enabling this to be done." I agree in thinking there is no express enactment to that effect, but, with great deference, in my opinion the power of suing and liability to be sued in the society's name is clearly and necessarily implied by the provisions of the statutes. If Farwell, J., had not carefully gone over and pointed out these provisions in his judgment, I should have thought it right now to do so, but I content myself with referring to what he has so well said. A registered trade union has an exclusive right to the name in which it is registered, a right to hold a limited amount of real estate and unlimited personal estate for its own use and benefit and the benefit of its members, the power of acting by its agents and trustees, and is liable to be sued for penalties, as it

appears to me, in the society's name. I am clearly of opinion that these and the provisions generally of the statutes imply a liability of the society to be sued in its trade union name, and a privilege of thus suing.

I am further of opinion that as the society by its agents is alleged to have been violating the law as stated by the appellants and sworn in their affidavits, the appellants are entitled to an injunction, not only against the agents but against the society itself for whom their servants and agents were acting.

Lord BRAMPTON.—I shall trouble your lordships with but a few words, for I entirely concur in the judgment and words of the Lord Chancellor in adopting the judgment of Farwell, J. I do not think this House is called upon to do more to-day than determine whether a *primâ facie* case has been disclosed by the Taff Vale Railway Co. entitling them to the injunction they claimed, and whether the trade union society can be sued for such an injunction in its registered name. I think both these questions ought to be answered in the affirmative.

The lawless acts alleged to have been committed, and the continuance of which was more than probable, were clearly wrongful acts, which justified the Taff Vale Railway Co. in seeking to have them restrained by those who caused them to be committed; and inasmuch as they were done by men acting as agents of the society in furtherance of a strike, sanctioned and directed by its authorized officers, the society is responsible for them. Whether it is so responsible in and by its registered name is the only remaining question.

I see no reason why this question should not also be answered in the affirmative. I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name, in the manner prescribed, and that a legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body, created by statute distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings, unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by section 9 of the same Act, who hold real and personal property of the society. I may refer also to the effect of the rules with regard to the present registration. I find that rule 7 (3) provides that the funds of every branch shall be the common property of the society. That being so, I do not see how it would be possible for these funds to be made applicable for remuneration or recompense or redress for any wrongful act done by a body of men like the society, unless the society can be sued in the way in which it is proposed to sue them, and as I think it may be.

For the reasons I have very shortly given, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Farwell, J., restored.

Lord LINDLEY.—The problem how to adapt legal proceedings to unincorporated societies consisting of many members is by no means new. The rules as to parties to common law actions were too rigid for practical purposes when those rules had to be applied to such societies; but the rules as to parties to suits in equity were not the same as those which governed courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent failure of justice: see *Meux* v. *Maltby*, 2 Swans. 277, and the observations of Sir George Jessel, M.R., in *Commissioners of Sewers* v. *Gellatly*, 24 W. R. 1059, 3 Ch. D. 610.

The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied and made applicable to the various divisions of the High Court by the Judicature Act of 1873, and by ord. 16, r. 9, and the unfortunate observations made on that rule in *Temperton* v. *Russell* have been happily corrected in this House in the case of *Bedford (Duke of)* v. *Ellis*, [1901] A. C. 1, 49 W. R. Dig. 145, and in the course of the argument in the present case.

I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name some of its members—namely, its executive committee—could be sued on behalf of themselves and other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is, in my opinion, equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union.

I entirely repudiate the notion that the effect of the Trade Union Act of 1871 is to legalize trade unions and confer on them rights to acquire and hold property, and at the same time to protect the union from legal proceedings if their managers or agents acting for the whole body violate the rights of other people. For such violation the property of a trade union can unquestionably, in my opinion, be reached by legal proceedings properly framed. The Court of Appeal has not denied this, but it has held that the trade union cannot be sued in its registered name; and in strictness the only question for determination by your lordships now is whether the Court of Appeal was right in holding that the name of the trade union ought to be struck out of the writ and that the injunction granted against the trade union in that name ought to be discharged.

If I am right in what I have already said, this question is of comparatively small importance. It is not a question of substance, but of mere form, and turns on the Trade Union Act of 1871 and on the amending Act of 1876. The principal Act does not in express terms say what use is to be made of the name under which the trade union is registered and by which it is known; but a trade union which is registered under the Act must have a name—sections 14 and 16, and Schedule I. It may acquire property, but, not being incorporated, recourse is had to the old well-known machinery of trustees for acquiring and holding such property and for suing and being sued in respect of it. Sections 7, 8, and 9 show this. The property so held, however, is the property of the union. The union is the beneficial owner. Section 12 provides summary remedies for misapplications of trade unions' property, but there is nothing here to oust the

jurisdiction of the superior courts; and, there being nothing in the Act to prevent it, I cannot conceive why an action in the name of the trade union against its trustees to restrain a breach of trust or to make them account for a breach of trust already committed, should be held unmaintainable or wrong in point of form. Further, sections 15 and 16 of the Act of 1871 and section 16 of the Act of 1876 impose duties on registered trade unions, and penalties on them (and not only on their officials) for breach of those duties. The mode of enforcing these penalties is pointed out in section 19 of the Act of 1871, but there is nothing there to show that the trade union on which the duty is cast, and which has to pay the penalty, could not be proceeded against in its registered name. Again, I apprehend that a *mandamus* could go against a trade union to compel it to perform the duties cast upon it by statute; and here, again, the obvious course would be to proceed against the union by its registered name, unless there is something in the statute to prevent it. A careful study of the Act leads me to the conclusion that the Court of Appeal held, and rightly held, that trade unions are not corporations; but the Court held, further, that, not being corporations, power to sue and be sued in their registered name must be conferred upon them, and that the language of the statutes was not sufficient for the purpose. Upon this last point I differ from them. The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings, as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is, at least, permissive.

Your lordships have not now to consider how a judgment or order against a trade union in its registered name can be enforced. I see no difficulty about this, but to avoid misconception I will add that if a judgment or order in that form is for the payment of money, it can, in my opinion, only be enforced against the property of the trade union, and that to reach such property it may be found necessary to sue the trustees.

I am of opinion that the orders of Farwell, J., were right and should be restored.

Appeal allowed.

Solicitors for appellants, *Williamson, Hill, & Co.*, for *Ingledew & Sons*, Cardiff.

Solicitors for respondents, *Riddell & Co.*, for *Meyrick, Davies, & Forsdike*, Cardiff.

From C. A. (England). July 23, 1901.

JACOBS v. BOOTH'S DISTILLERY. (a.)

Practice—R. S. C. ord. 14—Leave to defend.

Unless the court is satisfied that the defendant has no defence, the plaintiff is not entitled to judgment under order 14. The merits of the case are not to be gone into upon an application under this order, and a defence is not to be shut out where on the disclosed facts a triable issue arises.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Appeal from order of Court of Appeal affirming that of the master and judge.

The respondents brought an action against the appellant and another person for £3,000 odd, claimed under the following circumstances:

To secure an advance and further sums by the respondents, the appellant had signed a memorandum of charge and promissory notes, together with the other defendant, who did not contest his liability.

The appellant received an indemnity from this co-defendant, and said he was informed that he incurred no liability by signing, and that he had done so relying on this statement.

On a summons under order 14 the master ordered the amount to be paid into court by the defendants within seven days, with judgment if the sum was not so paid.

This order was affirmed by the judge and by the Court of Appeal.

The defendant Jacobs appealed to the House of Lords.

R. A. McCall, K.C., and *F. Low*, for the appellant.

Joseph Walton, K.C., and *Herbert*, for the respondent company.

Earl of HALSBURY, L.C.—I am of opinion that this judgment ought to be reversed. I am surprised at the decision which has been arrived at by the tribunals before whom this question has come. I think that if this is an example of the mode in which order 14 is administered, it would be desirable for the Legislature to consider whether that order should continue to be put in force. People do not seem to understand that the effect of order 14 is not that upon the allegation of the one side or the other a man is not to be permitted to defend himself in a court.

Order 14 was intended to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. I do not propose to deal with the facts or the merits of the case, which will have to be dealt with when the cause is tried, as it ought to be tried. But I am bound to say that it startles me to think that in a case of this sort an order should be made, the effect of which is that the defendant is not to be heard to make his defence. It appears to me that order 14 is quite inappropriate to the facts of this case, so far as they are intelligible.

Lord MACNAGHTEN.—I agree.

Lord JAMES OF HEREFORD.—The view which I think ought to be taken of order 14 is that the tribunal to which the application is made should simply determine "Is there a triable issue to go before a jury or court?" It ought not to enter into the merits of the case at all, and should make the order only when it can say to the person who opposes the order, "You have no defence; you could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact." I think there is here a plain issue to be tried.

Lord BRAMPTON.—I entirely agree.

Lord LINDLEY.—I agree. I think the case ought to be tried.

Order appealed from reversed. Respondent company to pay to the appellant the costs both here and below.

Solicitor for appellant, *Shirley Woolmer*.

Solicitors for respondents, *Foster, Spicer, & Foster*.

From C. A. (England). July 22, 1901.

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING CO. (a.)

Banker—Bill of exchange—Crossed cheque—"Not negotiable"—Receipt of payment for customer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 81 *and* 82.

A rate collector who is well known and accustomed to get cheques cashed at a bank, but having no account of his own there, is not a "customer" within the meaning of the Bills of Exchange Act, 1882, *s.* 82. *Should a bank cash for such a person a cheque drawn upon another bank in favour of such a person as payee, but marked "not negotiable," and afterwards receive payment of the amount from the bank on which the cheque is drawn; if the cheque had been obtained by such payee by false pretences, the first-mentioned bank is not protected from liability to the drawer by the above section.*

Decision of the Court of Appeal (48 *W. R.* 662, [1900] 2 *Q. B.* 464) *reversed.*

This was an appeal from an order of the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.), reported 48 W. R. 662, [1900] 2 Q. B. 464.

The action was brought to recover £142 10s., money had and received by the respondents to the use of the appellants, or in the alternative to recover damages to a like amount for the conversion of a cheque.

One Huggins had been for many years a rate collector in the employment of the Wantage District Council and for many years had been in the habit of receiving from the respondents' branch bank at Wantage cash for cheques. He was well known at the bank, but had no account there. By falsely pretending that a poor rate had been made he obtained from the appellants a cheque of the value of £142 10s.

Huggins was subsequently tried and convicted of obtaining the cheque by false pretences.

The cheque was drawn in favour of Huggins or order on the London Joint Stock Bank, and was crossed "and Co.," and marked "not negotiable." Huggins, in accordance with his usual practice, took the cheque to the branch bank of the respondent company at Wantage, who gave him the sum of £117 10s. in notes and gold, and carried the balance, £25, to the credit of the Wantage Rural District Council, at the request of Huggins, in discharge of his liability to the council. The cheque was presented by the respondents the next day at the London Joint Stock Bank and payment was made on behalf of the appellants.

At the trial Bigham, J., found as a fact that the respondents received payment of the cheque in good faith and without negligence, and that they so received payment for Huggins, and that as Huggins was a customer of the bank within the meaning of section 82 of the Bills of Exchange Act, 1882, the respondents were protected from liability.

The Court of Appeal (Vaughan Williams, L.J., doubting as to bank receiving payment of the cheque for Huggins) affirmed the judgment of Bigham, J.

H. D. Greene, K.C. (*Asquith, K.C.*, and *Park Goff* with him), for the appellants.

A. T. Lawrence, K.C., and *Guy Lushington*, for the respondents.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—The importance of this case depends upon the true construction of sections 81 and 82 of the Bills of Exchange Act, 1882. I think there are more reasons than one for the opinion I entertain. But the sections are of such wide and general importance that I prefer to rest my judgment upon that.

I think it is very important that everyone should know that people who take a cheque which is marked "not negotiable" and treat it as a negotiable security must recognize the fact that if they do so they take the risk of the person for whom they negotiate it having no title to it. In this case it cannot be pretended that Huggins had any title to do it at all. I do not understand what additional security is supposed to be given to a cheque by putting the words "not negotiable" upon it, if the fact of its being negotiated can give a title to anyone. The supposed distinction between the title to the cheque itself and the title to the money obtained by it seems to me to be absolutely illusory. The language of the statute, which seems to be clear enough, would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. Section 82, which contemplates the receipt of such cheque in the ordinary course of business for the customer of a bank, seems to me to contemplate a totally different class of transaction from what is disclosed in this case. The bank thought proper to take this cheque as representing its face value; and if the holder of it had no title, as he certainly had not, there is nothing in section 82 which will entitle them to treat it as a receiving payment for a customer.

It is not true to say that the banker is here sought to be made liable by reason of his having received payment for a customer. I do not think that Huggins was a customer of the bank at all within the meaning of the sections, but what the bank are really insisting upon here is the valid negotiability of a cheque which was fraudulently obtained, and which, by the form of it, it is enacted by the statute, shall give no better title to the cheque than that which the person from whom it was taken had, shall nevertheless give a title to them which shall enable them to sue.

As I have said, I do not think Huggins was a customer at all. I do not think the transaction was a banking transaction; and although I think there is another and a distinct ground which would defeat the bank's claim, I am content to rest my judgment upon the true construction of the statute.

I therefore move your lordships that the judgment of the Court of Appeal be reversed, and that judgment be entered for the appellant with costs.

Lord SHAND (whose judgment was read by Lord Davey) said: I have found the decision of this case to be attended with much difficulty, but have come to be of opinion with your lordships that the judgment of Bigham, J., and the Court of Appeal should be reversed. Having had an opportunity of considering the judgment about to be delivered by my noble and learned friend Lord Lindley, I concur in that judgment and in his lordship's views of the provisions of the Bills of Exchange Act, and in the reasons which his lordship has given for the reversal of the decision of the Court of Appeal.

Lord DAVEY.—The first point raised by counsel for the appellants was that Huggins, in the circumstances which are stated in the case, had a property in the cheque which was indeed voidable by the appellants, who had been defrauded, but that the money having been received by the respondents in good faith and without notice of the fraud, before the appellants had disaffirmed the transaction, it could not be recovered back from them, the respondents. *Horwood* v. *Smith*, 2 T. R. 750, and the Sale of Goods

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Act, 1893, s. 24, were cited in support of this proposition. I am of opinion that Huggins never had any property in the cheque, which was handed to him only as the collector and agent of the overseers in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers, the overseers, notwithstanding that it was made payable to Huggins's order. Huggins, therefore, had no real title to the cheque, and, it being marked "not negotiable," the respondents never acquired title to it as against the appellants. I think that this is shown by the cases of *Higgons* v. *Burton*, 5 W. R. 683, 26 L. J. Ex. 342, and *Cundy* v. *Lindsay*, 26 W. R. 406, 3 App. Cas. 459. In the former case one Dix, pretending to be agent for one Fitzgibbon, obtained goods from the plaintiff and pledged them to the defendant. It was held that the plaintiff could recover the goods from the defendant before any notice of the fraud or disaffirmance of the transaction. And in *Cundy* v. *Lindsay* the same principle was affirmed in this House. Bigham, J., and the Court of Appeal, however, decided in favour of the respondents on the ground that Huggins was a customer of the respondents, who received the cheque for collection on his behalf within the meaning of section 82 of the Bills of Exchange Act. The facts upon which they came to that conclusion are that Huggins had for about twenty years been in the habit of cashing cheques received by him as collector of rates on the respondents' bank. His employers, the overseers, kept their account at another bank in Newbury, and it was *primâ facie* his duty to pay cheques received by him for rates into their banking account. It does not appear whether Huggins cashed cheques at the respondents' bank in any cases except those in which he had to make payments out of the rate collected as poor rate to the credit of the waywarden or rural district council, who kept their accounts with the respondents. In all the instances which were put in evidence from the books of the respondents the transaction was similar to the one in question—namely, a payment to the credit of a customer of the respondents by means of a large cheque, out of which Huggins received the change. He was asked the question in cross-examination whether he ever cashed cheques with the respondents except when he had to make a payment out of the rate to the credit of one of their customers. Unfortunately a discussion arose and the question was never answered. It is not shown that he did so, and I doubt whether he ever did. But, be this as it may, I do not think that the relation of customer and banker was ever established between him and the respondents. It is true that there is no definition of customer in the Act, but it is a well-known expression and I think that there must be some sort of account—either a deposit or a current account, or some similar relation—to make a man a customer of a banker. On the facts proved in this case I do not think the respondents undertook any duty towards Huggins. They took the cheque he offered in payment of a sum to be placed to the credit of their customers and gave him the change, or in some cases (though it is not proved) they may have bought his cheque, possibly for their own convenience in remitting to the head office. But this will not in my opinion prove that Huggins was a customer, or that they undertook to collect the cheque on his behalf so as to bring them within the protection of section 82. I therefore agree that the appeal should be allowed.

Lord BRAMPTON.—Although I am of opinion that the evidence in this case would have justified the conviction of Huggins for larceny under section 88 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), still, as the jury by their verdict in fact found him guilty of obtaining the cheque by false pretences—that is, of a misdemeanour and not of a felony—and as throughout the trial of this action the case was so treated, both by the appellants and the respondents, I have thought it right so to treat it in considering the question of the respondents' liability now before your lordships.

I do not, however, look upon this distinction as at all material, for the question before this House is not whether the respondents, when they received the cheque from Huggins, became the holders in due course in the sense that they were *bonâ fide* holders for value without notice of the fraud, nor whether they continued to be so until after the cheque was honoured by the appellants' bankers, upon whom it was drawn—for nobody impeaches the absolute integrity of the respondents, their officers, and clerks—but whether, in taking this cheque with the words "not negotiable," added to the general crossing "—— & Co.," written upon the face of it by the secretary of the appellants before it was sent to Huggins, the respondents' right to receive payment of it was affected by section 81 of the Bill of Exchange Act, 1882, and was not within the protection of section 82.

I deal first with section 81, which enacts, "Where a person takes a crossed cheque which bears on it the words "not negotiable,' he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had." The object of this section is obvious. It is to afford to the drawer or the holder (section 77) of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit, if he will only take the precaution to cross it, with the addition of the words "not negotiable," so as to make it difficult to get such cheque so crossed cashed until it reaches its destination.

To apply that section to the present case, I cannot imagine that anybody would entertain a doubt that a person who obtains from another, by a fraudulently false pretence, a cheque so crossed with the intent to appropriate the proceeds to his own use, as Huggins did, could make any real title to such cheque; practically it would be the same as if he had stolen it. Having no title himself, he had none to give to anybody else; and if this had been the case of an obliging tradesman cashing the cheque for a friend, it would have been unarguable.

But it is said the respondents, being bankers, are protected from liability to pay over to the appellants the moneys they have received by the honouring of the cheque, by section 82, which enacts that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

That the respondents in good faith received payment for the cheque is beyond question. I am not, however, quite so sure that it was altogether without negligence, for I must assume the manager at Wantage knew the meaning and legal effect of the crossing, with the words "not negotiable." This point, however, does not appear to have been raised, and certainly there was no finding upon it at the trial. I will reject it, therefore, for present purposes.

The only remaining question is whether the money received by the respondents' bank, when the cheque was honoured, was so received for any customer of the

bank. I cannot come to the conclusion that it was. Nor do I think the evidence would justify such a finding. Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential to constitute a person a customer of a bank, for if it were shown that cheques were habitually lodged with a bank for presentation on behalf of the persons lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer within the meaning of section 82; indeed, I think they would. But as between Huggins and the Wantage branch of the respondents' bank the transaction amounted to nothing of the sort.

It is true that for many years the branch bank manager had been in the habit of accommodating Huggins by cashing cheques made payable to him, some crossed and some not crossed; but none marked "not negotiable." All the cheques were cashed across the counter before presentation. Sometimes a portion of the amount was paid by Huggins's direction in to the credit of the account kept with the bank by the Wantage Rural District Council, but there was never a cheque so changed without Huggins getting some cash out of it, and upon no occasion was a cheque paid in to the credit of the Wantage account above mentioned for presentation on their account; and I can well understand why it was so, because once paid in it could not have been got out without a cheque of the Wantage Rural District Council. I should further observe that the language of section 82 is where a banker "receives payment for a customer." In the case before your lordships on every occasion of cheques so cashed the money had already been given to Huggins in exchange for the cheque; the money paid to the respondents has been received on their own account to reimburse them, and not on account of Huggins at all.

For these reasons I think the transaction between Huggins and the respondents is not within the protection of section 82, and that as Huggins could give the respondents no better title than he had himself the appellants are entitled to your lordships' judgment, and that this appeal should be allowed with costs.

Lord LINDLEY.—In the view I take of this case it is unnecessary to determine whether Huggins was guilty of larceny in stealing the cheque, or whether he only obtained it by false pretences, which is the crime of which he was convicted. Whether the cheque was void or only voidable, as contended by Mr. Lawrence, appears to me really immaterial.

Be it void or be it voidable, it was not negotiable, and by section 81 of the Bills of Exchange Act, 1882, Huggins was not capable of giving a better title to the cheque than he had himself. But it is said that, although the bank had a defective title to the cheque, they have a good title to the money paid to them as holders of it. So to construe the section would destroy more than half its utility; a cheque marked "not negotiable" would be no safer than any other cheque if once cashed—that is, unless payment of it was stopped before it was presented.

I cannot think this an admissible construction; it has never yet been judicially adopted, and I advise your lordships to reject it. Everyone who takes a cheque marked "not negotiable" takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself. *Fisher* v. *Roberts*, 3 Times L. R. 354, is an authority to this effect, and section 82 seems to me framed on the assumpton that this view is correct. The section would not otherwise be wanted.

Upon the other point, it is plain to me that the bank obtained payment of the cheque for themselves and not for Huggins. Whether the bank is to be regarded as having purchased the cheque, or as having advanced him its amount on the security of it, seems to me immaterial. The bank wanted the money for themselves, and not for him. They were entitled to hold the money as against him, and were under no obligation to remit it to him. In no ordinary sense of the expression can the bank be regarded as collecting the money for him, although, no doubt, if the bank could keep the money all liability on his part would be at an end, and in that way he would be benefited by the receipt of the money. Section 82 of the Act is a mere reproduction of the previous Act of 1876, and the construction put upon that Act in the case of *Mathiessen* v. *London and County Bank*, 27 W. R. 838, 5 C. P. D. 7, was, in my opinion, correct. In *Clarke* v. *London and County Banking Co.*, 45 W. R. 383, [1897] 1 Q. B. 552, the cheque was paid in for collection, and this was the *ratio decidendi*.

Further, I cannot think that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank. Nothing was put to his debit or credit in any book or paper kept by the bank. The entry in the waste-book, p. 20, is only a memorandum of the transaction. Romer, L.J., thought he was a customer because the bank had for years collected money for him; but, in my view, the bank collected money for themselves, not for him, in this particular transaction, and the evidence only shows that previous transactions were similar to this.

The case suggested by Romer L.J., of a customer paying in a non-negotiable cheque to his own credit when his account is overdrawn appears to me very different from that which is before your lordships for decision. The reasoning of Vaughan Williams L.J., commends itself to my mind, and, although out of deference to his colleagues he accepted a view which he would not otherwise have entertained, I am clearly of opinion that the judgments appealed from should be reversed, and that judgment should be entered for the plaintiffs with costs, and that they should have the costs of this appeal.

Appeal allowed.

Solicitor for appellants, *R. R. Nelson.*

Solicitors for respondents, *Harries, Wilkinson, & Raikes.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Oct. 30.

JENNINGS v. MATHER.

GRAY (*Claimant*). (*a.*)

Bankruptcy — Interpleader — Property divisible among creditors—Property held on trust—Assignee for benefit of creditors—Right of indemnity over assets—Lien passing to trustee in bankruptcy—Execution creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

The assignee of a business under a deed of assignment for the benefit of creditors who incurs debts in carrying

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

on the business has a right of indemnity or lien over the assets of the business which on his bankruptcy passes to his trustee.

The assignee of a business under such a deed incurred a debt in carrying it on, for which judgment was signed against him, and the judgment creditor seized some of the assets of the business in execution. The assignee then became bankrupt.

Held, that, although the assets of the business were properly held by the assignee on trust, and so, by virtue of section 44 *of the Bankruptcy Act,* 1883, *were not divisible among his creditors, yet the trustee in bankruptcy had such an interest in them as to entitle him to succeed in an interpleader issue against the execution creditor.*

Decision of the Divisional Court (49 W. R. 495, [1901] 1 Q. B. 108) *affirmed.*

Appeal from the judgment of a Divisional Court (Lawrance and Kennedy, JJ.) on the hearing of an appeal from the Bradford County Court: 49 W. R. 495, [1901] 1 Q. B. 108.

In June, 1898, Messrs. Smales Brothers & Co., who were carrying on business at Bradford, executed a deed of assignment for the benefit of their creditors, by which they transferred all their trade assets to one Mather as trustee in trust to carry on the business and apply the profits in paying the creditors fifteen shillings in the pound, and subject to this in trust for Smales Brothers.

Mather carried on the business in accordance with the trust, and in so doing incurred debts, among others, to one Jennings.

Jennings being unable to obtain payment of his debt sued Mather as trustee of Smales Brothers and obtained judgment, on which execution was issued, and the sheriff seized under the execution certain of the trade assets.

Before they were sold Mather absconded and was adjudicated a bankrupt, one Gray being appointed his trustee in bankruptcy. Gray then claimed the goods seized by the sheriff, and the sheriff interpleaded.

The goods were sold by consent, and the proceeds, amounting to £120, were paid into court, and an issue was directed to be tried in the county court to determine whether the proceeds of the goods sold were the property of Gray, Mather's trustee in bankruptcy, or of Jennings, the execution creditor.

The county court judge gave judgment for the execution creditor, holding that the goods in question, being trust property, by virtue of section 44 of the Bankruptcy Act, 1883, did not pass to the trustee in bankruptcy.

The Divisional Court reversed the decision of the county court judge and gave judgment for the claimant, holding that though the assets of the business were property held by the bankrupt on trust, and so, by virtue of section 44 of the Bankruptcy Act, were not divisible among his creditors, yet he had a right of indemnity or lien over them which passed to his trustee in bankruptcy, and that therefore the trustee in bankruptcy was entitled to succeed as against the execution creditor.

The execution creditor appealed.

Muir Mackenzie, for the execution creditor.—The execution creditor is *primâ facie* entitled to the proceeds of the sale of the goods, and the burden is on the claimant to show that he has a superior title. The claimant here does not satisfy that burden, because he does not show that Mather was in fact in a position to avail himself of the lien which is relied on. If Mather's liabilities incurred in the execution of the trust were less than what he received on account of the trust—if, in other words, he had made any default in carrying out the trust, then he would not be in a position to avail himself of the lien.

J. G. Wood (*Carrington* with him), for the claimant.—It is too late to take the point that there was no evidence that Mather was in a position to avail himself of the lien. If that point had been taken at the hearing in the county court, it might have been met by evidence.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The question arises on an interpleader issue directed to be tried between Gray, the trustee in bankruptcy of Mather, and Jennings, an execution creditor. Mather was the assignee of the trade assets of the firm of Messrs. Smales Brothers & Co. under a trust deed by which he was to carry on the business as trustee for the creditors of the firm. In dealing with the trust estate Mather became liable to creditors, and among others to Jennings, for various debts. Those debts, though Mather was personally liable for them, were incurred by him in his capacity as trustee, and he had a right to resort against the trust estate for indemnity against that personal liability.

But the goods of the estate were not the goods of Mather and were not liable to execution for his debts. Jennings obtained judgment against Mather, and also obtained leave to issue execution. But he was only entitled to take in execution the goods of the debtor. The goods which he did in fact take were not the goods of the debtor. Mather having become bankrupt, the trustee in bankruptcy says that though he has no claim on the trust estate he has a right to stand in Mather's shoes, and he says that Mather had a lien on the trust goods to indemnify him against any liability incurred by him in carrying out the trust, and that as against an execution creditor the goods ought to be allowed to remain where they are to satisfy that lien. I do not think the execution creditor had any right to take the goods at all. And apart from that, in my opinion, the right of the trustee in bankruptcy has not been displaced. It is said by the execution creditor that Mather could not avail himself of the lien if he had made defaults in carrying out the trust which outweighed the liabilities which he had incurred, and that the burden of proof was on the trustee in bankruptcy to show that no such defaults had been made. I do not think the trustee in bankruptcy ought to be called upon to prove that negative. In my opinion the decision of the Divisional Court is right, and the judgment of Kennedy, J., is admirable.

STIRLING, L.J.—I am of the same opinion. I think that Kennedy, J., accurately stated the legal position of the parties in this case. He held that Mather, as a trustee, had an equitable right to indemnfy himself against all liabilities incurred by him in performing the trust out of the trust property, which right was available to the trustee in bankruptcy and ought to be enforced in his favour as against an execution creditor who has seized the trust goods. I think he was right in so holding. Every trustee has for his protection the right to have all costs and expenses properly incurred by him in carrying out the trust paid out of the estate, and such costs and expenses form a first charge on the trust property. And the trustee has a right to resort to that property without the assistance of the court for indemnity against all liabilities incurred by him in the administration of the trust. It is said that there is no evidence that this right is available to the trustee in the present case. But it is clear that the trustee has incurred personal liability to the execution creditor and other creditors, and the *primâ facie* right to indemnity out of the

trust estate exists. If this is to be rebutted by showing that he has committed any default, I think the onus is on those who assert the existence of such a default. In my opinion, therefore, the appeal fails.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the execution creditor, *G. J. R. Stubbs*, for *Gaunt, Hines, & Bottomley*, Bradford.

Solicitors for the claimant, *Wrensted & Hind*, for *Scott & Holmes*, Bradford.

High Court of Justice.

Chan. Div. Kekewich, J. } June 5, 1901.

In re MADDOCK.

LLEWELYN *v.* WASHINGTON. (*a.*)

Administration—Order of administration of assets—Insufficiency of personalty—Will—Secret trust of residue — Specific bequest — Power of appointment exercised by will—Incidence of estate duty.

A testatrix by her will gave her residuary estate to A., and by a memorandum subsequent to the date of the will, and which was acknowledged by A. to be binding upon her, gave a specific portion of the residue in trust for certain other persons therein specified. The residuary estate, after deducting therefrom the portion bound by the memorandum, proved insufficient to pay the debts and testamentary expenses of the testatrix.

Held, that the trust constituted by the memorandum, though specific, did not amount to a specific bequest, and that the debts and testamentary expenses were consequently payable out of the whole of the residuary estate rateably between the portion bound by the memorandum and the portion not so bound.

The testatrix having by her will appointed a fund over which she had a testamentary power of appointment,

Held, following In re Treasure, 48 *W. R.* 696, [1900] 2 *Ch.* 648, *that the estate duty payable in respect of the fund so appointed was payable out of the appointed fund.*

In re Moore, 49 *W. R.* 373, [1901] 1 *Ch.* 691, *not followed.*

Sarah B. Maddock by her will dated the 11th of January, 1897, after appointing the plaintiff F. W. Llewelyn and the defendants S. A. Washington and J. F. Maddock to be trustees and executors of her will, appointed and bequeathed to them one-third share of a sum of £18,000 over which she had a testamentary power of appointment under the will of her father, upon trust to pay the income to S. A. Washington for her own use during her life, and after her death to divide the principal of such share amongst certain specified charities; and she devised and bequeathed all her real estate and the residue of her personal estate to S. A Washington absolutely.

On the 17th of January, 1897, subsequent to the date of the will, the testatrix signed a memorandum requesting that the interest arising from all the money she had saved should be paid to certain persons therein specified, and it was admitted that a valid trust was thereby created in favour of those persons.

The testatrix died on the 14th of December, 1898, possessed of both realty and personalty.

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

The residuary estate after deducting the portion bound by the memorandum proved insufficient to pay the testatrix's debts, and testamentary expenses.

The questions as raised by the summons were—(1) Whether or not, having regard to the fact that the residuary personal estate of the testatrix was insufficient for the payment of debts, estate duty, and costs, the deficiency was payable out of the funds passing under the memorandum made by the testatrix and the real estate of the testatrix rateably, or, how such deficiency should be borne; and (2) whether the estate duty payable in respect of the sum of £6,000 appointed by the will was payable out of the appointed fund, or out of what other funds.

E. Ford, for the summons.

Warrington, K.C., and *T. H. Carson, K.C.*, for S. A. Washington.—The trust arising under the memorandum does not amount to a testamentary bequest at all. The title of the persons claiming is not derived under the will, but only under the memorandum, which is binding on the conscience of the legatee. Therefore the estate must be administered as though the memorandum had not existed. There is no case exactly in point. However, in the case of *Cullen* v. *The Attorney-General for Ireland*, 14 W. R 869, L. R. 1 H. L. 190, at p. 198, Lord Westbury lays it down that the title of a *cestui que trust* under a secret trust or a trust affecting the conscience of the legatee is not testamentary.

They also cited *Wallgrave* v. *Tebbs*, 4 W. R. 194, 2 K. & J. 313, and *Rowbotham* v. *Dunnett*, 26 W. R. 529, 8 Ch. D. 430.

Renshaw, K.C., and *Vaughan Hawkins*, for the *cestuis que trustent* under the memorandum.—The case of *Cullen* v. *The Attorney-General for Ireland* is not in point; it was a decision upon the Irish Stamp Acts. In this case the testatrix drew the memorandum with the express purpose of binding S. A. Washington, her executrix; it was merely another means of drawing up a codicil. So the beneficiaries take the property as a specific bequest, and the deficiency must be borne rateably between the property subject to this trust and the real estate of the testatrix.

P. S. Stokes, for the charities, on the question of the estate duty in respect of the appointed fund, cited: *In re Treasure*, 48 W. R. 696, [1900] 2 Ch. 648, and *In re Moore*, 49 W. R. 373, [1901] 1 Ch. 691.

KEKEWICH, J.—Nobody pretends that the point is covered by any decision. Counsel on the one side has cited to me a *dictum* of Lord Westbury in the case of *Cullen* v. *The Attorney-General for Ireland*, and counsel on the other side has truly said that that case does not touch the point in hand. There the question turned and was decided upon the construction of certain Acts of Parliament, and the remark of Lord Westbury was merely *obiter*, and though entitled to all respect it must not be treated as a decision. The principle there laid down by Lord Westbury is as follows: "Where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary." That carries me some part of the way. The fallacy of the argument on behalf of those who, claiming under the memorandum, say that this is a "specific bequest," seems to me lie in the use of those two words together. That the gift is "specific" there can be no doubt. The memorandum speaks of "all the money I have saved"; and that is a specific description. But

it is not a "bequest," for the gift is not contained in any will or in any testamentary instrument which could be proved with the will. If the gift of all the money which she had saved had been to Miss Washington it would have operated as a specific bequest. But the testatrix has not done that. What she gave to Miss Washington was the residue, and she has proceeded to declare this trust of a particular part of the residue. The title of those claiming under the memorandum is, as Lord Westbury has said, *dehors* the will; and the *cestuis que trustent* can only make Miss Washington accountable for that part of the testatrix's property which comes to her as residue, and which, on taking the accounts, is found to represent the money she has saved. The answer, therefore, to the first question raised will be that the payment of the debts of the testatrix, the estate duty on her personal estate and the costs of administration, must be made rateably out of funds comprising her residuary estate passing under the memorandum, and the funds not so passing.

As to the second question raised, his lordship decided to abide by his former decision in *In re Treasure*, without further comment, leaving the conflict which had arisen between that case and the judgment of Buckley, J., in *In re Moore*, to be determined by the Court of Appeal when occasion arose. The answer, therefore, that his lordship gave to the second question was that the estate duty payable in respect of the £6,000 appointed by the will was payable out of the appointed fund.

Solicitors, *Ridsdale & Son*, for *Heaton & Son*, Burslem.

Chan. Div. Cozens-Hardy, J. } July 17, 19; Aug. 6, 1901.

FLEMING *v.* LOE. (*a.*)

Contract—Assignment of contract—Specific performance—Failure of consideration—Money had and received.

On the 16th of July B. entered into an agreement to buy certain mining claims from A., the purchase to be completed on or before the 8th of November, subject to the payment by B. of instalments of £400 per month. On the 18th of July B. sold the same property to C., on condition that C. paid a deposit and a sum of £230 per month up to the 1st of November. On the 18th of July B. assigned the benefit of his contract with C. to D. The deposit and the monthly contributions were paid by C. to D. for four months. In an action brought by D. against B. and C. for specific performance, C. counterclaimed the return of the deposit and the four instalments.

Held, that, on total failure of consideration, C. could recover his payments from D.

On the 16th of July, 1896, an agreement was made between J. Neill and Loe, by which Neill agreed to sell certain mining claims and mining leases in Australia to the defendant Loe for the sum of £42,500, to be paid partly in cash and partly in shares in a company to be formed.

It was also arranged by this agreement that Neill was to continue to work and develop the property up to the 1st of November, 1896, and Loe was to pay him £400 a month towards the expenses of such working, the first payment to be made on the date of the agreement. The purchase was to be completed on or before the 8th of November, 1896, and in the event of Neill being unable to produce a title to the property Loe was to be at liberty to rescind the agreement and recover the moneys paid by him to the vendor.

On the 18th of July, 1896, Loe entered into an agreement with Mackusick for the sale of the same property to him for £65,000, payable partly in cash and partly in shares.

It was also agreed that Mackusick was to pay £230 a month up to the 1st of November, 1896, towards the cost of working and developing the property.

Before signing the agreement Mackusick received a written guarantee, dated the 18th of July, 1896, from Fleming, by which the latter guaranteed "the performance by Mr. Loe of the obligations undertaken by him to you under such contract." In consideration of the guarantee given by Fleming, Loe (without Mackusick's knowledge) assigned to Fleming "the contract made by me for purchase of such mines, which contract I now deposit with you, and also to assign to you the contract between Mr. Mackusick and myself, which I also deposit with you."

On this Fleming claimed that he stood in the shoes of Loe, and that therefore Mackusick was liable to pay him the £230 per month, as arranged under the agreement of the 18th of July.

Subsequently Mackusick paid the deposit on the purchase and the sum of £920, being the amount due for four months, and Fleming paid Neill the sum of £400 per month, according to the agreement of the 16th of July.

In July, 1897, Fleming, as assignee of the contract, brought an action against Loe and Mackusick for specific performance of the agreement of the 18th of July and damages.

Loe did not defend the action.

Mackusick counterclaimed against Loe and Fleming for repayment of the deposit of £500 and the sum of £920.

The case came on before Cozens-Hardy, J., in October, 1899, and judgment was given for specific performance, the judge ordering the counterclaim to stand over.

On appeal this order was reversed.

The counterclaim and defence were then amended, and the case now came on for trial.

Loe had died in the meantime, and no personal representative had been appointed.

Mackusick sought to recover from Fleming the various sums paid by him under the contract.

Fleming repudiated all liability on the ground that he was not a party to the contract with Mackusick, and that Mackusick's only remedy was against Loe's representatives when constituted.

Upjohn, K.C., and *D. D. Robertson*, for Mackusick, said that the assignee of a contract took subject to all the burdens: *Werderman* v. *Société Général d'Electricité*, 30 W. R. 33, 19 Ch. D. 246; *Aspden* v. *Seddon*, 25 W. R. 277, 1 Ex. D. 496. The case of *Aberaman Ironworks* v. *Wickens*, 17 W. R. 211, L. R. 4 Ch. App. 101, was decided in the old Court of Chancery and merely meant that there was no equity.

Eve, K.C., and *Martelli*, for plaintiff, referred to the cases of *Aberaman Ironworks* v. *Wickens* and *Tasker* v. *Small*, 3 Myl. & Cr. 63.

Upjohn, K.C., replied.

COZENS-HARDY, J.—It is reasonably clear that Mackusick cannot claim anything under Fleming's guarantee. Nothing is due from Loe in respect of any obligation undertaken by him under the contract. Mackusick is not suing for breach of the contract. But Mackusick alleges that the deposit and the several sums of £230 were paid by him to Fleming as assignee

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

of the contract, and not as agent for and on behalf of Loe, and that although there was no contract of sale between him and Fleming, yet he is entitled to recover the money so paid on the ground of a total failure of consideration.

The facts are not really in dispute, although the inferences to be drawn from the facts are disputed. Now it is plain that Mackusick only signed the agreement with Loe upon having Fleming's letter of guarantee, and that Mackusick was anxious that not a penny of his money should reach Loe's hands.

It is urged on the part of Fleming that the case of *Aberaman Ironworks* v. *Wickens* is decisive in his favour, because it was there held that, although the purchaser was entitled to relief against Wickens, his vendor, no relief could be given against Wilkinson, Sudlow, and Sarl, into whose hands part of the purchase-money had come. I do not agree with this contention. Malins, V.C., dismissed the bill against all the defendants without prejudice to the rights of the plaintiff at law. On appeal Lord Cairns reversed the decision so far as Wickens was concerned, but gave no relief against the other defendants in the shape of repayment, the money not having been obtained by fraud or impressed with any trust. In other words, the Court of Chancery had no jurisdiction to deal with a simple money demand of that nature, and the parties were left to assert such rights, if any, as they might have by an action at law. That case did not decide the question which now arises for my decision. Mackusick must succeed, if at all, on the footing that this is a claim for money had and received on a total failure of consideration. The circumstances are peculiar, but I think Fleming, having regard to his conduct, including his proceedings in the present action, cannot successfully contend that this money was not received by him for the use of Mackusick. I must therefore give judgment for Mackusick for the several sums paid by him to Fleming; and Fleming must pay the costs of the counterclaim.

Solicitors for the plaintiff, *Last & Sons.*

Solicitors for the defendants, *Morten, Cutler, & Co.*

Chan. Div.
Cozens-Hardy, J. } July 11, 19, 1901.

HARTLEY v. PENDARVES. (*a.*)

Administration—Settled land—Sale of timber—Conversion.

By an order of the court timber growing on land settled upon A. for life, with remainder in fee to B., was sold, and the proceeds invested in Consols in court.

Held, that as between the heir-at-law of B. and the personal representative of B. the proceeds of the sale were personalty, and an order was made (after the deaths of A. and B.) directing the transfer of the sum to the legal personal representative of B.

Henry Harris, who died in 1830, by his will settled two estates in Cornwall called Rosteague and Tregassa upon his niece Mary Hartley (the wife of William Henry Hartley) and her issue. She had issue an only son, William Henry Harris Hartley.

In the year 1860 Mary Hartley was equitable tenant for life, subject to impeachment for waste, of the two estates. She and her son W. H. H. Hartley were both lunatics.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

The Lords Justices in Lunacy and in Chancery made an order on the 20th of July, 1860, in the administration suit of *Hartley* v. *Pendarves* by which they referred to the Master in Lunacy for inquiry the question whether there was any timber on the two estates proper to be cut, and if so that the same should be felled and sold, the proceeds to be paid into the bank to the credit of the case of *Hartley* v. *Pendarves*—"The Timber Account." The money thus obtained was to be invested in Bank 3 per cent. Annuities.

On the 15th of April, 1864, the master made his certificate, which stated that the timber had been felled and sold, and the proceeds placed to the credit of the cause of *Hartley* v. *Pendarves*. Afterwards the sum was invested in 3 per cent. Annuities as directed by the order.

Mary Hartley died in October, 1868, and W. H. H. Hartley died intestate in June, 1894. The question was now raised by adjourned summons as to whether the sum realized by the sale of the timber was to be regarded as real or personal estate, and therefore whether the heir-at-law or the legal personal representative of W. H. H. Hartley was entitled to it.

Boome, for the heir-at-law of W. H. H. Hartley, cited the case of *Field* v. *Brown*, 27 Beav. 90, 8 W. R. Ch. Dig. 23, and contended there had been no conversion.

He also referred to the cases of *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672, and *Awdley* v. *Awdley*, 2 Vern. 192.

Dickinson, for the legal personal representative, argued that conversion had taken place: *Ex parte Bromfield*, 1 Ves. jun. 453; *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69; *Ex parte Phillips*, 19 Ves. 118; *Phillips* v. *Daycock*, [1867] W. N. 54; *Steed* v. *Preece* 22 W. R. 432, L. R. 18 Eq. 192.

Boome replied.

COZENS-HARDY, J., stated the facts, and proceeded: The order directing the sale of the timber was made under the general jurisdiction of the court, and was not in any way dependent upon the circumstance that both the tenant for life and the tenant in fee were lunatics. The jurisdiction of the court to order the sale of timber on a settled estate, when it is for the benefit of all parties interested in the settled estate, is well established, and in such a case the tenant for life, though impeachable for waste, is entitled to the income produced by the proceeds of sale of the timber: *Tooker* v. *Annesley*, 5 Sim. 235. It was on this footing that the committee of Mary Hartley received the dividends of the Consols during her life. This being so, I think, on principle, that where timber has been rightfully sold under an order of court all the consequences of conversion must follow, and that there is no equity as between the heir and the legal personal representative of the owner in fee. This is the view taken by Sir George Jessel in *Steed* v. *Preece*, and by Kay, J., in *Hyett* v. *Mekin*, 32 W. R. 513, 25 Ch. D. 735. It is contended, however, that the point was decided in the opposite sense by Sir John Romilly in *Field* v. *Brown*. I cannot regard that case as a satisfactory authority. It seems to me difficult to reconcile it with the decision of the same learned judge in *Dyer* v. *Dyer*, 13 W. R. 732, 34 Beav. 504. It was apparently based on *Cooke* v. *Dearley*, 22 Beav. 196, a case which was disapproved by Sir George Jessel in *Steed* v. *Preece*. Under these circumstances I feel at liberty to follow my own view, and to hold that the Consols in court form part of the personal estate of the late owner in fee. The order must, subject to the payment of costs, direct the transfer of

the Consols to the legal personal representatives of W. H. H. Hartley.

Solicitors for the heir-at-law, *Collyer-Bristow, Hill, Curtis, & Dods.*

Solicitor for the legal personal representative, *F. C. Lingard.*

Chan. Div. Cozens-Hardy, J. July 2, 1901.

In re RICHARDS.
LAWSON *v.* HARVEY. (*a.*)

Administration—Grant to manager of bank—Debt due to bank—Retainer.

Where the manager of a bank had been granted administration of the estate of an intestate who was a debtor to the bank,

Held, that after an order for the administration of the estate had been made, the manager could not, as administrator, retain the debt due to the bank.

Letters of administration of the personal estate of an intestate were granted to the defendant on the 10th of April, 1896, in which he was described as "John Francis Harvey, manager of Trades Commercial Bank (Limited), creditors of the estate." The Trades Commercial Bank (Limited) were the bankers and creditors of deceased, and it was for this reason that the manager of that bank was granted administration.

An administration order was made on the 7th of February, 1898. The administrator had not at that date paid any of the funds which came into his hands as administrator to the bank on account of their debt.

The master found by his certificate dated the 31st of July, 1899, that the defendant had a balance of £1,011 14s. 6d. to his credit for which he was accountable, but he did not decide whether the defendant had power to retain the amount of £242 10s. 6d. due to the bank. The question now came before the court on further consideration whether the defendant, as administrator, could retain the debt due to the bank.

Rowland Rowlands, for the plaintiff.

Dunham, for the defendant, contended that Harvey was made administrator as an official of the bank and for its benefit. His position was analogous to that of an administrator *durante minoritate*: *Franks* v. *Cooper*, 4 Ves. 763; *Talbot* v. *Frere*, 27 W. R. 148, 9 Ch. D. 568.

A. J. Chitty, for a creditor.

COZENS-HARDY, J.—This claim cannot be maintained. It is a peculiar case because administration was granted to the manager of the bank, and although he was described as manager of the bank in the grant of administration, and it was, no doubt, made to him because he was manager, nevertheless it was made to him as an individual and not to the use of the bank. Had he ceased being manager he would still have retained the position of administrator. In the case of a grant made *durante minoritate* or to the use of a lunatic, there is a right of retainer, but here the manager would have to prefer the bank to the other creditors if he were to pay out the sum owing to them. The right to prefer was destroyed by the administration order, though the decree did not prevent the administrator from retaining his own debt. The claim will be disallowed.

Solicitors for creditors, *Spencer, Chapman, & Co.*, for *J. R. Richards*, Swansea.

Solicitor for plaintiff, *J. T. Lewis*, for *Aeron Thomas & Co.*, Swansea.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div. Farwell, J. July 30, 1901.

DODSON *v.* DOWNEY. (*a.*)

Partnership—Vendor's right to indemnity on sale of share—Partnership Act, 1890 (53 & 54 *Vict.* c. 39), *s.* 31.

The purchaser of a share in a partnership business must indemnify the vendor against the liabilities of the business.

This was an action by D. C. Dodson for specific performance of a contract for the sale of his share in a partnership business.

Upjohn, K.C., and *R. B. Yardley*, for the vendor.—The purchaser of a share in a partnership must indemnify his vendor.

They referred to *Kelly* v. *Hutton*, 16 W. R. 1182, L. R. 3 Ch. App. 703, at p. 709; *Whetham* v. *Davey*, 33 W. R. 925, 30 Ch. D. 574, at p. 580; *Waring* v. *Ward*, 7 Ves. 332, at p. 337.

Phipson Beale, K.C., and *S. R. Earle*, for the purchaser.

They referred to the Partnership Act, 1890, s. 31.

[FARWELL, J., referred to *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672.]

The Partnership Act, 1890, provides, section 31: (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not as against the other partners entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

FARWELL, J., in giving judgment, said: The question is raised as to what is the position of a purchaser of a share in a partnership business. Assuming, as stated in the pleadings and correspondence, that the vendor had severed his connection with the business, and had made this arrangement for leaving his money dormant for three years, he still had certain rights as a partner, or a late partner, including the right to have his capital repaid, subject to that arrangement. I cannot follow the purchaser's argument on section 31 of the Partnership Act, 1890. That section, in my opinion, is primarily intended for the protection of the vendor's partners. It is also intended to declare that a partner may sell or mortgage his share in a partnership, provided that he does not interfere with his partners' rights. They are not bound to accept or acknowledge the purchaser at all; but the vendor, as between himself and his partners, may sell everything he has to sell. The purchaser of a share in such a business differs in no way that I can see from the purchaser of any other property. As from the date of the contract he becomes the owner of the property, subject

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

only to the liability to pay the purchase-money, and the vendor becomes a trustee with certain qualifications, as is correctly stated in Dart on Vendors and Purchasers (6th ed.), p. 283: "The vendor is not a mere dormant trustee, he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subject to the paramount right of the vendor to protect his own interest as vendor of the property. When the title has been accepted and the purchase-money paid, this paramount right of the vendor ceases, and the trusteeship subsists without any qualification, but as from the date of the contract the relationship is throughout that of trustee and *cestui que trust*." It appears to me to follow from that statement that the purchaser as *cestui que trust* is personally bound to indemnify the vendor as trustee from the liabilities of the trust property: *Hardoon* v. *Belilios*, 49 W. R. 209, [1901] A. C. 118. He buys the share and steps into the position of the vendor. The purchaser contends that he takes the benefits and not the liabilities. Suppose a man buys a share in a partnership, and it goes on for six years, during which time the vendor remains as the nominal partner. The first four years are successful, and the purchaser takes all the profits. At the end of that time there are two disastrous years in which the liabilities exceed the assets. The purchaser contends that the vendor must bear the loss; such a proposition is, in my opinion, absolutely untenable.

Applying the principle which seems to me to be correctly stated in the passage I have read from Dart, as soon as the relation of trustee and *cestui que trust* is established all the incidents follow, including the vendor's right to a personal indemnity.

The result is I make a decree for specific performance, and the purchaser must pay the costs of the action. By analogy to the case of *Bridgman* v. *Daw*, 40 W. R. 253, the assignment will contain an express covenant by the purchaser to indemnify the vendor against the liabilities of the business.

Solicitors, *Alexander Neale*, for *Bennett & Marsh*, Worthing; *Edward Betteley*.

Chan. Div. } Buckley, J. } Oct. 31.

In re CLIFFORD.
SCOTT *v.* CLIFFORD. (*a.*)

Settled land—Power of tenant for life to mortgage—Costs of consolidating mortgage—"Where money is required"—Settled Land Act, 1890, *s.* 11.

Section 11 *of the Settled Land Act*, 1890, *must be read as if it meant "where money is reasonably required having regard to the circumstances of the settled land."*

Where land was settled subject to several mortgages, all bearing interest at 4 *per cent., and the tenant for life had a right under the settlement to resort to capital in the event of the income payable to her falling below a certain figure, and one of the mortgages was called in, and it was found that that mortgage could not be readily transferred, but that a consolidating mortgage for the whole amount due under all the mortgages could be got at* 3½ *per cent. interest,*

Held, that the tenant for life was empowered by the 11*th section of the Act of* 1890 *and was justified in raising the amount by which the costs of the consolidating mortgage exceeded the costs of the transfer of the mortgage called in by a mortgage of the settled land for that amount.*

Under a deed of settlement a mother and her son were respectively tenant for life and remainderman of the settled property. The property was settled subject to a mortgage for £15,500 and several other mortgages all bearing interest at 4 per cent.

Under the settlement, if the net income of the settled property fell below £1,000 per annum, the tenant for life might have recourse to capital to make up the deficiency. The mortgagees of the £15,500 mortgage called in their mortgage debt. A transferee was found who would be willing to take a transfer of the mortgage at the same rate of interest, provided certain additional security was given—the money to be advanced being trust money. It was admitted that it was undesirable to encumber the only property which was then available as additional security.

The tenant for life found that a consolidating mortgage could be obtained bearing interest at 3½ per cent. per annum if the sum to be advanced was sufficiently large, and she therefore gave notice to pay off all the other mortgages with a view to having them all consolidated with the £15,500 mortgage.

This transaction was carried out and the tenant for life sought to charge the settled estates with the costs of the whole transaction.

Buckmaster, for the tenant for life.—The whole transaction has been done in good faith and for the benefit of all concerned. The tenant for life can charge these costs under section 11 of the Settled Land Act, 1890. Here the money is "required," at all events it is reasonably required, and the section must be read as if it said "reasonably required." Not only is the tenant for life benefited by increase of income, but the remainderman is benefited also, for he will receive a larger income on the death of the tenant for life, and the fact that there is now more income available for the tenant for life lessens the risk of the tenant for life having recourse to capital to make up her income to £1,000 a year. To consolidate all the mortgages at once is much cheaper in the long run than to get transfers piecemeal. The tenant for life could have achieved her object in any case by getting the several mortgagees to call in their mortgages.

Dunham, for the remainderman.—The limitations here are legal, therefore the court cannot be called upon to execute any trusts. The power, therefore, sought by the tenant for life must be got only under the Act of 1890. The only money required was so much as was needed to effect a transfer of the £15,500 mortgage. The whole object of the transaction has been to provide the present tenant for life with a larger income, and the costs of such a proceeding ought not to be charged against the remainderman. The income from the estate is ample, and there is practically no risk of recourse being made to capital.

H. Fellows, for the trustees.

BUCKLEY, J.—Under the Settled Land Act, 1882, a tenant for life had no power to mortgage the settled land except in the cases mentioned in section 18 of that Act where money was required for enfranchisement or equality of exchange or partition. There was power to sell the land, but not to mortgage it. In 1890 there was passed section 11 of the Settled Land Act of that year, which for the first time gave power to mortgage for other purposes. The dominant words of that section are "where money is required for the

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

purpose of discharging an incumbrance on the settled land or part thereof." And the question I have to consider here is what is the meaning of the word "required"? Where the mortgagee gives notice to call in his money the word is clearly satisfied; the money is required for the purpose of discharging an incumbrance on the settled land or part thereof. But is the section confined to that? I think that it is not. The section must be read as if it meant "where money is reasonably required having regard to the circumstances of the settled land"; and, in fact, Mr. Dunham, who has argued this case on behalf of the remainderman, did not contend to the contrary. The facts with which I have to deal here are that there were on the settled estate, of which the applicant is tenant for life, several mortgages, the largest for £15,500 and several others, at the date of the settlement making up £22,000, and there were later incumbrances bringing the total to £26,043. That being so, the mortgagee for £15,500 gave notice calling in his money. That money was certainly "required," and the tenant for life would certainly have been entitled to mortgage the settled land in order to raise the costs of obtaining a transfer of that mortgage. When she went into the matter she found that the £15,500 could not be readily transferred, but that if she were able to consolidate all the mortgages she could get £26,043 at 3½ per cent. interest instead of 4 per cent. Accordingly, notice to call in having been given to her by the mortgagee of the £15,500, she gave notice to the other mortgagees of her intention to pay them off, and she effected a mortgage for £26.043 at 3½ per cent.. If she had raised the £15,500 it would have been within her right to charge the costs of doing so on the settled estate, and those costs are said to amount to £480. The costs of the whole transaction amounted to a larger sum, and the difference is said to be £180 or £200. The only question is whether she is entitled to charge that difference on the settled land. If I am right in my view of the section I have to consider whether the money was "reasonably required" for the benefit of the estate, and whether the tenant for life has acted properly, and how does it affect the remainderman? Under the settlement the tenant for life had the income with a right to resort to capital if the income fell below £1,000. If she saves ½ per cent. interest on the mortgages the income will be larger by £129 a year, and the probabilility of resorting to capital will be less, and that will be a benefit to the remainderman. Again, when he comes into the property he will succeed to a larger income. Was it reasonable on her part to replace 4 per cent. mortgages by 3½ per cent. mortgages; and were the costs of doing so reasonably incurred? I answer that they were. If I am right in my construction of the section, she was justified in acting as she did and the costs ought to be raised by mortgage of the estate. I may say that in arriving at the conclusion I have come to I am fortified by the judgment of Kekewich, J., in the case of *In re Parc's Settled Estate*, with a copy of which I have been furnished by Mr. H. Fellows (as *amicus curiæ*). The judgment was delivered on the 21st of December, 1897, in chambers, but it appears to have been a written judgment and initialled by the learned judge, and in it he held that it would be a narrow construction of the section to hold that "required" met only the case of a calling in of a mortgage by the mortgagee, and that it extended to all cases in which the economical administration of the settled estate reasonably demanded that a mortgage should be paid off whether for the purpose of transfer or otherwise. Mrs. Scott is therefore entitled to raise these costs by mortgage of the settled estate.

Solicitors for the applicant, *Clayton, Sons, & Fargus.*

Solicitors for the trustees, *Taylor, Hoare, & Pilcher*, for *Russell & Musgrove*, Birmingham.

Solicitors for the remainderman, *Pritchard & Sons.*

K. B. Div.
(Kennedy and Phillimore, JJ.) } May 10, 1901.

ATTORNEY-GENERAL *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF EASTBOURNE. (*a.*)

Inland Revenue—Stamp duty on sale of chattels—Property vested by Act or purchased under statutory power—Finance Act, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

The Corporation of Eastbourne purchased by agreement from the Eastbourne Electric Light Co. the whole of the undertaking of the company, with the full benefit of all pending contracts and engagements.

Held, that ad valorem *duty was payable on the conveyance of the whole property, including so much of the consideration as represented goods, wares, and merchandize.*

Special case stated by consent pursuant to ord. 68, r. 2, and ord. 34, r. 1.

1. This is an information on behalf of the Crown to recover £443 15*s.* and interest for duty claimed under section 12 of the Finance Act, 1895, in respect of a purchase of property by the defendants under statutory powers as hereinafter mentioned.

2. On the 19th of April, 1899, an agreement was entered into between the Eastbourne Electric Light Co. (Limited) (thereinafter and hereinafter called the company) and the defendants (thereinafter called the corporation).

3. It was recited in the said agreement that the company under the Eastbourne Electric Supply Order, 1890, confirmed by the Electric Lighting Order Confirmation (No. 8) Act, 1890, had acquired land and erected electric lighting works, and provided plant, machinery, mains, and other appliances, and had been supplying electrical energy within the area specified in the said order.

4. Clause 1 of the said agreement was as follows: "Subject to the provisions hereinafter contained the company will sell and the corporation will buy the whole of the undertaking of the company under the said order, and all the powers, rights, and privileges thereby conferred on the company; together with the full benefit of all pending contracts and engagements to which the company are or may be entitled in connection with the said undertaking; together with the freehold piece of land and the building erected thereon situate in Junction-road, Eastbourne, aforesaid, with all the works, engines, and fixed and movable plant and machinery, wires, cables, pipes, instruments, utensils, tools, and all other goods, chattels, and effects belonging to the said company which now are or shall at the time of completion of the said purchase be used and provided by the company for the purposes of the said undertaking save and except all depreciation and other reserve funds, cash balances, book and other debts, earnings, rights and credits belonging or due to the company at the time of such completion, and the company's books and papers and the furniture of the board-room."

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

5. By clause 2 it was agreed that the consideration for the purchase should be the sum of £82,135 in addition to the sums thereinafter and hereinafter mentioned, provided always that if the corporation agreed to take into their employment either the manager or secretary of the company upon such terms as should be agreed upon between the corporation and the said manager and secretary respectively, then the corporation should be entitled to deduct from the said purchase-money the sum of £2,000 in the proportion of two-thirds thereof in respect to the manager, and one-third thereof in respect to the secretary so agreed to be taken into the employment of the corporation for the loss of office. The corporation did not take either the said manager or the said secretary into their employment, and no part of the said £2,000 became deductible.

6. By clause 3 it was provided that the purchase should be completed and the purchase-money paid on the 1st of January, 1900, on which day the company would convey their freehold premises to the defendants, and also assign or deliver over to them all the remainder of the premises agreed to be sold.

7. By clause 4 the company were to carry on the undertaking as a going concern until the day of completion, and by clause 5 the defendants were to pay for all new plant and machinery provided since the 31st of December, 1898, and for certain additional capital outlay which might be incurred by the company before completion; the amount which became payable under this provision was £6,614 2s. 9d.

8. Of the two sums of £82,135 and £6,614 2s. 9d., together making £88,749 2s. 9d., the consideration for the sale as aforesaid, £37,929 was in respect of goods, wares, and merchandize.

9. By section 3 of a provisional order subsequently granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, to the defendants it was provided as follows:

"3. (1) This order shall not, except as provided by this section, come into force or have effect notwithstanding the confirmation thereof by Parliament until such date as the Board of Trade fix in accordance with this section, and the date so fixed is in this order referred to as 'the commencement of this order.'

"(2) The Board of Trade shall fix a date for the commencement of this order when they are satisfied that the undertakers have completed the purchase of the undertaking of the Eastbourne Electric Light Co. (Limited), under the Eastbourne Electric Supply Order, 1890, in accordance with the agreement made between that company of the one part and the undertakers of the other part, dated the 19th day of April, 1899, or any further agreement made between the company and the undertakers necessary or expedient for enabling the original agreement to be carried into effect.

"(3) As from the commencement of this order the Eastbourne Electric Supply Order (1890) confirmed by the Electric Lighting Order Confirmation (No. 8) Act, 1890, shall be revoked without prejudice to anything done or suffered, or any liability to a penalty or otherwise incurred, or to the prosecution of any legal proceedings thereunder.

"(4) The undertakers shall have power to buy, and the Eastbourne Electric Light Co. (Limited) shall have power to sell the undertaking of the company in conformity with this section, and for that purpose this order shall come into force and have effect on the day when the Act confirming this order is passed."

10. By section 4 it was provided that the undertakers for the purposes of the order should be the defendants.

11. By section 2 of the Electric Lighting Orders Confirmation (No. 19) Act, 1899, passed the 13th of July, 1899, the above-mentioned provisional order was confirmed, and it was enacted that all the provisions thereof should from and after the passing of the Act have full validity and effect.

12. The purchase provided for by the said agreement of the 19th of April, 1899, was duly completed on the 1st of January, 1900, payment of the purchase-money being made as to £88,135 on that day, and as to the balance, £614 2s. 9d., on the 27th of February following. It is to be taken that the defendants have been always ready and willing to produce to the Commissioners of Inland Revenue an instrument of conveyance stamped with *ad valorem* duty upon the consideration, excluding the £2,000 in paragraph 5 hereof mentioned, and excluding the £37,929 in respect of goods, wares, and merchandize in paragraph 8 hereof mentioned, and that if the production of such a conveyance so stamped would have been a compliance with the requirements of section 12 of the Finance Act, 1895, the defendants have committed no default. Save as aforesaid no conveyance has been produced under the said section.

13. The said agreement and the provisional orders and Acts hereinbefore referred to, and the above referred to conveyance and the correspondence between the Commissioners of Inland Revenue and the defendants, copy of which is annexed hereto, may be referred to as part of this case.

14. The Attorney-General contends that by virtue of the Electric Lighting Orders Confirmation (No. 19) Act, 1899, confirming the provisional order granted to the defendants as hereinbefore mentioned, the defendants were authorized to purchase the property comprised in the said agreement of the 19th of April, 1899, and were therefore bound within three months of the completion of the said purchase, that is to say, on the 1st of January, 1900, to produce an instrument of conveyance of the whole of the said property, including chattels, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of such property, that is to say, with a duty of £443 15s., or 5s. for every £50 of the sum of £88,749 2s. 8d., such sum being arrived at by adding together the sum of £82,135 mentioned in paragraph 5 hereof, and the sum of £6,614 2s. 9d. mentioned in paragraph 7 hereof, the whole of which sum of £88,749 2s. 9d. the Attorney-General contends to be consideration for such sale. The Attorney-General further contends that under the circumstances a default has been made within the meaning of section 12 of the said Act, and that the duty claimed, with interest at 5 per cent. from the date of completion, is a debt due to his Majesty from the defendants.

15. The defendants contend—(1) That no duty is payable on the sum of £37,929 mentioned in paragraph 8 hereof; (2) that no duty is payable on the sum of £2,000 mentioned in paragraph 5 hereof.

The question for the court is whether *ad valorem* duty on so much of the consideration as represented goods, wares, and merchandize, viz., £37,929, and on the sum of £2,000 referred to in paragraph 5 hereof is recoverable or not. If the decision is in the affirmative on either or both points judgment is to be entered for the Crown for the amount recoverable with interest. If the decision is in the negative on either or both points judgment is to be entered for the defendants upon that point or points. The costs to be in the discretion of the court.

Sir E. Carson, S.G. (*Rowlatt* with him), for the Crown.—The question in this case arises under section 12 of the Finance Act, 1895. "Property" in that section means all kinds of property. The purchaser is required to produce the instrument of conveyance of

all the property for the purposes of stamp duty, even though some of the property would pass by delivery.

J. R. Macoun (*Beaufoi Moore* with him), for the defendants.—The object of section 12 of the Finance Act, 1895, is not to impose a new tax where one was not previously payable, but to facilitate the collection of an existing tax. The expression "any property vested" does not apply to personalty. The property referred to in section 12 is property that requires a deed of conveyance to pass it, and does not refer to chattels. There has been a sufficient compliance by the corporation with section 12 by the production of the agreement which should then have been stamped with *ad valorem* duty on the consideration after deducting that part thereof as related to goods, wares, and merchandize.

KENNEDY, J.—It appears to me that the contention of the Crown is right. The Eastbourne Electric Lighting Co. (Limited), in April, 1899, agreed to sell their undertaking to the corporation of Eastbourne. And by an agreement, after reciting that the company had acquired land and erected electric lighting works, and provided plant, machinery, mains, and other appliances, it was provided that the corporation should buy the whole of the undertaking of the company with the full benefit of all pending contracts and engagements. It must be taken that in apportioning the contract price of £82,135 and £6,614 2s. 9d. that £37,929 was the amount attributable to goods, wares, and merchandize. Afterwards an Act was obtained confirming a provisional order under which the agreement was confirmed, and a conveyance is executed to carry out the agreement. Under section 12 of the Finance Act, 1895, "where any person is authorized to purchase property, such person shall . . . after the completion of the purchase . . . produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer . . . and an instrument of conveyance of the property . . . duly stamped with the *ad valorem* duty payable upon a conveyance or sale of property." That clearly means that the conveyance is to be duly stamped as a conveyance of the property authorized to be conveyed by Act of Parliament. I do not see how you can take out the £37,929 paid for goods which are in fact conveyed by the conveyance. It has been suggested that all that is meant is a conveyance of so much of the property as usually requires a conveyance to pass it, and that as goods need not be included in a conveyance they are not to be treated as the subject of a conveyance for the purpose of stamp duty. A second point is raised as to £2,000, a sum by which the consideration money might have been reduced if the corporation had taken over the manager and secretary of the company. But they did not do so.

PHILLIMORE, J.—I am of the same opinion. The Finance Act, 1895, requires a conveyance of the property authorized to be purchased. Here the corporation are authorized to purchase the property of the company. They were therefore required to produce an instrument of conveyance of all the property. Personal chattels may as a rule pass by delivery, but if they are passed by an instrument of conveyance *ad valorem* stamp duty must be paid.

Judgment for the Crown.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Sharpe, Parker, & Co.*, for *Fovargue*, Eastbourne.

K. B. Div. (Bigham, J.) — May 13, 17; June 26, 1901.

SCOTT & HORTON v. GODFREY. (*a.*)

Stock Exchange—Principal and agent—Broker including several orders in one contract—Privity of contract between jobber and broker's customer—Custom.

A broker and member of the Stock Exchange was instructed by the defendant to purchase for him 225 shares in a certain undertaking for the next account. The broker having orders from other customers also to purchase similar shares entered into one contract with the plaintiffs, jobbers on the Stock Exchange, for the purchase of the whole number of shares, 925 in all, and appropriated them in his books to the orders of his various customers. Before the account day the broker was declared a defaulter. The defendant having repudiated the transaction as regards the plaintiffs, they sold 225 of the shares, and, the price having fallen, claimed the difference in an action for breach of contract to buy 225 shares.

Held, that apart from any custom or usage of the Stock Exchange, privity of contract had been created between the plaintiffs and the defendant, and that the defendant was liable to the plaintiffs in damages.

Action in the commercial list tried by Bigham, J., with a special jury.

The plaintiffs were a firm carrying on business on the London Stock Exchange as jobbers.

The defendant resided and carried on business in Belgium.

Previously to the 12th of December, 1899, he had been engaged in dealings in Randfontein shares through one Hemmerde, a stockbroker and member of the Stock Exchange.

On that date the defendant gave instructions to Hemmerde to carry over 225 of these shares to the end of December account. Hemmerde also had orders from other clients to carry over Randfontein shares, and was himself dealing in the shares on a joint account with another person, which shares were also to be carried over to the end of December account.

For the purpose of effecting the carry over of these various lots of shares, which amounted in all to 925 shares, Hemmerde on the 12th of December sold to the plaintiffs and bought from them again one block of 925 shares for the end of December account.

These 925 shares were appropriated by Hemmerde in his books in the following manner: 125 to Hemmerde's joint account, 225 to the defendant, and the remainder to Hemmerde's other clients.

On the 14th of December, 1899, Hemmerde was declared a defaulter on the Stock Exchange. His clerk wrote to the defendant informing him of this, and asking whether he wished to have another broker instructed to act for him. The defendant wrote in reply that the effect of his broker's failure was to close the transaction at the hammer price. The clerk showed this letter to the plaintiffs, who had ascertained that 225 of the 925 shares had been carried over for the defendant. The plaintiffs treated the letter as a repudiation by the defendant of his contract, and thereupon sold the 225 shares. The price had fallen, and the plaintiffs claimed to recover in this action the difference between the contract price and the price at the date. The plaintiffs alleged that by a custom of the Stock Exchange privity of contract had, in the circumstances, been created between them and the defendant.

Dr. Richardson, the official assignee of the Stock Exchange, gave evidence on behalf of the plaintiffs

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

that if a broker was instructed by several clients to buy for them shares in the same company, the practice of the Stock Exchange was for the broker to enter into one contract with a jobber for the total amount of the shares, and the jobber was by the custom or practice of the Stock Exchange bound to recognize the fact that the contract was, or might be, made by the broker for separate clients, and the jobber was bound to carry out his contract with each of the broker's clients. If only one of the clients required delivery of the shares and the others did not desire to complete, the jobber was bound by custom to carry out his bargain so far as that one client was concerned. The custom applied to cases of carrying over, as well as to completing. If a broker was declared a defaulter it was the custom for his clients to complete their transactions with the jobber, although the broker might have lumped together in one contract with the jobber the orders of several clients.

The witness's evidence applied to every case, whether the transaction was partly for the broker and partly for the client or wholly for the client. The custom or practice only came into operation when a broker became a defaulter. If at the date of the broker's default the client was himself in default to the broker, the jobber had the right to close the client's shares.

The chairman and the deputy-chairman of the Stock Exchange gave evidence to the same effect.

The learned judge left the following questions to the jury:

1. Is there a custom or practice of the Stock Exchange by which a broker lumps together the orders of different clients and executes them by means of one contract with a jobber? Answer.—Yes.

2. Did the defendant give his order on the terms that it might be executed in that way? Answer.—Yes.

3. Is there a further custom or practice by which the jobber and each client become bound to each other to carry out that part of the contract applicable to the particular client's order? Answer.—Yes.

4. In the present case did the addition to the order of the broker's own bargain in any way affect the price. Answer.—No.

5. Was this case within the custom? Answer.—Yes, but that it was not expedient for a broker to include his own bargains in an order executed for his clients.

Rufus Isaacs, K.C., J. R. Atkin, and *G. A. H. Branson,* for the plaintiffs.—On the findings of the jury privity of contract was established between the plaintiffs and the defendant. The defendant will rely on *Robinson* v. *Mollett,* L. R. 7 H. L. 802, 24 W. R. Dig. 222; but that case is not really an authority against the plaintiffs. The House of Lords in that case only decided that evidence of a custom by which an agent might contract as principal with his principal was inadmissible, the reason being that such a custom would be in contradiction of the duty of the agent towards his principal, which is to create privity between the principal and a third person. But in the present case the custom does not contradict the contract; on the contrary it is the means by which it is carried out. [BIGHAM, J.—If apart from custom the defendant is not liable to the plaintiffs, can liability be imposed upon him by custom?] Yes. In *Hutchinson* v. *Tatham,* 22 W. R. 18, L. R. 8 C. P. 482, evidence was admitted to prove a trade usage by which in certain events an agent was liable as principal on a contract made by him as agent. Secondly, apart from any evidence of custom, privity of contract was established between the plaintiffs and the defendant. The broker was authorized by the defendant to contract according to the rules and regulations of the Stock Exchange, and it was the intention of the plaintiffs and the broker that the contract should be one which should bind each of the clients to the extent of their respective orders. The *dictum* of Cleasby, B., in *Mollett* v. *Robinson* in the Exchequer Chamber, 20 W. R. 544, L. R. 7 C. P. 84, supports this contention.

Herbert Reed, K.C. (*Boydell Houghton* and *A. H. Chaytor* with him), for the defendant.—Apart from the alleged custom it is clear that privity of contract was not created between the plaintiffs and the defendant, for in *Beckhusen* v. *Hamblet,* 49 W. R. 481, [1901] 2 K. B. 73, the Court of Appeal dismissed the appeal on the ground that the custom had not been proved. As to the custom there was no such evidence of it as should have been left to the jury. It may be the practice on the Stock Exchange for a broker to include the orders of several clients in one contract with a jobber, but that does not make each of the clients liable to the jobber to the extent of his particular order. If a broker is instructed to sell 225 shares he does not comply with the order by entering into a contract for 925 shares, and it is immaterial that the broker subsequently appropriates in his books a part of the 925 shares to the fulfilment of the order to sell 225. In any case the custom does not apply to a case such as this where the broker's own dealings were included in the contract. Further, the defendant, being a foreign principal, cannot be taken to have notice of the custom relied on, and for the same reason there is no presumption that credit was given to him. Lastly, it is submitted that the evidence shows that there was no repudiation of the contract by the defendant communicated by him to the plaintiffs at the time they closed the shares.

Isaacs, K.C., in reply, cited *Pike* v. *Ongley,* 35 W. R. 534, 18 Q. B. D. 708.

Cur. adv. vult.

June 26.—BIGHAM, J.—The facts in this case were as follows: The plaintiffs are members of the Stock Exchange, and they are jobbers. On the 12th of December, 1899, the defendant instructed his broker, a Mr. Charles Hemmerde, to carry over, subject to the rules, regulations, and usages of the Stock Exchange, 225 Randfontein shares to the end of December account, and accordingly on the 12th of December his broker carried over with the plaintiffs that number of shares to the end of December account. The broker, in accordance with the ordinary usage of the Stock Exchange, carried the shares over together with a number of other shares of the same kind which he had to carry over for other clients; in fact, the broker carried over with the plaintiffs in all 925 Randfontein shares by one transaction. The broker intimated to the plaintiffs that he required to carry over for the end of December account—that is to say, from the middle to the end of December account, in all 925 shares. He did not specify the names of his various clients for whom he was transacting the business, nor did he mention the different numbers of shares which he desired to have carried over for each particular client; but the plaintiffs knew well that the transaction which the broker was carrying through with them was one which might be, and probably was, carried out for many different clients. On the 14th of December the broker was declared a defaulter on the Stock Exchange. Thereupon the plaintiffs asked the broker for the names of his principals for whom he had carried over the 925 shares, and the broker gave to the plaintiffs the names of the principals, and amongst those names

was the name of the defendant in respect of 225 shares, part of the 925. It appears that, as soon as the defendant heard that his broker had failed, he intimated to the broker through one of the broker's clerks that he considered himself no longer bound by the contract, and he claimed, as I understand, to settle the bargain at the price of the day when the broker stopped payment. The fact that he declined to be further bound by the transaction was communicated by the broker's clerk to the plaintiffs in the ordinary course of business, and the plaintiffs thereupon closed the transaction, as in my opinion they were entitled to do, supposing that there was in existence in point of law a contract between them and the defendant. The defendant had intimated that he would no longer be bound by the contract, that is to say, that he would not take up the shares at the end of December, when the time for delivery would come, and he had intimated that intention in a way which amounted, in my opinion, to notice to the plaintiffs, or to anybody concerned in the contract, that he would not perform his obligations under it. In those circumstances I think the plaintiffs, assuming always that they had a contract with the defendant, were entitled to end the contract and to sue for the damages. Accordingly they sold out the 225 Randfontein shares, and what they now seek for is the difference between the price at which they had carried over those shares on the 12th of December and the price at which they sold them, a sum of £136. The defendant says he is not bound to pay this money because he has made no contract with the plaintiffs and the plaintiffs have made no contract with him. His contention is, as I understand, that having given a mandate to his broker to carry over 225 shares, that mandate was in fact never carried out, that the contract entered into with the jobbers on the 12th of December, which related to 925 shares, could in no sense be regarded as a carrying out of his mandate, and that, therefore, his agent not having carried out the transaction, and the only transaction, which he was authorized to enter into, there is no contract between him, the defendant, and the plaintiffs. Now, what really happened was this, on the 12th of December the broker, having authority to carry over 225 shares on behalf of the defendant, and having authority also to carry over a number of other blocks of the same shares, added all the number of shares together, and, acting for all his various clients, carried over with the plaintiffs the whole lot of 925 in one transaction. No writing of any kind passed between the jobber and the broker. It is not usual that any writing should pass. The practice is for each party to make some sort of a note of the transaction in his own books; beyond that there is no record of the transaction. The broker having entered into this transaction with the plaintiffs, returned to his office and made an entry in one of his own books, a book kept for such purpose, recording the fact on one side of the page that he had carried over 925 Randfonteins with the plaintiffs, and recording the fact on the other side of the page that these 925 shares had been carried over for the particular clients there named, and he placed opposite the name of each client the number of shares in respect of which each client was concerned. Thus the defendant's name appears in that book as being a person for whom he had carried over 225 shares with the plaintiffs, being part of the 925 shares. The defendant was then advised by the usual continuation contract, or carrying over contract, by the broker that the transaction had taken place. The question that I have to determine is whether privity of contract was established by this transaction between the plaintiffs and the defendant, because if no privity of contract was established, the plaintiffs cannot sue in this action; they sue in contract, and they must make out a contract with the defendant. Whether there was a contract or not is, in my opinion, a question of intention. When the broker went to the plaintiffs and carried over the 925 shares he, in my opinion, intended that as to 225 there should be a contract on behalf of his principal, the defendant, with the plaintiffs. He intended to do that which his principal, the defendant, had directed him to do. On the other hand, in my opinion, the plaintiffs intended to make with the broker any number of different contracts that the broker might be engaged to make. It is true they did not ask the broker how many clients he was dealing for when he entered into the one transaction, nor was it necessary that they should. They neither asked him for the name or names nor the number of the shares, but they knew perfectly well that when the broker was entering into this transaction he was probably doing it for more than one client, and therefore, in my opinion, there was an intention on the part of the plaintiffs to make such number of contracts for such people as the broker might have instructions from, and there was an intention on the part of the broker that privity should be created between the plaintiffs' and his, the broker's, respective clients. I should have thought myself that that was of itself sufficient to establish the necessary privity. The case was tried before a jury, and the jury found, in answer to some questions put by me, that there was a usage on the Stock Exchange, which was in fact admitted by the defendant, by which brokers lump together the orders of their clients and execute them by means of one transaction with the jobber and that the defendant gave his order on the terms that it might be so executed. The jury found further that there is a custom or practice by which the jobber and each client—that is, each client of the broker—become bound to each other to carry out that part of the contract applicable to the particular client's order.

Now, it is said that the privity of contract was not established, and the case of *Robinson* v. *Mollett* is relied on as an authority for the contention. I have said that, in my opinion, privity of contract was clearly established by what happened in this case. Authority was given to the broker to create privity; he intended to create it; and the person with whom he was making the bargain intended that it should be created; and that, in my opinion, forms the contract. But I should like to refer to *Robinson* v. *Mollett* in order to see whether it really applies to this case at all. It is very difficult to discover from the conflicting judgments in *Robinson* v. *Mollett* what the true grounds were upon which the decision was ultimately based. For my own part I prefer the view taken by Blackburn, J., that the brokers in that case had not been employed to establish privity of contract, but had been employed merely to buy tallow for the defendants, and that having bought the tallow for the defendants, though they bought it in their own names, and by means of a contract which established no privity of contract between their client and the vendor, yet they carried out his instructions and were entitled to be indemnified for the consequences. But it is too late in the day to take that view of the case, and I can only refer to the opinion in the House of Lords in order to see what the grounds were upon which that case was decided. The judgment was delivered by Lord Chelmsford, and it proceeded upon a particular view taken upon the particular facts of the case. After setting out the facts, Lord Chelmsford said (L. R. 7 H. L., at p. 835): "In the arguments and in the judgments in this case

it seems to have been taken for granted that the custom applies in the case of a single transaction of a broker buying in the market upon the order of a principal. But upon a careful examination of the terms of the custom as stated it appears to me that it merely regulates the dealings of brokers amongst themselves, in buying and selling as principals, and the mode of adjusting and settling accounts with each other, and that no part of it is applicable to the ordinary employment of a broker engaged to buy for a real principal." He was apparently of opinion that the so-called "custom" in that case had no application at all to the transaction between the plaintiff and the defendant, but that it was a custom only as to the dealings between the brokers themselves in the market. Then he goes on to say: "Assuming, however, that the custom would have applied in the present case, if it had been known to the appellant at time of employing the respondents as his brokers, the question arises whether it is of such a nature as to be binding on a person who is ignorant of its existence, by merely employing a broker to buy for him in the market where the custom prevails." He says, as I understand, that inasmuch as it is a custom by which a broker becomes entitled as between himself and his client to convert the mandate which he has received to make a contract with a third party into a mandate between himself and his client to convert the mandate which he has received to make a contract with a third party into a mandate between himself and his clients, it is not a custom which in the absence of express knowledge can bind the client. That is all that the case lays down; and Lord Chelmsford says that on the facts of that case no contract was made between the client and the vendor. In *Robinson* v. *Mollett* there had been apparently some vague intention on the part of the plaintiff, the broker, to appropriate to the defendant some part of the tallow which he, the broker, had purchased in supposed execution of his clients', the defendants, order; and as to that intention to appropriate Lord Chelmsford said: "Now the mere intention to appropriate a portion of the tallow agreed to be purchased from Simpson & Co. and Rayner & Co., respectively, could not possibly establish a privity between them and the appellant, even if the delivery of a smaller quantity than that which they had agreed to sell could have been enforced against them." But I do not read this passage as meaning that if there had been an effective appropriation privity might not have resulted. In the present case there was not only an intention on both sides to create a contract which should bind the plaintiffs on the one side and the defendants on the other, but there was an actual appropriation of part of the 925 shares in the books of the broker to the fulfilment of this contract, and the present case appears to be like the case, imagined for the purpose of argument by Cleasby, B., in *Mollett* v. *Robinson*, L. R. 7 C. P., at p. 94, when it was before the Exchequer Chamber. Cleasby, B., in his judgment, says this: "If the plaintiffs, as soon as the contract with Simpson & Co. was made, had (as it is said they intended to do) really appropriated fifty tons of it to the defendant, and that contract had continued in force until the time for performance, the defendant would have been entitled to the benefit of that appropriation, and would have been entitled (supposing the usage did not make it a distributable contract among the purchasers, so as to entitle each to sue in his own name) to sue in the name of the plaintiffs and recover damages." I think there arose in this case the state of facts contemplated by Cleasby, B., in that part of his judgment, and I, therefore, think that the privity was established.

Now, there are two cases to which I should like to refer, as they illustrate the point before me. In the case of *Beckhusen* v. *Hamblet*, [1900] 2 Q. B. 18, 48 W. R. Dig. 185, the circumstances were very like the circumstances of the present case, and Kennedy, J., in the course of his judgment, said ([1900] 2 Q. B, at p. 26): "Let it be assumed that there is a usage on the Stock Exchange, legally valid and known to and binding upon a client such as the defendant, that a stockbroker employed in the purchase of shares for a client properly may, if he thinks it convenient, fulfil his duty to his client although, instead of creating, as it is ordinarily a broker's duty to create, a contractual relation between his client and the seller, he lumps the client's order with other orders, and in his own name contracts in a single transaction with the selling jobber for the purchase of a larger number of shares than the client has instructed him or authorized him to buy. What follows from this assumption? This only, as it appears to me that, as the broker will have fulfilled his duty according to usage, the client cannot complain, and is bound to pay the broker his commission and indemnify him against such liabilities as the broker may necessarily or properly incur in the course and for the purpose of his employment. Surely the usage in no way assists the plaintiff's case here." In *Beckhusen* v. *Hamblet* the action was brought, as it is here, by a jobber upon a contract supposed to exist between the broker's client and the jobber. "The plaintiff's case," said Kennedy, J., "is not a case of a broker suing his client for indemnity in respect of shares bought for the client in a way which is sanctioned by the rules and usages of the Stock Exchange, but it is the case of a seller seeking to have recourse against the principal of a broker who has contracted with the seller in his own name by a contract for the purchase of a larger number of shares than that which the client authorized, and which included a number which were being obtained by the broker for a different client. The usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not, in point of law, his contract; it cannot create contractual rights between parties where none exist according to legal principle." With most of that I entirely agree, but I disagree in this—that there is no contract already created. In my opinion, there was a contract created in the case of *Beckhusen* v. *Hamblet*. If there is no contract created of course nobody is liable; but it is a mistake to suppose that, because the broker has carried over the shares of a number of his clients in one transaction, he has therefore not created privity of contract between each one of his clients and the jobber with whom the transaction is carried through. In my opinion privity of contract is established by the intention of all the parties.

Beckhusen v. *Hamblet* went to the Court of Appeal, and the Court of Appeal dismissed the appeal on the ground that the existence of usage had not been established; but the Court stated that the dismissal must not be taken in any way to prejudice the plaintiffs' right to raise the question as to the existence and validity of such a usage in any subsequent action in respect of the said transaction.

There is one other case to which I desire to refer, the case of *Levitt* v. *Hamblet*, [1901] 2 K. B. 53. I refer to it because the Master of the Rolls, Collins and Romer, L.JJ., referred to *Robinson* v. *Mollett*, and pointed out the distinction, which I have endeavoured to point out, between *Robinson* v. *Mollett* and the case then before the court. I think it is only necessary that I should read the following passage from the judgment of Romer, L.J.: "With reference to the meaning imputed to Lord Chelmsford in his judgment in *Robinson* v. *Mollett*, that a mere intention to appropriate is not enough to make an appropriation,

I think for the reasons pointed out during the argument that meaning cannot fairly be ascribed to the words used. The question whether a person does or does not buy shares for an undisclosed principal is a question of fact and may depend upon his intention; but, though difficult to prove, it may be proved. It does not follow that because the intention is hard to prove the law will not allow it to be proved at all. In many cases it is essential to prove a person's intention as a question of fact, and then it must be proved on such evidence as is available. When once the position is reached that a person's intention is a question of fact, it is illogical to say that it cannot be proved because it is a mere question of intention."

Now, in this case the broker was instructed by the defendant to make the contract for him with the jobber on the Stock Exchange. He went with that mandate in his hand to the plaintiffs and he made a contract. He made it, it is true, as part and parcel of a larger transaction which included other contracts; but he made the contract that he was instructed to make, and in my opinion, as I have said before, that is of itself sufficient. But there is in this case a further fact, for, having made the contract, the broker forthwith appropriated to each one of his clients the number of shares necessary for carrying through each client's instructions, and he accordingly appropriated to the defendant in this case 225 shares, parcel of the 925 shares. I am absolutely satisfied that if, instead of the jobber having to sue the broker's customer, the broker's customer had had to sue the jobber, the jobber would have had no answer at all to the action; and, if that be so, then it follows that the co-relative right exists by which the jobber is entitled to sue the broker's customer.

There was one other matter to which I have to refer. When the broker carried over the 925 shares for the plaintiffs there were a number—I think 125 of them—in which he had himself some sort of personal interest. He was interested with somebody else in 125 of the shares, and there was a suggestion that in some way or another that invalidated the transaction. In my opinion it has nothing whatever to do with it. It is just as if the broker had bought or carried over 125 shares for himself—a separate transaction. The jury have found in point of fact that the inclusion of the shares belonging to the broker made no difference whatever in the price; that the other clients of the broker did not in any way suffer, nor do they. If I am right in supposing that the transaction in connection with the 925 shares can be resolved into the component transactions which go to make it up, then each transaction becomes a separate transaction independently of the others, and the one transaction of 125 shares in which the broker was interested is an absolutely independent matter which does not affect the rights of the plaintiffs or the defendant in any way whatever.

There is another question, which was not left to the jury but with which I have to deal—namely, whether there was evidence of any repudiation of the contract by the defendant? It was said that, inasmuch as he had only communicated his intention no longer to be bound by the contract, by letter written to the clerk of the broker, he had not communicated his intention to the plaintiffs not to carry out the contract. I do not think there is anything in that contention. When the defendant communicated to his broker's clerk his intention to be no longer bound by the contract he must be taken, in my opinion, to have intended that that communication should be forwarded to all persons who were interested in the transaction, and it was in fact forwarded to the plaintiffs, and the plaintiffs, as I have said, before they were entitled to do, acted upon it.

In these circumstances I think there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Spyer & Sons.*

Solicitors for the defendant, *Webbers & Duncan.*

House of Lords.

From C. A. (England). Nov. 29, 30; Dec. 7, 10, 11, 1900; Aug. 1, 1901.

DOVEY AND OTHERS v. CORY. (a.)

Company—Director—Dividends—Loss of capital—Misfeasance—Reliance of director on officers of company—Director's responsibilities—Statements honestly made—Damage—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

A director of a company, in the absence of reasonable ground for suspicion, is entitled to rely upon the judgment information and advice of the officials of a large company. Where the necessary course of business necessitates delegation to others, and there is no moral fraud on his part, the management of the affairs of the company in a reasonable manner is a sufficient discharge of his duties.

What constitutes reasonable care must be dealt with in each particular case.

Remarks as to payment of dividends out of capital (floating and fixed), and some observations of the Court of Appeal *thereon not approved of.*

Decision of the Court of Appeal (sub. nom. In re National Bank of Wales, 48 *W. R.* 99, [1899] 2 *Ch.* 629), *affirmed.*

This was an appeal from an order of the Court of Appeal (Lindley, M.R., Jeune, P., and Romer, L.J.), 48 W. R. 99, [1899] 2 Ch. 627, which reversed that of Wright, J.

The facts are set out very fully in the report below. It will be sufficient to give the following:

The National Bank of Wales was incorporated as a limited company in 1879 with its head office at Cardiff.

The course of business pursued is given in the judgments.

The respondent, John Cory, was for some years a director of the bank, but resigned in 1890.

In 1893 the Metropolitan Bank of England and Wales agreed to take over all the assets of the National Bank (except uncalled capital) on certain terms.

The agreement was approved and resolutions passed for the voluntary winding-up of the National Bank. There proved to be a large deficiency which the National Bank had to make good.

In the liquidation a summons was taken out to render the respondent liable—in respect of alleged misfeasance—first, in paying dividends out of capital; secondly, in making or sanctioning improper advances to directors; and thirdly, in making improper advances to customers who were, or were reputed to be, insolvent; and that he might be ordered to pay to the liquidator the full amount of such losses.

The creditors of the bank had been paid, and Wright, J., ordered the respondent to pay £37,000, the amount of dividends paid to the shareholders in 1887, 1888, 1889, 1890, and interest at 5 per cent.,

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

but without prejudice as to the question of repayment by shareholders.

The Court of Appeal reversed this order.

The liquidator appealed.

Sir R. T. Reid, Q.C., and *Ingpen, Q.C.* (*S. T. Evans* with them), for the appellant Dovey.—Though no moral fraud is imputed, the respondent was guilty of culpable negligence. Should a director pay dividends out of capital, the onus is on him to show there was no neglect of duty, otherwise he is liable. Bad debts were treated as good assets. The circulating capital should have been kept intact, and loss incurred in a previous year provided for. The respondent Cory was guilty of misfeasance, for he took no reasonable care, and as a director it is for him to make out that he did.

They referred to *Overend, Gurney, & Co.* v. *Gibb*, L. R. 5 H. L. 460; *Rance's case*, 19 W. R. 291, L. R. 6 Ch. App. 104; *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519; *In re Oxford Benefit Building and Investment Society*, 35 W. R. 116, 35 Ch. D. 502; *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 W. R. 322; *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Wilmer* v. *M'Namara & Co.*, 43 W. R. 519, [1895] 2 Ch. 245; *In re Denham & Co.*, 32 W. R. 487, 25 Ch. D. 752; *In re Lands Allotment Co.*, 42 W. R. 404, [1894] 1 Ch. 616; *Lee* v. *Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1; and *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 48 W. R. 74, [1899] 2 Ch. 392.

Sheldon, for the appellants, the Metropolitan Bank of England and Wales.

Swinfen Eady, Q.C., Rufus Isaacs, Q.C. (*G. F. Hart* and *Nepean* with them), for the respondents, as to the question of the alleged payment of dividends out of capital.—Dividends were paid out of the profits of each year: *In re Barrow Hæmatite Steel Co.*, 37 W. R. 249, 39 Ch. D. 382. The respondent, who always acted honestly and reasonably, was entitled to rely on his colleagues and the officers of the bank. There is no question of creditors, who have all been paid.

They referred to *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409.

Ingpen, Q.C., replied.

THE HOUSE took time for consideration.

Aug. 1.—Earl of HALSBURY, L.C.—In this case the liquidator of the National Bank of Wales appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Wright, J.'s, judgment had imposed upon him to pay £37,000 for the benefit of the shareholders of the company, in respect of dividends already distributed, and a further sum for interest.

Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Cory is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company, and had had a share in causing these losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and counsel for the appellant Dovey, in opening this appeal, stated that he did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now, there is no doubt that there were balance-sheets laid before meetings of shareholders which, to use the language of the articles of association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend, that it should be paid out of the profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid.

A great part of the judgment, both of Wright, J., and of the Court of Appeal, is occupied by discussing matters which are not now before your lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890.

I am very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and for reasons which I will refer to hereafter I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case.

Now, in the first instance. I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like anyone else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims, but after the admission that has been made it is unnecessary to pursue this head of inquiry; he certainly could not be acquitted of moral obliquity if party to a fraudulent statement. But it is said he has so grossly neglected his duty as a director that, though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out it is necessary to consider what the business of the company was, and what was the position of Mr. John Cory in relation to it.

I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now there are some things which, of course, must be, or at all events ought to be, apparent to anyone responsible for the conduct of a commercial business, and to apply that observation to the business of which we are speaking—namely, a banking business—but I do not understand that anyone has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured.

It is admitted that the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager. The course of business was this: Each branch manager sent weekly to the head office what is called a weekly state—that is, an account showing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office showing the position of the branch and the business done during the past quarter. It

was the duty of the general manager to examine these documents, and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board room for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch banks appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders only saw the head office books and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings show that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives. But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his repsonsibility is that he did not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor, which were never suffered to reach him, are suggested as warnings to him which he ought not to have neglected. Again, the insufficient striking out of bad and doubtful debts by which it is alleged that the amounts paid in dividends to himself and other directors, as well as shareholders, are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention, while at the same time the admission is made that there was no evil mind or conscious fraud.

Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own brother, another was the general manager; and once I arrive at the conclusion that there were those about him whose interest and object was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take, the whole of the evidence which is relevant and important to question, did Mr. Cory knowingly permit the things to be done which were done, becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them.

Dealing with the several heads of charge as they have been formulated in the judgment of Wright, J., —namely, negligence, breaches of trust in respect of advances made contrary to said articles of association, and payments of dividends and of capital—I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things—as Wright, J., put it, unless he is shown to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out. The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, as to how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this—that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate, but those who assured him that it was adequate were the very persons who were to attend to that part of the business —and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive. If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed, and which as coming from the officers of the bank to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise when it may be necessary to decide it. I deprecate any premature judgment.

I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits, and what is capital. Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's Wealth of Nations is appropriate enough, may with reference to a concrete case be

quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but, as an illustration of what difficulties may arise the example given by counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin. On the other hand, companies cannot at their will and without the precautions enforced by the statute reduce their capital; but what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I for one decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a court of law.

I move that this judgment be affirmed, and the appeal dismissed with costs.

Lord MACNAGHTEN.—I have had an opportunity of reading the judgment of the Lord Chancellor, and I desire to express my concurrence in it, and at the same time to guard myself from being understood to assent to all the propositions supposed to have been laid down by the Court of Appeal in this case. I say no more, because it seems to me that when counsel for the appellant Dovey withdrew all charges involving moral obliquity against Mr. Cory, the case was at an end. And I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more. I understand from Lord Shand that he also takes this view.

Lord DAVEY.—I agree in thinking that the appellant has not succeeded in making out a case for the relief which he asks against the respondent.

The appellant seeks to make the respondent liable under three heads—first, in respect of losses incurred by advances of money which he alleges that the respondent and the other directors of the bank negligently made to irresponsible persons, and without sufficient security; secondly, in respect of advances to the directors themselves, which he alleges were made contrary to the express provisions of the articles of association; and thirdly, in respect of sums paid to the shareholders (including the respondent himself) by way of dividend on their shares, which he alleges were paid out of the capital of the bank, and not out of profits. In fact, he alleges that there were no profits out of which such dividends could properly be paid, and that an apparent profit was created only by including as assets debts known to be bad and irrecoverable.

As regards the first two heads of claim, Wright, J., as well as the Court of Appeal, has held that the claims cannot be sustained; and as I agree with the reasons which have been assigned for so holding, I need not repeat them. As regards the third head of claim, the case as presented at the bar has been very much narrowed by the admission of the appellant's counsel that the respondent ceased to be a director in December, 1890, and his acceptance of the decision of the Court of Appeal that the Statute of Limitations applies so as to bar the recovery of any sums paid away prior to six years before the commencement of the proceedings. The claim is thus confined to the three dividends paid in July, 1889, December, 1889, and July, 1890.

I think it appears from the evidence that in the balance-sheets upon which these dividends were recommended by the directors, bad and irrecoverable debts were in fact included amongst the assets of the company, and that if those debts had been written off (as they ought to have been) the balance-sheets would not have shown any profit out of which the dividends could have been paid. But before proceeding to discuss the evidence upon which it is sought to fix the respondent with responsibility, I will say a few words with regard to the law upon the subject with a view to ascertain exactly what it is the appellant must establish.

I need only refer to three cases which seem to me to contain the whole law upon the subject. In *In re Mercantile Trading Co., Stringer's case*, 17 W. R. 694, L. R. 4 Ch. App. 475, the business of the company in question was of an extremely speculative and hazardous character, and the directors had paid a dividend on their estimated value of assets which were afterwards totally lost. It was held that the estimate, having been made *bonâ fide*, and without any intention to defraud anybody, a director could not be made liable, when the company was wound up, to replace the money. In *Rance's case* Lord Romilly laid down the principle which he thought governed cases of this description thus: "When an improper payment has been made, if it be a mere error of judgment it cannot be recovered; if it be a fraudulent payment, then it can." The learned judge explained what he meant by a fraudulent payment: "I mean one where the person who makes it, or is concerned in making it, is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself"; and he adds, "The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him, he is equally guilty." I think that this statement of the law is very nearly but not quite accurate. In my opinion it is not necessary that the motive of improper payment should be to obtain a benefit for the director himself. I also understand Lord Romilly to include in the expression "wilfully shutting his eyes," culpable negligence or reckless indifference by the director in the performance of his duties. Lord Romilly decided that case in favour of the director. The Court of Appeal took a different view of the facts from that taken by Lord Romilly, and held that the directors in the preparation of the so-called balance-sheet had not followed the directions in their articles of association, and the balance-sheet did not in fact purport to show a profit out of which a dividend could be paid. In such a case there can be no doubt of the liability of the director who took part in the payment of the dividend. The case of the *Leeds Estate, &c., Co.* v. *Shepherd*, 36 W. R. 322, 36 Ch. D. 787, before Stirling, J., was a case of the same description. The directors had not followed the directions contained in the articles of association. The learned judge, in the course of his judgment, states the law thus: "It seems to me that the views expressed by the learned judges who decided *Rance's case* are consistent with the proposition that directors who are proved to have

in fact paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements submitted to them." I agree in this statement of the law, and I do not think it inconsistent with that of Lord Romilly, properly understood, and subject to the observation which I have already made upon it. It is by this standard that the conduct of the respondent must be judged in this case.

The respondent, in his affidavit, states generally that he was, from first to last, under the honest and genuine belief that the affairs of the company were in a sound and solvent condition, and that its business was being carried on at a profit, and that its net profits for the time being were amply sufficient to justify the dividends which were from time to time, during his directorship, paid to the shareholders. And he adds that the general manager and branch managers were, so far as he knew, men of unquestioned competence and integrity, and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally, to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail. And he deals specifically with the various matters alleged in the liquidator's evidence on the same lines. The respondent was cross-examined on his affidavit at great, but not unnecessary, length. I am not, I think, doing injustice to the appellant's case when I say that reliance was chiefly placed on the "weekly states" and "quarterly returns" made by the branch managers; or that if he cannot succeed in fixing the respondent with liability on these documents his case fails. These returns were laid on the table in the board room at each meeting of the directors. The comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, show that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets submitted by him to the directors were in fact irretrievably bad, and it is difficult to acquit the general manager of improper conduct in including them as assets. The respondent says, in his affidavit, that the "weekly states" consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors—and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly states were not consulted by the directors, but they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. On cross-examination he adhered to this statement. He added that the chairman also went through them often individually, and he did so for the board. He admitted that, before recommending a dividend, he did not look at all the accounts or look at the books themselves, but he said that the directors looked at the documents which were put before them by the manager—the amount which he considered was doubtful and bad—and they made a reserve for it. He also said that it was never brought before him that amounts due from bankrupt debtors were included in the balance-sheet of each year, and he never heard of any single case of that kind. It further appeared, from the evidence of other witnesses, that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors.

In this state of the evidence, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent? or (alternatively) whether he was guilty of such neglect of his duty as a director as would render him liable to damages? I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Jessel, M.R., in *In re Wincham Shipbuilding, Boiler, and Salt Co., Hallmark's case*, 26 W. R. 529, 824, 9 Ch. D. 329, and by Chitty, J., in *In re Denham & Co.*, that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my own satisfaction that the respondent wilfully, as that term is explained in the cases I have referred to, misappropriated the company's funds in payment of dividends.

What I have said is sufficient for the decision of this appeal. But I desire to express my dissent from some propositions of law which were laid down in the Court of Appeal, and upon which this House thought it right to hear the respondent's counsel. The learned judges seem to have thought that a joint-stock company, incorporated under the Companies Acts, may write off to capital losses incurred in previous years, and may in any subsequent year, if the receipts for that year exceed the outgoings, pay dividends out of such excess without making up the capital account. If this proposition be well founded, it appears to me a company whose capital is not represented by available assets need never trouble itself to reduce its capital, with the leave of the court and subject to the other conditions imposed by the Act of 1877, in order to enable itself to pay dividends out of current receipts.

It may be that I have misapprehended the statement of law intended to be made by learned judges in the Court of Appeal. I think that is possible, because I find that in *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239, Lord Lindley says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk or lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as

otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

I reserve my opinion as to the effect of an actual and ascertained loss of part of the company's fixed capital, as in the case put by counsel for the respondent of a loss of a ship uninsured. But, subject to this observation, I think that the statement of law in the passage I have quoted is not open to objection, and it is only because the learned judge appears to me to have departed from it in his judgment in the present case that I have troubled your lordships with these remarks.

I agree that the appeal should be dismissed.

Lord BRAMPTON concurred.

Appeal dismissed.

Solicitors for the appellants, *Riddell & Co.*, for *Thomas Williams*, Neath; *Burton, Yeates, & Hart*, for *Johnsons, Barclay, & Rogers*, Birmingham.

Solicitors for the respondent, *Michael Abrahams, Sons, & Co.*

Court of Appeal.

From Chan. Div.
Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 5.

In re WILLIS.
WILLIS *v.* WILLIS. (*a.*)

Settlement—House—Repairs—Salvage—Jurisdiction to sanction expenditure out of capital.

The jurisdiction of the court to sanction expenditure in the repair of settled property out of capital is to be exercised, if at all, only where a case of salvage is clearly made out.

Observations of Chitty, J., *in* In re De Teissier's Settled Estates, 41 *W. R.* 186, [1893] 1 *Ch.* 165, *approved.*

This was an appeal from the decision of Kekewich, J.

By his will dated the 18th of December, 1895, the testator in this case, who died in the year 1899, appointed executors and trustees of that his will, and after bequeathing certain legacies, devised his freehold mansion-house at Richmond and all other his real property at Richmond to and to the use of his said trustees in fee simple upon trust for his sister so long as she should remain a spinster and unmarried, subject nevertheless to a condition that she should keep the said house and premises at Richmond substantially in the same state of repair in which she found them at the time of his death, and from and after the death or marriage of his said sister the testator directed his trustees to stand possessed of the said house and premises upon trust for his nephew for and during his life, he keeping the said premises in such state of repair as aforesaid, with remainder in trust for the first and other sons of such nephew successively in tail, with remainders over in default of such issue. And after devising certain freehold houses at Twickenham to his said trustees in trust for sale, the said testator bequeathed the sum of £80 000 to his said trustees upon trust to invest the same as therein mentioned, and to hold the said sum when so invested and also the proceeds of the sale of the houses at Twickenham upon trusts corresponding to those declared concerning the house at Richmond, and he directed his trustees to hold his residuary personal estate upon similar trusts.

The will contained powers for the trustees to manage let and repair the houses at Twickenham, but contained no similar powers with respect to the house at Richmond.

On the death of the testator in the year 1899 the sister as first tenant for life entered into possession of the house at Richmond, and has ever since resided there.

At that time the house was in a general state of disrepair, and there was some evidence that there had been a subsidence causing cracks in the walls, and rendering the house unsafe, or at least unfit for letting purposes.

The question now arose whether the money required for the repairs could be provided by the trustees out of the capital of the said legacy of £80,000, the proceeds of the sale of the houses at Twickenham and the residuary personal estate of the testator, or whether the cost of such repairs should be borne by the tenant for life in possession.

The question was raised by originating summons taken out by the trustees.

Kekewich, J., held that any expenditure by the trustees out of capital must be restricted to "salvage," that is, to preservation of the property, and could not be extended to repairs which were not necessary for preservation; that the evidence showed that the works contemplated were for the most part repairs in the ordinary sense of the word, and therefore the application must be refused.

The trustees appealed.

Renshaw, K.C., and *Methold*, for the trustees.

Warrington, K.C., and *E. S. Ford*, for the tenant for life.

VAUGHAN WILLIAMS, L.J., said the decision of Kekewich, J., must be affirmed. It was conceded that the application could not be justified under the Settled Land Acts. Where, then, was the jurisdiction to grant it to be found? This was a case where the trustees were the persons legally entitled to the property, but they had only a bare legal estate with no active duties to perform, and no powers to manage or repair the trust property. The court had no general jurisdiction to order the costs of repairs to be paid out of capital and therefore none to make the order asked for. But it was said that the court had a general jurisdiction to authorize expenditure out of capital where it was necessary for the purpose of salving the property. The answer to that was that their lordships were not satisfied on the evidence that this was a case of salvage. By the terms of the will there was an obligation cast upon each tenant for life in turn to keep the property in repair. It was difficult, therefore, to see how any case of salvage could arise if the tenants for life one by one did their duty. His lordship wished to call attention to some observations of Chitty, J., in *In re De Teissier's Settled Estates*, 41 W. R. 186, at p. 188, [1893] 1 Ch. 153, at p. 165, where the learned judge said: "If I were to accede to this application I foresee in all cases where a testator leaves a dilapidated mansion that there would be first an application by the tenant for life to see what he could get under the Settled Land Acts, and then failing to obtain all he wished for under that jurisdiction, he would apply in this ingenious manner to what is called the general jurisdiction of the court. The Settled Land Acts, whether they do or do not exclude the application of any of the doctrines of this general jurisdiction, at any rate afford a guide to

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

the court and are of assistance to the court in arriving at a proper conclusion. Confessedly the things asked for on this summons cannot be done under the Settled Land Acts, and unless the court is firm in a matter such as this is the court will be flooded with similar applications." That, in his lordship's opinion, was a most useful rule, and ought to be applied to the present case. The appeal would therefore be dismissed.

ROMER, L.J., agreed, and said in a case like the present, where the trustees had a bare legal estate, with no powers of management and no active duties to perform, the case was to be treated in the same way as the case of a legal tenant for life and legal remainders, as to which the Settled Land Acts formed a code under which applications of this sort ought to be dealt with. In his opinion the court had no wider general jurisdiction to sanction the expenditure of capital for the benefit of the estate at the expense of the remaindermen.

COZENS-HARDY, L.J., agreed.

Appeal dismissed.

Solicitors, *Crossman, Prichard, Crossman, & Block.*

From Chan. Div.
(Lord Alverstone, L.C.J., and Vaughan Williams and Romer, L.JJ.) } Nov. 1.

In re BARROW HÆMATITE STEEL CO. (*a.*)

Company — Reduction of capital — Available assets — Reserve fund — Unappropriated profits — Preference shares.

The court will not confirm a reduction of capital where it would work unjustly or inequitably. The court therefore refused to confirm a reduction which would benefit the ordinary shareholders at the expense of the preference shareholders.

In ascertaining the available assets of a company for the purpose of a reduction of capital, the amounts of reserve and unappropriated profit, and the value of the goodwill, are to be taken into account.

Decision of Cozens-Hardy, J. ([1900] 2 *Ch.* 846), *affirmed* (49 *W. R. Dig.* 24).

This was an appeal from the decision of Cozens-Hardy, J. (reported [1900] 2 Ch. 846, 49 W. R. Dig. 24).

A petition was presented by the company for the confirmation by the court of resolutions for the reduction of the capital of the company by one half.

In the early part of 1888, besides capital borrowed on the security of debentures, the nominal capital of the company consisted of £1,500,000 in £10 ordinary shares, £37,700 in £100 eight per cent. preference shares, and £500,000 in £10 six per cent. preference shares, making a total of £2,037,700.

The preference shareholders had no voice in the management; they had a cumulative preference as to dividend, but no preference as to capital.

In 1888 resolutions were passed to reduce the capital by one quarter, reducing the shares proportionately all round, reducing the £100 preference shares, to £75 eight per cent. preference shares; the preference £10 shares to £7 10s. six per cent. preference shares; and the ordinary shares to £7 10s. shares.

The confirmation of these resolutions was opposed by preference shareholders, but in the result they were confirmed by North, J., who held that there was nothing in the bargains between the preference shareholders and the company which prevented the reduction of their shares, and that, under the circumstances then before the court, the proposed reduction was fair.

In 1899 the ordinary shareholders passed resolutions to reduce the shares all round by one half, bringing them down to three-eighths of their original denominations, and the petition asked for the confirmation of the resolutions.

The petition was opposed by a majority of the preference shareholders, who alleged that the scheme was so unfair that the court in its discretion would not sanction it.

It was alleged by the company that the 50 per cent. of capital which it was proposed to cancel was, within the words of section 3 of the Companies Act, 1877, "lost or unrepresented by available assets."

The petitioners alleged that their iron ore mines stood in the balance-sheet at twice their value, and they proposed to reduce it by, roughly, £177,000. They said their works, which stood at upwards of £2,000,000, were over-estimated by £486,000, and that their freehold land and house property, which stood at £200,000, was over-estimated by £100,000. These three items made up the £764,000 which they proposed to write off. The preference shareholders challenged these figures, and the learned judge said that upon the evidence he thought he might dispose of the petition on the short ground that the company had not satisfied him that the first two items had been proved. He was not satisfied that the colliery was not worth much more than £175,000, though he did not base his judgment upon that. He could see no answer to the argument that the £40,000 reserve fund ought to have been treated as an available asset, and he thought that similar observations applied to the £90,000 to the credit of profit and loss. In his opinion goodwill must also be regarded as an "available asset" for the purpose of a reduction petition. For all these reasons he thought that the company had not proved that £764,000 was capital "lost or unrepresented by available assets," and therefore he could not confirm the reduction. But even if the loss of the £764,000 had been established his lordship would not have thought it right to confirm the proposed reduction. What was the necessity for it? The company had paid, and, having regard to decisions which were binding upon every court short of the House of Lords, had properly paid, dividends out of its profits, notwithstanding the loss of capital. Why should any change be made? The earning capacity of the company would not be in any way increased by the reduction of the capital, and his lordship did not think that in dealing with two classes of shareholders he ought to make an unnecessary reduction for the avowed purpose of relieving the ordinary shareholders from the payment of preferential interest. The annual preferential charge was, in round figures, £24,000, subject to which all the profits went to the ordinary shareholders. The proposal was that the ordinary shareholders should in future take all the profits, subject to a preferential charge of £12,000 only. In substance it was a proposal by the ordinary shareholders to deprive the preferential shareholders of £12,000 a year for the benefit of the ordinary shareholders, without any necessity for so doing, and without any advantage to the company as a whole. This did not strike his lordship as fair and equitable. The result was that he dismissed the petition, with costs.

The company appealed.

By clause 106 of the company's articles of associa-

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

tion the directors had power (*inter alia*) "to set out of the profits of the company, before recommending any dividend, such sums as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing, renewing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their discretion think conducive to the interests of the company."

Swinfen Eady, K.C., and *Cassel*, for the company.

Eve, K.C., and *Kirby*, for preference shareholders.

Hon. E. C. Macnaghten, K.C., and *Simey*, for shareholders holding both ordinary and preference shares.

Lord ALVERSTONE, L.C.J., said: I am sorry that I cannot give more assistance to Mr. Eady's clients. I do not understand Cozens-Hardy, J., as not having given a decision on the facts. The learned judge said that, as to the greater part of the proposed reduction, the company had not satisfied him that there had been the alleged loss of capital. Looking at the affidavits as a judge of first instance, I should have felt some difficulty in coming to a conclusion as to the loss of capital to the extent alleged. It is by no means clear to me that the valuers had valued either the works or the colliery or the business of the company on the right basis. With regard to the reserve fund and the balance to the credit of profit and loss, I will not express any final opinion how those sums ought to be dealt with, but having regard to clause 106 of the articles of association, it seems to me impossible to say that the alleged loss of £764,000 has been established without knowing how those sums are going to be dealt with. Therefore the only ground upon which I can decide this case is that I am not satisfied that Cozens-Hardy, J., came to a wrong conclusion in holding that the loss of £764,000 capital had not been established. There I will stop, so far as the decision of this case is concerned. But I will make this observation on the judgment of Cozens-Hardy, J.: I do not think that the learned judge decided anything adverse to a *pro rata* reduction of capital in a proper case. Nor do I understand him as deciding that simply because a company is at the time paying dividends there can be no reduction of capital. It seems to me that in considering whether the proposed reduction of capital would work unjustly, the learned judge was of opinion that the financial position of the company as a going concern ought not to be lost sight of. I do not understand Cozens-Hardy, J., as deciding that upon different materials a reduction of the capital of this company would not be justified. Upon the facts as they stand, I am of opinion that this court ought not to differ from Cozens-Hardy, J., and that we should not be justified in hearing an argument upon points of law which do not really arise for decision.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Currey, Holland, & Currey; Walker & Pettitt.*

From Q. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) (And Q. B. Div. (Wright, J.)) — Nov. 12, 1900; Oct. 29, 1901.

WARD *v.* FRY. (*a.*)

Bankruptcy—Property of bankrupt—Relation back of trustee's title—Money paid for bets—Protected transaction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

Money paid away by a debtor after an act of bankruptcy committed within three months before the presentation of a bankruptcy petition against him, upon which he is adjudicated bankrupt, can be recovered by his trustee in bankruptcy in like manner as goods transferred by him or their proceeds can be recovered.

A debtor, after he had committed an act of bankruptcy, paid to the defendant a sum of money in respect of a bet which he had lost to the defendant, and he also deposited with the defendant a sum of money as security for bets which he had made with him. The defendant won the bets and retained the money. Subsequently a receiving order was made against the debtor, founded on the act of bankruptcy, and he was adjudicated bankrupt.

Held, that the transactions were not protected by section 49 (c) (d) *of the Bankruptcy Act,* 1883, *as the money was paid without valuable consideration, and that the trustee was entitled to recover the money.*

Action to recover two sums of £200 and £300.

The plaintiff was the trustee in bankruptcy of one Barratt, and the defendant was a betting man.

On the 26th of July, 1899, Barratt paid the defendant £200, being the amount of a bet which he (Barratt) had lost to him, and on the 27th of July, 1899, he deposited with the defendant £300 as security for certain other bets made between them, on the terms that if Barratt lost the bets the defendant was to retain the money.

Barratt lost the bets, and the defendant retained the money.

On the 6th of July, 1899, Barratt had committed an act of bankruptcy, on which a petition in bankruptcy was presented against him on the 29th of July, 1899.

On the 1st of August, 1899, a receiving order was made on the petition, and on the 30th of November he was adjudicated bankrupt.

The plaintiff claimed a declaration that the two sums of £200 and £300, which had been paid by the bankrupt to the defendant, subsequent to the act of bankruptcy on which the petition was founded, formed part of the property of the bankrupt divisible among his creditors, and an order for payment of these sums.

The defendant contended that the plaintiff was not entitled to recover these sums, on the grounds (1) that, though goods of the bankrupt alienated by him after the act of bankruptcy or their proceeds could be recovered by the trustee in bankruptcy, moneys paid away by the bankrupt during the same period could not be recovered unless the circumstances were such that the bankrupt or the trustee could have maintained an ordinary action for the money as received to his use apart from relation back under the bankruptcy law; and (2) that the transactions were protected by section 49 (*c*) (*d*) of the Bankruptcy Act, 1883, as being a conveyance or assignment by the bankrupt, or a contract, dealing, or transaction by or with the bankrupt, for valuable consideration, the defendant at the time when the transactions were completed having no notice of an available act of bankruptcy committed by the bankrupt.

Robert Wallace, K.C., Hansell, and *Œneas Mackintosh*, for the plaintiff.

Rufus Isaacs, K.C., and *Muir Mackenzie*, for the defendant.

The authorities referred to are stated in the judgment of Wright, J.

Nov. 12, 1900.—WRIGHT, J., delivered the following written judgment: The point most strenuously argued

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

for the defendant was that, although goods of the bankrupt alienated by him after act of bankruptcy committed within the three months can be followed by the trustee when the property has vested in the trustee by relation back, or the proceeds of them, if sold, recovered as money received to his use, yet that moneys which the bankrupt has paid away during the same period cannot be recovered unless the circumstances are such that the bankrupt or the trustee could have maintained an ordinary action for the money as received to his use apart from any special bankruptcy law. It seems, however, to have been settled for a good number of years that there is no distinction in this respect between goods transferred by the bankrupt and money paid away by him, and that, subject to the protection given by the Bankruptcy Acts to certain *bonâ fide* transactions, the trustee can sue the person to whom the bankrupt has paid moneys which, by virtue of the bankruptcy, have become the property of the trustee by relation back, without showing wrongfulness or fraud or other ground of general equity against the recipient. The ancient rule is so stated in Cooke's Bankrupt Laws (8th ed.), pp. 585, 586 (where exceptions introduced by some of the Bankruptcy Acts are enumerated), on the express authority of Lord Hardwicke in *Billon* v. *Hyde*, 1 Ves. sen. 326. To the same effect are the decisions or *dicta* in *Hitchin* v. *Campbell*, 2 W. Bl. 827; *Vernon* v. *Hall*, 2 T. R. 648; *Bradley* v. *Clark*, 5 T. R. 197; *Allanson* v. *Atkinson*, 1 M. & Sel. 583; and *Harwood* v. *Lomas*, 11 East. 127. No case has been cited to show that any different general rule has been established in more modern times, and there seems to be no reason why any different rule should be established, and the continued existence of the doctrine as above stated seems to be implied in *Ex parte Wolverhampton, &c., Banking Co.*, 33 W. R. 642, 14 Q. B. D. 32. Then the question is whether the defendant is protected by section 49 of the Bankruptcy Act, 1883. He is so protected if, and only if, the transaction ought to be regarded as covered by one or other of the descriptions (*c*) and (*d*) in that section, which are as follows: "(*c*) Any conveyance or assignment by the bankrupt for valuable consideration"; "(*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration." I will take first the deposit of the £300. When this money was paid by the bankrupt it was paid, as it seems to me, by way of deposit or security, and not by way of conveyance or assignment. No doubt the particular coins, notes, or cheque must be supposed to have been intended to become the property of the defendant, but in substance there was a deposit of a fund to be retained or returned according to the event, and not a conveyance or assignment of the fund, and (*d*) seems to apply rather than (*c*). Then was there a "contract, dealing, or transaction"? That, I think, must mean a contract, dealing, or transaction, which has contractual force, and which involves a legal obligation. But here the contract is a contract by way of gaming or wagering, and as such null and void as a contract under 8 & 9 Vict. c. 109, s. 18. And if so, then, even if the defendant's consent to undertake a risk which he would not otherwise have undertaken was a valuable consideration, (*d*) did not apply so long as the transaction was incomplete. Then does it make any difference that before the receiving order was made the transaction had been concluded, the event determined, and the defendant's title to the money perfected, as between him and the bankrupt, so that the defendant's right no longer depended on an unexecuted contract, and the depositor if he had not been bankrupt could not have recovered the deposit? This seems to depend on whether there was any valuable consideration for the change by which the fund, instead of being a mere deposit or security, became transferred to the defendant as his property. I think not. This part of the transaction seems to me to differ in no substantial respect from any ordinary payment of a bet, and to be in effect a voluntary payment: see *Manning* v. *Purcell*, 3 W. R. 273, 7 De G. M. & G. 55; *In re Deerhurst, Ex parte Seaton*, 60 L. J. Q. B. 411, 39 W. R. Dig. 24. The payment of the £200 stands on the same footing. It was paid for a debt, not recoverable at law, and was therefore as against the trustee in bankruptcy paid without consideration. It follows that the plaintiff is entitled to judgment.

The defendant appealed.

Oct. 29, 1901.—*Rufus Isaacs, K.C.*, and *Muir Mackenzie*, for the defendant.

McCall, K.C., and *Œneas Mackintosh*, for the plaintiff, were not called upon.

COLLINS, M.R.—I do not think that I need say more than this, that I entirely agree with the judgment of my brother Wright.

STIRLING and MATHEW, L JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Venn & Woodcock.*

Solicitors for the defendant, *Beyfus & Beyfus.*

High Court of Justice.

Chan. Div. Byrne, J. — Oct. 29.

PHILLIPS v. HOWELL. (*a.*)

Practice—Set off—Equitable deduction—Vendor and purchaser—Specific performance—Costs—Debt en autre droit.

A purchaser obtained judgment for specific performance of a contract of sale against his vendor with costs. The vendor could only make title as administratrix of an intestate. The vendor was entitled beneficially as next-of-kin of the intestate to a portion of the proceeds of sale.

Held, on motion to retain the costs of the action out of the vendor's beneficial interest in the purchase-money, that the court having no power in this case to administer the estate of the intestate, the plaintiff purchaser could not bring into account all or any part of an unascertained sum to which the defendant might be beneficially entitled in the administration of her intestate's estate as against the purchase-money which was due to the defendant in her representative capacity.

In this case the plaintiff, purchaser from the defendant of certain leasehold property, brought an action for specific performance.

The defendant sold, and could make title only as administratrix of an intestate.

She had also a beneficial interest as one of the next-of-kin and as assignee of another of the next-of-kin of the intestate to the extent in all of one-fourth of the intestate's estate.

The defendant resisted specific performance and counterclaimed seeking to set aside the contract on the ground of fraud, undue influence, and surprise.

The plaintiff succeeded in his action, and obtained judgment for specific performance with costs, the counterclaim being dismissed with costs.

When judgment was pronounced, counsel for the

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

plaintiff made some application as to setting off or deducting the costs he was entitled to from the purchase-money; but, on its being pointed out that there was a difficulty, stated that he did not press his application.

Having subsequently ascertained that the defendant had, after action, purported to charge her beneficial interest in the property, the subject of the contract, in favour of her solicitor, the plaintiff now applied (the judgment not having been passed or entered) to add a direction enabling the plaintiff to retain so much of the balance of purchase-money as represented or was properly applicable as the defendant's beneficial share of the intestate's estate or so much thereof as might be necessary in or towards satisfaction of the costs ordered to be paid by the defendant.

Rowden, K.C., and *Hon. F. Russell*, for the plaintiff. —The purchase-money being due to the defendant in her capacity of administratrix, and the costs being against her personally, the plaintiff may not be strictly entitled to set off, but we submit he is entitled to charge his costs on the beneficial interest of the defendant by way of equitable deduction: *Green* v. *Sevin*, 13 Ch. D. 589, 28 W. R. Dig. 172.

Levett, K.C., and *T. L. Wilkinson*, for the defendant. —The court has no power here to administer the intestate's estate. The motion is misconceived: *Medlicott* v. *Bowes*, 1 Ves. sen. 207; *Bishop* v. *Church*, 3 Atk. 691; *Middleton* v. *Pollock*, 23 W. R. 766, L. R. 20 Eq. 29; *Freeman* v. *Lomas*, 9 Hare 109.

Byrne, J., after stating the facts as above set out, said: It is said that it was proved by the defendant in the course of the trial that except a mortgage for £500 there are no unpaid debts of the intestate, and that the purchase-money represents the whole of the intestate's estate, and consequently the plaintiff ought to be allowed to retain the whole, or so much as may be necessary to answer costs, of one-fourth of the balance of the purchase-money after discharging the mortgage debt. It is conceded that the plaintiff could not ask to retain his costs out of the purchase-money generally, that being payable to the defendant in her capacity of administratrix and the costs being due from her personally; but it is said that the defendant having proved in the course of the case that one-fourth of the purchase-money belongs to her absolutely, subject to discharge of a mortgage and to a charge created by her subsequently to the contract, the plaintiff is entitled to have provision made for the application of what would otherwise have been payable in administration of her intestate's estate in respect of her beneficial interest or so much thereof as is necessary in or towards satisfaction of the costs ordered to be paid by her. I may point out that without some form of administration order, which I have no power to a make in this action, it would be impossible to ascertain what the amount representing the beneficial interest of the defendant is, so as to bind other persons interested in the intestate's estate. No authority was produced for such an order as is asked, but *Green* v. *Sevin* was relied on as justifying it. In that case a successful purchaser plaintiff was allowed to deduct the costs of action and counterclaim from the purchase-money, notwithstanding a charge created on the property agreed to be sold subsequently to the date of the contract. In my judgment that case is no authority for the order now asked. It does seem to be an authority for the proposition that, where judgment for specific performance is granted in favour of a purchaser, there is jurisdiction to direct that, in adjusting the accounts as between vendor and purchaser the purchaser is entitled to bring into the account the amount of the costs which the vendor has been ordered to pay against the purchase-money—that is, in a case where the debt due to and the debt due from the defendant are so due to and from the defendant in the same capacity. I do not think that the jurisdiction extends to allowing the plaintiff to bring into account all or any part of an unascertained sum to which the defendant may be beneficially entitled in the administration of her intestate's estate as against the purchase-money which is due to the defendant in her representative capacity. I think that if any right is to be established against the beneficial share of the defendant in the estate it must be by due process of execution; the two debts, the costs, and the purchase-money not being capable of being set off or brought into account against one another. It appears to me that the motion is misconceived, and must be dismissed with costs, which may be set off against the costs already ordered to be paid to the defendant.

Solicitors, *Beaumont, Son, & Rigden*, for *Phillips*, Newport; *C. A. Elgood*, for *Gardner & Herbert*, Newport.

Chan. Div. Farwell, J. } July 15, 1901.

Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co. (Limited). (a.)

Trade name—Name of company—Foreign firm—Market in United Kingdom—Registration—Imitation—Signatories to memorandum—Liability—Injunction

A foreign trader whose goods are in fact imported into England, although he has no English agency, has a sufficient English market to entitle him to an injunction restraining the piracy of his trade name and reputation.

The signatories of a company formed for a fraudulent purpose and duly registered are guilty of a fraudulent conspiracy to effect that purpose, and together with their company can be restrained by injunction.

Witness action.

The plaintiff company was constituted under French law in 1897 in succession to a former firm of "Panhard et Levassor," and had since then carried on business in Paris as engineers and manufacturers of motors, motor-cars, and parts thereof. They had no agency in England at the time when the action was brought, but their motors had been frequently imported into England either by the British Motor Co. (Limited), who held patents covering inventions embodied in many of the plaintiffs' motors, or by private purchasers, who usually obtained licences from the patentees. It appeared from the evidence that the words "Panhard" or "Panhard Levassor" exclusively denoted in the English market motors of the plaintiffs' manufacture. They therefore claimed the exclusive right to the use of those names in such connection.

The defendants were the Panhard Levassor Motor Co. (Limited), and the seven signatories to the memorandum of association of that company, who each held one share and were the only shareholders and directors. None of the signatories bore the name of Panhard or Levassor. The defendant company was registered the 29th of March, 1900, its principal object being the manufacture and sale of motor-cars.

The plaintiffs alleged that the signatories had

(a.) Reported by Warwick H. Draper, Esq., Barrister-at-Law.

wrongfully and fraudulently conspired to form and register the defendant company with the intent to injure the plaintiffs' business; that the English public would be led to believe that the defendant company were selling the plaintiffs' goods; and that the plaintiffs would be prevented from registering themselves or their agents as a company in England under their own name or a name similar thereto. They accordingly claimed an injunction to restrain the defendant company and the signatories from using the names of Panhard and Levassor or either of them, or any title or description including those names or either of them, or otherwise colourably resembling the name of the plaintiffs, in connection with the manufacture or sale of motor-cars, an injunction to restrain the signatories from allowing the defendant company to remain registered under its present name or any such title or description as aforesaid, and damages.

Fletcher Moulton, K.C., A. J. Walter, J. F. Iselin, and *H. F. Moulton,* for the plaintiff company.—The company is entitled to restrain the piracy of its trade name and reputation, although it does not itself carry on business in England: *Collins Co.* v. *Brown,* 3 K. & J. 423.

Upjohn, K.C., and *Stewart Smith,* for the defendants. Here there was no interference with the actual market of the plaintiff company, who have none in England: *Jamieson* v. *Jamieson,* 15 Rep. Pat. Cas. 169. The defendants were not guilty of any fraud in choosing the name of their company so as to prevent any risk of the plaintiffs registering in England a company in their own name which, on obtaining a licence from the patentees, might seriously interfere in the English market with the trade of the Motor Manufacturing Co. (Limited). Indeed, they offer to adopt effectual means of distinguishing the two companies in their advertisements and otherwise. At any rate no relief can be granted against the signatories, who have merely signed the memorandum and have no power to remove their company's name from the register.

FARWELL, J.—This appears to me to be a plain case. The plaintiffs are a well-known firm of motor-car manufacturers in Paris. Their reputation has extended to England for several years. Although prior to this action they had no agency and did not sell directly in England, they sold indirectly in the sense that their cars were bought and imported into England, both by the British Motor Co. (Limited), and by private individuals, so that England was one of their markets. The difficulty about England was that there were certain English patents, and the great majority of the cars formerly made by the plaintiffs could not be imported into England without the licence of the patentees. In many cases those licences were obtained, and the plaintiffs got the benefit of the English market, although they only got it indirectly in the way I have mentioned.

The defendants have registered a company in England under the name of the Panhard Levassor Motor Co. (Limited). The seven signatories are joined as defendants. There is absolutely no sort of excuse or justification for taking the name "Panhard Levassor." It is said that their object is not so much to annex the benefit of the plaintiffs' reputation as to shut out the plaintiffs from England and prevent them interfering with some other company which is not a party to this action. With that I have nothing to do. I judge the case as I have it before me, and I find seven persons signing the memorandum of a company with a capital of £100 divided into 100 shares of £1 each, with seven signatories with one share apiece, and therefore an actual paid or possibly unpaid capital of £7, for I do not know whether it has been paid or not. The question of the plaintiffs' right to an injunction is covered by *Collins Co.* v. *Brown,* but apart from that authority I should have thought it was plain that in a case such as I have stated, this court would certainly interfere to protect a foreign trader who has a market in England, in the way I have specified, from having the benefit of his name annexed by a trader in England who assumes that name without any sort of justification.

The only part of the case which has caused me a little difficulty is the claim against the seven signatories to the memorandum, who are the directors and sole shareholders of the company. The allegation is that they have fraudulently and wrongfully, and with intent to injure the plaintiffs in their said business, conspired together to form, and have formed, and procured the defendant company to be registered. Now, as I hold that the defendant company has the fraudulent intention of annexing the benefit of the plaintiffs' name, it follows that the persons who have formed that company and caused it to be registered are guilty in the eye of this court of a fraudulent conspiracy to carry into effect that which the company, an entity without body or soul, has attempted to do, and are liable in damages accordingly. It would certainly be exceedingly unfortunate if the court were to hold that a limited company with a very small nominal capital can be formed for the purpose of trying to do unlawful, fraudulent, and illegal acts, and that no one except the incorporated body is liable.

In my opinion, the injunction which I grant against the company involves a similar injunction against the signatories who have caused the company to be registered, and who remain the only directors and members of the company. No damages have been proved, and I do not think any have been suffered, because the defendant company has not carried on business; but as the signatories are the directors, and the sole shareholders in the company, I see no reason why I should not also grant the second injunction asked against them by the statement of claim. There will, therefore, be judgment for the plaintiffs for the two injunctions as asked, and the costs of the action, and the defendants must either get the approval of the Board of Trade to a change of the company's name, or they must wind up the company.

Solicitors, *John B. & F. Purchase; Vallance, Birkbeck, & Barnard.*

Chan. Div. } Oct. 25, 29.
Buckley, J. }

In re JOPLIN'S BREWERY CO. (LIMITED). (*a.*)

Practice—Company—Debentures—Registration—Extension of time—Form of order—Saving of prior rights—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 15.

Direction given by the judge for the insertion in orders for the extension of time for registration of debentures of a company of words saving the rights of parties acquired prior to registration.

Motion.

This was an application on the part of the company, under section 15 of the Companies Act, 1900, for an extension of the time for registration of certain second and third mortgage debentures which had been issued by the company on the 2nd of September, 1901, and

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

the twenty-one days for registration of which allowed by section 14 had elapsed.

A. L. Ellis, for the company.

BUCKLEY, J.—Section 14 of the Bills of Sale Act, 1878, enables a judge on being satisfied that the omission to register a bill of sale was due to inadvertence to extend the time for registration on such terms and conditions as he thinks fit. It has been the practice at Judges' Chambers for years in making orders under this section to introduce the words "but this order is to be without prejudice to the rights of parties acquired prior to the time when the bill of sale is actually registered," and these orders are made as of course, for the reason that by the insertion of these words the rights of absent parties are not affected. The application before me on Friday last was made under section 15 of the Companies Act, 1900, which is a provision of similar effect to section 14 of the Bills of Sale Act, 1878. The language of the former section is somewhat wider than that of the latter, but the variation makes no difference with regard to the point with which I am dealing. Under section 15 of the Companies Act, 1900, a security if not registered within a certain time is void as against the creditors of the company. These applications for an extension of time for registration are made without serving the creditors, and the order ought to be drawn up so as to save the rights of persons who have become creditors of the company before registration is effected, just as is done under section 14 of the Bills of Sale Act. I therefore direct that there shall be added to this order the words "but this order is to be without prejudice to the rights of parties acquired prior to the time when the security in question shall be actually registered." In my opinion these words should be inserted in all orders of this kind, except where there is good ground to the contrary, as where the circumstances are such that the creditors cannot be prejudiced.

Application granted.

Solicitors, *L. W. Byrne*, for *G. N. Joplin*, Liverpool.

K. B. Div. (Kennedy and Phillimore, JJ.) May 17; June 5, 1901.

DULIEU v. R. WHITE & SONS. (a.)

Negligence—Injury—Nervous shock resulting from fright—Damages—Remoteness.

Damages for injuries which result from a nervous shock occasioned by fright, although unaccompanied by any actual physical impact, may be recovered in an action for negligence if such fright is followed by consequent physical damage to the plaintiff. Such damages are not too remote.

Victorian Railway Commissioners v. Coultas (37 *W. R.* 129, 13 *App. Cas.* 222) *considered, and not followed.*

This was a point of law raised upon the pleadings ordered to be set down for hearing before the trial of the action, pursuant to ord. 25, r. 2.

The statement of claim was as follows:

"1. The plaintiff is the wife of Arthur David Dulieu, who carries on the business of a licensed victualler at the Bonner Arms, Bonner-street, Bethnal Green, in the county of London.

"2. On the 20th of July, 1900, the plaintiff was behind the bar of her husband's said public-house, she being then pregnant, when the defendants by their servant so negligently drove a pair-horse van as to drive it into the said public-house.

"3. The defendants were also negligent in entrusting the driving of the said horses and van to their said servant, who had no knowledge or skill in driving.

"4. The plaintiff in consequence sustained a severe shock, and was and is seriously ill, and on the 29th of September, 1900, gave premature birth to a child.

"5. In consequence of the shock sustained by the plaintiff the said child was born an idiot.

"The plaintiff claims damages in respect of the aforesaid matters."

The statement of defence, after denying the above allegations, pleaded as follows:

"3. The defendants submit as a matter of law that the damages sought to be recovered herein are too remote, and that the statement of claim on the face thereof discloses no cause of action."

G. Spencer Bower, for the defendants.

Ritter, for the plaintiff.

Cur. adv. vult.

June 5.—KENNEDY, J., read the following judgment: In this case the only question for the judgment of the court is in the nature of a demurrer. The defendants have pleaded, as a matter of law, that the damages sought to be recovered are too remote and that the statement of claim upon its face discloses no cause of action. The statement of claim alleges that on the 20th of July, 1900, the plaintiff, then being in a state of pregnancy, was behind the bar of her husband's public-house, and that the defendants, by their servant, negligently drove a pair-horse van into the public-house. It goes on to allege, in paragraph 4, that the plaintiff in consequence sustained a severe shock and was seriously ill, and on the 29th of September following gave premature birth to a child; and, in paragraph 5, that in consequence of the shock sustained by the plaintiff the child was born an idiot. Then follows the claim for damages. The only matter we have to decide is whether, if it is proved at the trial that the defendants' servant did negligently drive a pair-horse van, and by reason of his negligence drove it into the public-house where the plaintiff was, and did thereby cause her such a nervous shock as to make her ill in body and suffer bodily pain in the way alleged, the plaintiff has a good cause of action for damages under paragraph 4. The head of damage under paragraph 5 is rightly treated by the plaintiff's counsel as untenable. The defendants' counsel summed up his contention against the legal validity of the plaintiff's claim in the statement that no action for negligence will lie when there is no immediate physical injury resulting to the plaintiff. He has argued that bodily harm, which in the present case resulted to the plaintiff through the shock received by her through the inroad of the van and horses into the room in which she was, and which so acted upon her, in her then state of health, as to produce the bodily harm, was in point of law too remote a consequence of the negligence of the defendants' servant. My brother Phillimore and I agree that this contention ought not to be upheld; but as we arrive at the result by somewhat different courses of reasoning, and the case is, upon the authorities, not free from difficulty, and raises points of general interest, I think I ought to state the considerations which have led me to my conclusion. This is an action on the case for negligence—that is to say, for a breach on the part of the defendants' servant of the duty to use reasonable and proper care and skill in the management of the defendants'

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

van. In order to succeed the plaintiff has to prove resulting damage to herself, and "a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect": Shearman & Redfield on Negligence, cited in Beven on Negligence in Law (2nd ed.), p. 7. In regard to the existence of the duty here, there can, I think, be no question. The driver of a van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property. His legal duty towards all appears to me to be practically identical in character and in degree. I understood the plaintiff's counsel to suggest that there might exist a higher degree of duty toward the plaintiff sitting in a house than would have existed had she been in the street. I am not at all satisfied that this is so. The wayfarer in the street, as it seems to me, has as much right of redress if he is injured in person or in property by the negligence of another as the man who is lawfully sitting on a side wall or in an adjoining house. "The whole law of negligence assumes the principle *Volenti non fit injuria* not to be applicable" for reasons which Sir Frederick Pollock points out (Law of Torts (6th ed.) pp. 166-167) in a passage which follows the quotation which I have just made. There is no legal reason why because A. is using the street as he has a right to do instead of sitting indoors that B. should claim to be entitled to drive his van negligently over A.'s body or to destroy his clothing by negligently bespattering it with mud. The legal obligations of the driver of horses are the same, I think, towards the man indoors as to the man out of doors; the only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by negligent driving which does not break his ribs but shocks his nerves. Before proceeding to consider the objections to the maintenance of such a claim as that of the present plaintiff, it is, I think, desirable for clearness sake to see exactly what are the facts which ought to be assumed for the purposes of the argument. We must assume all that consistently with the allegations of the statement of claim can be assumed in her favour. We must therefore take it as proved to the satisfaction of a jury that the negligent driving of the defendants' servant reasonably and actually caused a nervous or mental shock to the plaintiff by her reasonable apprehension of immediate bodily hurt, and that the premature childbirth, with the physical pain and suffering which accompanied it, was a natural and a direct consequence of the shock. I may just say, in passing, that I use the words "nervous" or "mental" as interchangeable epithets on the authority of the judgment of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*, 37 W. R. 129, 13 App Cas. 222; but I venture to think "nervous" is probably the more correct epithet where terror operates through parts of the physical organism to produce miscarriage and illness; and where, as in the present case, these physical injuries are produced by the shock, the use of the epithet "mental," as I am led to think from a perusal of some of the relevant cases, requires caution, in view of the undoubted rule that merely mental pain, unaccompanied by any injury to the person, cannot sustain an action of this kind: Beven on Law of Negligence (2nd ed.), p. 77. Now, these being the assumed facts, what are the defendants' arguments against the right to recover damages in this action? First of all, it is argued fright caused by negligence is not in itself a cause of action; *ergo*, none of its consequences can give a cause of action. In *Mitchell* v. *Rochester Railroad Co.*, 151 N. Y. Rep. 107, at pp. 109, 110, the point is put thus: "That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright." With all respect to the learned judges who have so held, I feel a difficulty in following this reasoning. No doubt damage is an essential element in a right of action for negligence. I cannot successfully sue him who has failed in his duty of using reasonable skill and care towards me unless I can prove some material and measurable damages. If his negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constitutent of a right of action for negligence is lacking. "Fear," as Sir Frederick Pollock has stated in his work on Torts (6th ed., p. 51), "falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects." It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is without resulting damage as insufficient a ground of legal claim as the infliction of fright. That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying "impact" appears to me to be a contention both unreasonable and contrary to the weight of authority. Leaving out of sight as perhaps involving special considerations cases of wilful wrongdoing, such as *Wilkinson* v. *Downton*, 45 W. R. 525 [1897] 2 Q. B. 57, decided by my brother Wright in a civil court, and the authorities as to criminal responsibility which are cited in Mr. Beven's Negligence in Law (2nd ed., pp. 81 and 82), we have, as reported, decisions which go far, at any rate, in my judgment, to negative the correctness of any such contention: *Jones* v. *Boyce*, 1 Stark. 493; *Harris* v. *Mobbs*, 27 W. R. 154, 3 Ex. D. 268; and *Wilkins* v. *Day*, 32 W. R. 123, 12 Q. B. D. 110. All the three cases are cited by Wright, J., in his judgment in *Wilkinson* v. *Downton*, and he there explains the judgment given in favour of the plaintiff in each of them on the ground that the fright occasioned by the defendant's wrongdoing—to the passenger in the earliest case and to the horse in the two later cases—properly ought in the circumstances to be regarded as the direct and immediate cause of the damage which ensued. In other words, an action was held to lie though the only physical injury did not accompany but was occasioned by the fright. Further, we have directly in point the decision given in December, 1882, by the Common Pleas Division in Ireland under the presidency of the present Lord Morris in the unreported case of *Byrne* v. *Great Southern and Western Railway Co. of Ireland*, and affirmed on appeal in a judgment delivered by the late Sir Edward Sullivan, and the approval of the last mentioned case in 1890 by the Exchequer Division in *Bell* v. *Great Northern Railway of Ireland*, 26 L. R. Ir. 428. In the course of his judgment (at p. 442) Palles, C.B., expressly points out that in the circumstances of the case in *Byrne* v. *Great Southern and Western Railway Co. of Ireland* there was nothing in the nature of impact, and the parts of the evidence which he quotes clearly show that this was so. In *Victorian Railway Commissioners* v. *Coultas*, which was much relied upon by the defendants in the argument before us and which I shall have to refer to later on more fully, the Privy Council expressly declined to decide that "impact" was necessary. But if

"impact" be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced the physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been actual impact? It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I think, one important limitation. The shock, in order to give a cause of action, must be one which arises from a fear of immediate personal injury to yourself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C. or towards the property of C. That limitation was applied by Bruce and Wright, JJ., in the unreported case of *Smith* v. *Johnson & Co.*, referred to by Wright, J., in *Wilkinson* v. *Downton*. In *Smith* v. *Johnson & Co.* a man was killed negligently by the defendant in the sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed. The court held that this harm was too remote a consequence of negligence. I should myself, as I have already indicated, have gone a step further and said, upon the facts in *Smith* v. *Johnson & Co.*, that, as the defendants neither intended to affect the plaintiff nor did anything to affect him, there was no evidence of any legal duty towards the plaintiff, or of that absence of care according to the circumstances by which Willes, J., in *Vaughan* v. *Taff Vale Railway Co.*, 8 W. R. 549, 5 H. & N. 679, at p. 688, defines negligence. I observe that Sir Frederick Pollock begins the passage in his work on torts (6thed., p. 50), in which he discusses the point at issue before us, with a question which expresses it. The learned author puts the inquiry in this form: "Where a wrongful or negligent act of A. threatening Z. with immediate bodily hurt, but not causing such hurt, produces in Z. a sudden terror or nervous shock from which bodily illness afterwards ensues, is this damage too remote to enter into the measure of damages if A.'s act was an absolute wrong, or to give Z. a cause of action, if actual damage is the gist of the action?" In order to illustrate my meaning in the concrete, I will say in regard to the present case that I should not be prepared to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by sorrow or vexation arising from the sight of mischief being threatened or done either to some other person or to her own or to her husband's property by the intrusion of the defendants' van and horses. The cause of the nervous shock is one of the things which in my view the jury will have to determine at the trial. It remains to consider the second and somewhat different form in which the defendants' counsel put his objection to the right of the plaintiff to maintain this action. He contends that the damages are too remote, and relies much upon the decision of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*, to which I have had occasion to make a passing reference. In that case the principal circumstances were that the appellants' gatekeeper negligently invited the male plaintiff and his wife, who were driving a buggy, to enter the gate at a crossing when a train was approaching, and, though there was no actual collision with the train, the escape was so narrow and the danger so alarming that the lady fainted and suffered a severe nervous shock which produced illness and a miscarriage. The colonial court had entered judgment for the plaintiff for the amount found by the jury at the trial of the action brought against the appellants for negligence. The Privy Council reversed this decision. The principal ground for their judgment is formulated in the following sentence: "Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper." A judgment of the Privy Council ought, of course, to be treated by this court as entitled to very great weight indeed, but it is not binding upon us; and in venturing, most respectfully, not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher, M.R., in his judgment in *Pugh* v. *London, Brighton, and South Coast Railway Co.*, 44 W. R. 627, [1896] 2 Q. B. 248, at p. 250, as open to question; that it was disapproved by the Exchequer Division in Ireland in *Bell* v. *Great Northern Railway Co. of Ireland*, where, in the course of his judgment, Palles, C.B., gives a reasoned criticism of the Privy Council judgment which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavourably reviewed by legal authors of recognized weight, such as Mr. Sedgwick (On Damages (8th ed.), p. 861), Sir Frederick Pollock, and Mr. Bevan. Why, I venture to ask, is the "accompaniment of physical injury" essential, as, if I read aright the passage which I have quoted, the Privy Council asserts it to be? For my own part, I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or physiologist told us that nervous shock is in itself truly an affection of the physical organism. Let it be assumed, however, that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate than damage which arises contemporaneously? "As well might it be said" (I am quoting from the judgment of Palles, C.B., 26 L. R. Ir., at p. 439) "that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." "Remoteness," as a legal ground for the exclusion of damage in an action of tort, surely means, not severance in point of time, but the absence of direct and natural casual sequence; the inability to trace, in regard to the damage, the *propter hoc* in a necessary or natural descent from the wrongful act. As a matter of experience, I should say that the injury to health which forms the main ground of damages in an action of negligence, either in cases of railway accidents or in "running down cases," frequently is proved, not as a concomitant of the occurrence, but as one of the *sequelæ*. To one other point only in the judgment in *Victorian Railway Commissioners* v. *Coultas* will I now refer. The judgment proceeds, at p. 225: "If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury." I find, with all respect, a difficulty in appreciating this argument, because in that case, as is to be assumed in this, there

was evidence of actual physical illness, and not only of a mental pain, and the defendants, if the verdict on this part of the case was against the weight of evidence, should have moved for a new trial. The case standing as it did, it is difficult to see how a decision on the appeal in favour of the respondents would have sanctioned the maintenance of an action for merely mental hurt. The counsel for the defendants on the argument before us referred also to two American cases. One I have already mentioned—*Mitchell* v. *Rochester Railroad Co.* The Court of Appeals of the State of New York did, no doubt, there hold both, as I have already stated, that no recovery may be had for fright, and also that it could not properly be said that the plaintiff's miscarriage in that case was the proximate result of the defendants' negligence. Shortly, the facts were that the plaintiff whilst waiting for a tramcar was nearly run over by the negligent management of the defendant's servant of a car drawn by a pair of horses, and, owing to terror so caused, fainted and lost consciousness, and subsequently had a miscarriage and consequent illness. The court, upon the present point, base their decision, to use their own language at p. 110, upon a view that the injuries "were plainly the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated and over which the defendant had no control." I can only say, with due deference to the learned judges who so decided, that I cannot assent to the view they thus took upon the assumed state of facts, which was that the defendants' driver by negligent driving threatened the plaintiff with immediate bodily injury, and by that threat caused her terror which caused the physical injuries above mentioned. Whether the terror was, in the circumstances, a natural and reasonable result of the threat was a question of fact for the jury. It must be taken, I think, that they found so. But if the damage thus occasioned ought to be held not to be proximate, it seems to me to be difficult to maintain the correctness of the decisions in *Jones* v. *Boyce*, *Wilkins* v. *Day*, and *Harris* v. *Mobbs*. It may be admitted that the plaintiff, as regards the personal injuries, would not have suffered exactly as she did, and probably not to the same extent as she did, if she had not been pregnant at the time; and no doubt the driver of the defendants' horses could not anticipate that she was in this condition. But what does that fact matter? If a man is negligently run over or otherwise negligently injured, it is no answer to the sufferer's claim for damages that he would have suffered less injury or no injury at all if he had not had an unusually thin skull or an unusually weak heart. The other American case cited for the defendants is *Spade* v. *Lynn and Boston Railroad*, 60 Amer. State Rep. 393, decided by the Supreme Judicial Court of Massachusetts in 1897. The court there held, as expressed in the head-note of the report, that in an action to recover damages for an injury sustained through the negligence of another there can be no recovery for a bodily injury caused by mere fright and mental disturbance. But whilst the decision is thus, in the result, in accord with the New York case, it is given upon very different grounds. In his full and interesting judgment Allen, J., who delivered the decision of the court, admits fully that which, as I have just pointed out, the New York court denied—viz., that damages for physical injury caused through fright which is occasioned by negligent conduct are not in principle too remote. "A physical injury," he says, "may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and, if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not be also a recovery for the mere mental suffering when not accompanied by any perceptible physical effects." This reasoning obviously concedes more than the present plaintiff asks, for she asks to be compensated in damages only if she proves physical injury. The learned judge then proceeds to state why the right to recover, which on principle ought to exist, is in his view properly refused. "It would seem, therefore," he says, "that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule." He goes on to develop his argument on the ground of public policy—the hardship of holding persons bound to anticipate and guard against anything but "the probable consequences to ordinary people" (in which it is clear he considers the consequences of fright should not be included), and the risk of opening "a wide door for unjust claims which could not be successfully met." He refers, amongst other cases, to the *Victorian Railway Commissioners* v. *Coultas*, and it will be seen on a reference to the report of that case, 13 App. Cas. at p. 226, that, while the judgment of the Privy Council proceeds mainly upon the view that the damages are too remote, it does also claim justification from the requirements of public policy and the danger which would arise from a contrary decision on account of "a wide field opened for imaginary claims." Naturally one is diffident of one's opinion when one finds that it is not in accord with those which have been expressed by such judicial authorities as those to which I have just referred. But certainly, if, as is admitted, and I think rightly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy, and in order to repress the possible prosecution of unrighteous or groundless actions of the like character. Such a course involves the risk of denial of justice to meritorious claims, and it necessarily implies a certain degree of distrust which I do not share in the capacity of legal tribunals to get at the truth in this class of case. So far as I am entitled to speak from experience, I see no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright than in weighing the like evidence as to the effects of nervous shock through a railway collision or a road-car accident where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time. I have now, I think, dealt with the authorities and the arguments upon which the defendants rely, and I have done so at greater length than I should have wished to do but for the general interest of the points involved and the difficulties which the conflicting authorities undoubtedly present. In this conflict I prefer the decisions of the Irish courts; they seem to me to constitute strong and clear authorities for the plaintiff's contention. It is suggested on the part of the defendants that the applicability of the judgment in *Bell* v. *Great Northern Railway Co. of Ireland* is impaired by the fact that the female plaintiff in that action was a passenger on the defendants' railway and as such had contractual rights. It appears to me that this can make no practical difference whatever. There was no special contract; no notice to the railway when they accepted her as a passenger that she was particularly delicate or peculiarly nervous

and liable to fright. The contractual duty existed, as it often does exist, concurrently with the duty apart from the contract; but the one is in such circumstances practically co-extensive with the other in the rights which it gives and the correlative liabilities which it imposes. I hold that if on the trial of the action the jury find the issues left to them as the jury found them in *Bell* v. *Great Northern Railway Co. of Ireland* after the direction of Andrews, J., which was approved by the Exchequer Division, the plaintiff will have made out a good cause of action.

PHILLIMORE, J., read the following judgment: The discussion in this case has ranged over wide ground, and many points have been brought to our notice. It will not, I hope, be thought that these matters have been omitted from consideration or not materially considered because I am able to put my conclusions into a comparatively narrow compass. I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B., as by terrifying B., and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind. I think, for example, that it may well be, as the Exchequer Division in Ireland held in the case of *Bell* v. *Great Northern Railway Co. of Ireland*, that a railway company has a duty to its passengers to use its best endeavours to convey them, not merely safely, but securely in the etymological sense of the word; and that, when it fails and physical damage accrues to a passenger through the fright which its failure occasions, the passenger may have an action. I cordially accept the decision of my brother Wright in *Wilkinson* v. *Downton* that everyone has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements, and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrongdoer was that of speech. I think there is some assistance to be got from the cases where fear of impending danger has induced a passenger to take means of escape which have, in the result, proved injurious to him, and where the carrier has been held liable for these injuries, as in *Jones* v. *Boyce*. The limit of the applications of this principle is shown in *Adams* v. *Lancashire Railway Co.*, 17 W. R. 884, L. R. 4 C. P. 739. These principles and cases seem to establish that terror wrongfully induced and inducing physical mischief gives a cause of action. Against them is to be set the weighty authority of the *Victorian Railway Commissioners* v. *Coultas*. This is an authority to be treated with the utmost respect, but no more binding upon us than it was upon the Exchequer Division in Ireland. Still less are the special reasons for the decision binding. I do not know whether I should or should not have come unaided to the same conclusion as that which was in that case arrived at; but I think it possible that I should, though not for the reasons which have prominence in the judgment. It must be conceded on behalf of the plaintiff that to give rise to a cause of action the act which terrifies must be either wilful or negligent. Negligence is a breach of duty owed to the person complaining. It is not certain that as between people travelling on highways there is any duty so carefully to conduct yourself or your vehicle as not to frighten others. It is a duty so carefully to conduct yourself or your vehicle as not to cause collision or some other form of direct physical damage. The gatekeeper in the *Victorian Railway case* was careless in opening the gate, and would have rendered his railway company liable if there had been actual impact, even if the actual impact was produced by a wrong manœuvre taken under the influence of fear: see per James, L.J., in *The Bywell Castle*, 28 W. R. 293, 4 P. D. 219, at p. 223. But it may be, nevertheless, that in such circumstances a railway is not liable if there be escape of actual impact, however narrowly. There are dangers sometimes from the traffic at Charing Cross which might frighten not only an inexperienced and elderly country woman, but an experienced and cool citizen, the ideal *vir constans* from whom ἐμπειρία makes ἀνδρεία. But if physical consequences were induced by terror so produced, it may be that there would be no cause of action. This principle is suggested, though in language perhaps open to criticism, by Baron Bramwell in *Holmes* v. *Mather*, 23 W. R. 869, L. R. 10 Ex. 261. It may be—I do not say that it is so—that a person venturing into the streets takes his chance of terror. If not fit for the streets at hours of crowded traffic, he or she should not go there. But if a person, being so unfit, either permanently or temporarily, stays at home, he or she may well have a right to his or her personal safety, giving to these merely the meaning given by my brother Wright, J.; and wilfully or negligently to invade this right, and so induce physical damage, may give rise to an action. In the case before us, the plaintiff, a pregnant woman, was in her house. It is said that she was not the tenant in possession, and could not maintain trespass *quare clausum fregit* if this had been a direct act of the defendant and not of his servant, as it was. This is true; her husband was in possession. But none the less it was her home, where she had a right and on some occasions a duty to be; and it seems to me that if the tenant himself could maintain an action his wife or child could do likewise. It is averred that, by reason of the careless driving of the defendants' servant, a pair-horse van came some way into the room, and so frightened her that serious physical consequences thereby befell her. If these averments be proved, I think there was a breach of duty to her for which she can have damages. The difficulty of these cases is, to my mind, not one as to the remoteness of the damage, but to the uncertainty of there being any duty. Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference. The learned counsel for the plaintiff has put it that every link is physical in the narrow sense. That may or may not be. For myself it is unimportant. The American cases to which we have been referred are worthy of much attention and respect. As to the decision of the Court of Appeal in *Mitchell* v. *Rochester Railroad*, I would make the same observations as I have made on the *Victorian Railway case*. I accept the reasoning in the later case of *Spade* v. *Boston*, and I think I should have come to the same decision, but I should not have expressed it in such broad and sweeping language. The following passage, 60 Amer. State Rep. at p. 395, which I only discovered after I had written the first part of my judgment, exactly expresses what I mean up to a certain point: "Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and thereby requiring precautions which are not usual or practicable for travellers in

general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness." *Aliter* in this case, where the plaintiff is not a passenger or a traveller. Our judgment must be for the plaintiff with costs. I do not, however, think that she has any lawful claim for damages in respect of the matter stated in paragraph 5 of her statement of claim. This, indeed, her learned counsel has abandoned.

Judgment for plaintiff.

Solicitors for the plaintiff, *H. Dade & Co.*

Solicitors for the defendants, *William Hurd & Son.*

House of Lords.

From C. A. (England). July 30, 1901.

COWLEY *v.* COWLEY. (*a.*)

Peer—Title or dignity of honour acquired by marriage—Re-marriage to a commoner—Damage—Injunction.

The High Court has no jurisdiction to entertain questions of dignity.

A peer's wife obtained a divorce and then married a commoner, but continued, on a bona fide *claim of right, to use her title as a peer's wife.*

Held, (1) *such questions are vested in the House of Lords, not as an appellate court from a court of law, but in its own inherent jurisdiction as the Committee for Privileges;* (2) *no legal wrong was committed by the lady so continuing to use her former title.*

Decision of Court of Appeal (49 *W. R.* 19, [1900] *P.* 305) *affirmed.*

Appeal from the order of Court of Appeal (49 W. R. 19, [1900] P. 305) (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.), reversing decision of Barnes, J. (48 W. R. 463, [1900] P. 118).

In this case Lord Cowley sought to restrain a lady, who was formerly his wife, but who had since married Mr. R. E. Myddleton Biddulph, from using the style or title of "Countess Cowley."

The facts are shortly stated by Lord Macnaghten.

Haldane, K.C. (*Bargrave Deane, K.C.,* and *C. J. Willock* with him), for the appellant.

Lawson Walton, K.C. (*Mark L. Romer* with him), for the respondent.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—In this case I wish to say that if the matter were *res integra,* and if what I am about to say did not arise, the reasoning of the Court of Appeal appears to me to be just and sound, and I should move that the appeal be dismissed with costs; but I think it is material that one should consider for a moment whether or not any such suit can be entertained. I do not wish to express any final opinion as to whether such a suit could be maintained if there were the elements of annoyance or malice, though I confess there is a doubt in my own mind whether even in such cases an action on the case would not be very difficult to maintain; but given, as it is assumed here, that there was no malice and no annoyance, and no assertion of marriage, either implied or expressed, so as to give rise to a suit of jactitation, the simple broad question being whether this lady, who, it is not doubted, *bonâ fide,* claims a right, and intends to claim a right, to be known by the name by which during the whole period of her married life she undoubtedly was known, can retain that right notwithstanding the divorce, it seems to me absolutely clear that no such suit could be entertained.

More than one reason occurred to my mind in considering this question. I do not know what jurisdiction the Divorce Court had in dealing with this matter at all. It seems to have been assumed that it had reference to the divorce; but counsel for the appellant has very candidly admitted that it is not a question of divorce at all, nor has the Divorce Court by any stretch of its jurisdiction any right to determine this question simply because there has been a divorce suit, and the lady who by her petition has succeeded in getting rid of her husband now claims to call herself by the name by which she has been known. What jurisdiction Barnes, J., had to entertain this question I confess I am wholly at a loss to understand. And, further, it seems to me that if counsel for the appellant had been successful in suggesting that this was a case in which there was a sort of territorial right in respect of a dignity, he would only by another process show that he was hopelessly out of court; because what jurisdiction has any court of law to determine a question of a dignity? I am not aware of any such jurisdiction. If indeed there was a claim to such a right, the jurisdiction would be vested in this House, not as an appellate court from a court of law, but in its own inherent jurisdiction as the Committee for Privileges. It has been laid down that no question of honour can be tried by a court of law. Where there was a question of a fine quoted in Collins, and ancillary to it a question of dignity, it was said by the learned judges in that case that they were not going to allow by a side-wind a matter outside their jurisdiction to be brought in upon the pretence that there is a question which the ordinary courts by an action in the Court of Common Pleas had a right to determine.

Under these circumstances it appears to me there is not the faintest shadow of a foundation for this suit; and I am a little surprised that in the elaborate judgment of the learned judge (Barnes, J.) he should never have considered at all what a curious thing it would be in our jurisprudence if, because a thing might be considered convenient, and, I will assume for the sake of argument, desirable, therefore you could invent a new jurisdiction and apply it to a matter with which that court has no concern whatever.

Under these circumstances I have thought it right to say this much. I think it is not a very abstruse point. It is admitted by everybody that no such case was ever heard of before, and that the question might equally arise, not only in the case of two persons divorced, but even in the case of a courtesy title to certain ranks of peerage. That a court of law should concern itself with such a question as that is certainly not a thing to be desired; but it is enough to say that for a court of law there is no foundation for any jurisdiction, and there is no precedent to be found where such a question has ever been decided. Under these circumstances, for these additional reasons, besides those which the Court of Appeal have given, and with which I entirely concur if the matter was to be reasoned upon that footing at all, I think this appeal ought to be dismissed, and with costs; and I move accordingly.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lord MACNAGHTEN.—I am of the same opinion, and substantially on the same grounds.

It seems to me that the present controversy between Earl Cowley and the lady who was his wife is a matter with which no court of law has any concern.

The position of the parties is clear enough. In 1889 Lady Violet Neville married Lord Dangan. On his succeeding to the earldom of Cowley she became Countess Cowley, and entitled to the privileges of peerage. She obtained a divorce from her husband on the ground of his misconduct. It was conceded, and I suppose rightly conceded, that there was nothing in her position as the divorced wife of Earl Cowley to deprive her either of the title or the privileges which she had acquired as his wife. Then she married a commoner, and thereupon she lost her right to the title of countess and the privileges of peerage. Still everybody knows that it is a very common practice for peeresses (not being peeresses in their own right) after marrying commoners to retain the title lost by such marriage. It is not a matter of right. It is merely a matter of courtesy, and allowed by the usages of society. In accordance with this usage the respondent still calls herself Countess Cowley. The appellant complains. He says she has no right to do so. That is perfectly true. And then he claims an injunction from a court of law to prevent his late wife using that designation on the ground that it is an invasion or disturbance of the dignity which belongs to him as an incorporeal hereditament.

The answer seems to be twofold. If it be a disturbance of a dignity, that is a matter not within the cognizance of a court of law. The right to a peerage can only be tried before the peers. And it was declared long ago that "it appertained altogether to the royal prerogative to give such honour, reputation, and placing to his counsellors and others his subjects as should be seeming to the King's most excellent wisdom."

There is another answer which, to my mind, is equally conclusive. It is that Lord Cowley has not suffered either legal wrong or damage. Counsel for the appellant argued that a legal wrong had been done to him because the respondent without colour of right claimed to share or participate in his incorporeal hereditament—the earldom of Cowley. For my part I must confess I cannot understand in what sense it can be said that the lady claims to participate or share in this hereditament. I can understand the Dowager Lady Cowley complaining. It is, or may be, inconvenient to her that another lady should use the same title which may have the effect of relegating her to the less coveted style of a dowager. But it seems to me that there is no substance in Lord Cowley's complaint, and that he at least suffers no damage. And, therefore, even if the matter were cognizable at law, I should hold that there was no right to an injunction. There is no precedent for such an order, and I should be very sorry that this House should make a precedent in this case.

Lady Dacres' case, on which counsel for the appellant relied, seems to me not to be altogether in his favour. This House declared on the opinion of the judges present that the Lady Dacres, by marrying Mr. Chute, a commoner, had lost her privilege of peerage in law. But still it is to be observed that the resolution of this House speaks of her as "the Lady Dacres," from which I think it may be inferred that the adherence to that style, even after the privilege of peerage was lost, was not so shocking a thing as counsel would have your lordships to understand.

I am, therefore, of opinion that the appeal must be dismissed with costs.

Lord JAMES OF HEREFORD.—There being no pleadings in this case, we must look at the arguments of counsel to learn upon what ground the present application for an injunction is made. From those arguments I gather that the injunction to restrain the respondent from terming herself Countess Cowley is based on the following grounds: It is said that Lord Cowley being in possession of the earldom holds an incorporeal hereditament, which is property, in the possession of which he alleges he has been disturbed by the retention of the name of Countess Cowley by the respondent. To establish the alleged disturbance I understood counsel for the appellant to argue at the bar that the respondent by virtue of her marriage with a commoner has lost her right to bear the title of nobility. It will be observed that this proposition in no way calls in aid the fact of a divorce having been decreed. If the respondent had been a widow, the same question would have arisen.

The argument was founded upon a *dictum* in Coke on Littleton (1 Co. Lit. 16*b*), which says: "And there is a diversitie betweene a woman who is noble by descent and a woman that is noble by marriage. For if a woman, that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still; but if she gaine it by marriage, she loseth it if she marry under the degree of nobilitie; and so is the rule to be understood, *Si mulier nobilis nupserit ignobili desinit esse nobilis.* But if a dutchesse by marriage marrieth a baron of the realme, she remaineth a dutchesse and loseth not her name, because her husband is noble, *et sic de cæteris.*"

It may be that this *dictum* of Lord Coke is quite correct. I express no opinion upon that. But the disregard of it in my opinion does not constitute a disturbance of any property. Effect may be given to it if, for instance, in Parliament the respondent sought to plead her privilege of Parliament. But the case now before this House is by way of appeal from a decree of a court of law, and in my opinion such courts have no power to control the action of a person who, under the conditions existing in this case, assumes the name, not for the purposes of fraud or molestation, but on a *bonâ fide* claim of right.

I further concur with the views which have been expressed by the Lord Chancellor and Lord Macnaghten, that the jurisdiction to try all questions of right connected with peerage and all dignities connected with peerages lies in this House and not in a court of law.

Lord BRAMPTON.—I so entirely agree in the judgment which has been pronounced by the Lord Chancellor that I think it is unnecessary to add one word.

Lord LINDLEY.—By letters patent under the great seal, dated the 11th of April, 1857, the dignity of the earldom of Cowley was granted to the then Baron Cowley and the heirs male of his body. The dignity so granted was an incorporeal hereditament—Cruise's Digest, ch. 3, p. 169, tit. xxvi. Dignities, c. 2; and such hereditament was granted for an estate in tail male. In 1895 this estate became vested in the present earl, and it has ever since been and is now vested in him.

In 1889 Earl Cowley married Lady Violet Neville. She was a daughter of a peer, and therefore of noble blood; but she was not a peeress in her own right. When her husband became Earl Cowley she acquired an estate for life in his dignity: see Co. Lit. 16*b*, and Cruise's Digest, tit. xxvi., ch. 1, par. 86. That has been the law ever since Coke's time, and it is not, I believe, disputed. Her life estate was not determinable on the death of her husband, but was determinable on a second marriage with a commoner: see Co.

Lit. 16. So long as her life estate in the earldom was undetermined she was entitled to the honour and dignity of a peeress and to the name attached to it.

In 1897 the Countess of Cowley obtained a divorce from her husband; but, although the divorce dissolved her marriage, it did not determine her life estate in the peerage which she has already acquired. There is no principle of common law, nor is there anything in the Divorce Act, which produces any such result. The case of *Fendall* v. *Goldsmid*, 2 P. D. 263, 26 W. R. Dig. 153, goes far to show that so far as name is concerned the countess was entitled to continue after the divorce to use the name and style which she had previously acquired the right to use.

In July, 1898, however, Lady Cowley married a commoner, and it seems clear that, although she did not use the position to which she was entitled by birth, her life estate in the dignity which she had acquired by marriage ceased: see Co. Lit. 16*b*, and Cruise's Digest, cited above. All the authorities are clear upon that point, whatever doubt there may be as to the effect of a lady marrying a peer lower in dignity than her first husband. But although by her second marriage the Countess Cowley ceased to be a peeress, the usages of society are such as to entitle her by courtesy to her old name. The entry in the journals of this House in the case of Lady Dacres shows the recognition of this usage by the Committee for Privileges of this House. The question we have to determine is whether Earl Cowley is entitled to an injunction from the High Court to restrain his former wife from still calling herself Countess Cowley. Barnes, J., decided this question in favour of the earl, and granted an injunction restraining her "from using the style or title of Countess Cowley." The Court of Appeal reversed this decision, and the earl has appealed to this House to restore it.

We are not now sitting as a Committee for Privileges to determine a claim to the dignity created and granted by the letters patent of 1857. The lady calls herself, and is called in society, Violet, Countess Cowley; she makes no claim to the peerage or to the dignity which is vested in her late husband; and if she did the High Court would not be the proper tribunal to entertain or decide such a claim. Chapter 6 of Cruise on Dignities is conclusive on that. The appellant's counsel urged your lordships to take the view that the countess was disturbing the earl in the enjoyment of his dignity—that is, of the incorporeal hereditament to which he is entitled. On reference to the authorities relating to actions on the case for disturbance, I can find no instance of an action for disturbing a dignity; nor any instance of an action for disturbing any incorporeal hereditament in the absence of actual damage. Damage is essential to the violation of such a right: see Com. Dig., "Action on the Case for Disturbance," and Roscoe on Real Actions, 353.

The controversy between the parties is thus reduced to a dispute about the use of a name as distinguished from a dignity. Speaking generally, the law of this country allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss. Your lordships will find the law on this subject examined in a very instructive note from the pen of the late Mr. Waley in 3 Davidson's Conveyancing, pt. 1 (2nd ed.), p. 283. The judgment of Tindal, C.J., in *Davies* v. *Lowndes*, 1 Bing. N. C. 597, and of the Privy Council delivered by Sir Robert Phillimore in *Du Boulay* v. *Du Boulay*, 17 W. R. 594, L. R. 2 P. C. 430, leave no doubt about it. Sir Robert Phillimore in *Du Boulay* v. *Du Boulay* stated that "in this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger." Then, after alluding to trade names, the judgment continues: "The mere assumption of a name which is the patronymic of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which our law affords no redress.

If this is true of strangers, it is *a fortiori* true of persons who have once acquired the right to use a name which the usages of society allow them to retain. The Court of Appeal held, and in my opinion correctly held, that the earl's rights are not infringed by what his late wife insists on doing. To grant the injunction asked by the earl would not, therefore, be legally just. The inconvenience of granting it is great and obvious, having regard to the long-established and well-known usages of English society. Nor is it immaterial to bear in mind that the Sovereign can at any moment confer on the countess the privilege of using the name, style, and title which the earl complains of her using. The case cannot be brought within section 25, clause 8, of the Judicature Act, 1873, which authorizes the High Court to grant an injunction in all cases in which it shall appear to the court to be just or convenient to do so. The decision of the Court of Appeal ought in my judgment to be affirmed, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors, *Wontner & Son; Lewis & Lewis.*

Court of Appeal.

From Chan. Div.
(Lord Alverstone, L.C.J., and Vaughan Williams and Romer, L.JJ.) } Oct. 30, 31.

PELHAM CLINTON *v.* DUKE OF NEWCASTLE. (*a.*)

Will—Construction—Estate in special tail—Issue—Gift to A. if he marries a gentlewoman and has issue male, to such issue male and their male descendants.

A testator willed and bequeathed certain estates to his son Charles. Then after providing that another son might redeem those estates, he continued: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which," then over.

Held, that Charles took an estate in tail male special. Decision of Buckley, J. (49 *W. R.* 12), *affirmed.*

This was an appeal from a decision of Buckley, J. (reported 49 W. R. 12).

The facts were as follow:

Henry Pelham, fourth Duke of Newcastle, by the fifth codicil, dated the 14th of August, 1846, to his will dated the 31st of January, 1814, willed and bequeathed to his son, Lord Charles Pelham Pelham Clinton certain estates, and after providing that his eldest son, the Earl of Lincoln, might purchase and redeem those estates for certain sums of money, the testator continued: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which," then over.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

At the date of the codicil Lord Charles was unmarried.

On the 10th of August, 1848, he married Elizabeth Grant.

On the 12th of January, 1851, the testator died.

In the same year Lord Charles executed a disentailing deed of the properties in question.

On the 14th of December, 1894, Lord Charles died.

The plaintiff in the present action was the eldest son of the marriage of Lord Charles with Elizabeth Grant.

The action came on under an order dated the 18th of June, 1900, made upon the application of the defendant, the present Duke of Newcastle, and upon the admission by him of the marriage, and that Elizabeth Grant was a fit and worthy gentlewoman, and that the plaintiff was the eldest son of the marriage, and that Lord Charles died as above stated, for the determination of the point of law, whether upon the true construction of the fifth codicil the same codicil conferred on Lord Charles a mere life estate, or an estate in tail male or in tail, or an estate in fee simple.

Buckley, J., held that the codicil gave Lord Charles an estate in special tail male.

The plaintiff appealed.

Eady, K.C., and *Peterson*, for the plaintiff.—The will shows an intention on the part of the testator to give Lord Charles only a limited interest and not an estate tail. It is said that he takes an estate tail by virtue of the rule in *Wild's case*, 6 Rep. 17, but that rule does not apply to a case like the present, where the gift to the son is immediate, but the gift to the issue is a future contingent gift. There is no gift of an estate tail here at all, but there is a plain intention to give this property in succession.

They referred to *Byng* v. *Byng*, 10 W. R. 633, 10 H. L. Cas. 171.

Haldane, K.C., *Vaughan Hawkins*, and *Benn*, for the defendant.—Upon the construction of the will, independently of the rule in *Shelley's case*, 1 Rep. 93*b*, a special estate tail descended to Lord Charles which he could have barred whether issue were born or not. *Page* v. *Hayward*, 2 Salk. 570, really decides this case.

They also referred to *Roe dem. Dodson* v. *Grew*, 2 Wils. 322; *Bowen* v. *Lewis*, 9 App. Cas. 890, 33 W. R. Dig. 245; *Van Grutten* v. *Foxwell*, 46 W. R. 426, [1897] A. C. 658; *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823; Preston on Estates, vol 2, p. 412; Fearne on Contingent Remainders, p. 423 (10th ed.).

Eady, K.C., replied.

Lord ALVERSTONE, L.C.J.—In this case I think Buckley, J., has arrived at the right conclusion, and I doubt whether I could add anything which would be of assistance to anybody beyond what appears in Buckley, J.'s, judgment; but inasmuch as the case is one of considerable importance, and certainly raises a very interesting point of law, I think I ought to give the reasons I have formed for concurring in his judgment.

The short point which arises is this: In the year 1851, Lord Charles Clinton executed a disentailing deed. It is said that at that time he had only a life interest, or, at any rate, that he had not an estate tail. Buckley, J., has held that on the true construction of the fifth codicil Lord Charles took, not a mere life interest, but an estate in special tail male. I think it would be convenient if I say what I have to say upon the authorities before I come to the construction which I put upon the codicil itself, because it seems to me that in this case, as I suppose in nearly every, if not every, other will case, we have to gather the intent from the words that the testator has used.

Now I do not wish to go so far as to say that *Page* v. *Hayward* is an authority conclusive upon the point. It seems to me to be an instance of the way in which a will containing not dissimilar provisions is to be construed. I need not read the words of that will again; they appear from the report and have been referred to in Buckley, J.'s, judgment, and in the text-books to which reference has been made. The court came to the conclusion upon the words there that the estate devised to Mary was a good estate tail, and so was the estate to Elizabeth, but it was an estate in special tail—it was to the heirs male begotten of her body by a Searle, and they further resolved this, which seems to me to be of importance, that the words "upon condition," though they are express words of condition, should be taken to be a limitation. Therefore I think the court only got at the particular estate tail which they held Mary had, by looking at the subsequent words which they construed as words of limitation, or, as I understand, words which define the estate that Mary got. It is perfectly true that in the third resolution they say that the estate tail of Mary and Elizabeth, or either of them, does not cease by marrying one that is not a Searle, for the remainder over was in default of both conditions, and in the meantime the estate was limited to her and the heirs male of her body. It seems to me that that is only a conclusion that follows from the fact that they had previously found upon the words of the will that Mary had a special estate tail.

Then with regard to the case of *Dodson* v. *Grew*, 2 Wils., at p. 322. Again I wish to say that I do not wish to be thought to suggest that it is an authority conclusive of this case, but it does again seem to be a case in which the court looking at the whole will came to the conclusion that there was an estate tail, and for reasons which I think to be applicable, if I may use no stronger expression, to this particular will. The court there thought that of two intentions both could not be carried out, there being a doubtful expression, an estate being given for life to the testator's nephew George, and after his decease to the issue male of his body lawfully begotten. The court came to the conclusion that the words as to issue male were so strong that they showed the general intention was that there should be an estate tail, and that, therefore, they must over-ride the particular words which would have indicated only a life estate in George. Of course they did attach great importance to the use of the word "issue" in the will. They were of opinion that the testator used the word "issue" in the will as indicating by the use of such term what may be called a legal intention, and, therefore, in that case—that again being a case in which there was something that might be construed as a condition—the court came to the conclusion that there was an estate tail in the person who otherwise would have been the tenant for life.

Lastly, I want to say a word about *Roddy* v. *Fitzgerald*. I am not surprised to see that the learned common law judges were equally divided—they were not really equally divided, because Baron Martin did not give a judgment because he was interested in some previous case which would have been affected by the judgment, but I notice that Lord Wensleydale, one of the learned lords, observed that the judges would have been equally divided had Baron Martin given his opinion.

That, to my mind, is one of the cases in which it is very difficult to say that any ordinary individual reading that will would have come to that conclusion, looking at the power that was given to the man to

appoint as he thought fit to children; and again, I do not think that case is what I may call an authority which is conclusive. I think it is very important, because it shows how far the House of Lords thought it right to go in giving effect to the word "issue," and in giving effect to words which in that will would *primâ facie*, and but for the existence of the subsequent direction, have been held to confer an estate for life. I think Mr. Vaughan Hawkins is at any rate justified in saying that it does limit to a very large extent any construction we might put upon the words "issue male," which are also found in this will.

Now that being the state of the cases which Buckley, J., has thought material, and which I think are material as affording a guide in laying down the principles, although not conclusive, I now go back to say in a very few words why I consider this codicil confers an estate tail.

It is a curiously drawn codicil. I think one great answer to the main argument of Mr. Swinfen Eady is that he presumes in the whole of his argument that there is a bequest in the first instance to the son Charles of all the estates, and severs that from what comes afterwards. He referred only indirectly to the 28th section of the Wills Act. I would only note in passing that that only says that "where real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple or other life estate unless a contrary intention appears by the will." I think that the reasonable construction of this codicil is what Buckley, J., has put upon it. The testator began by saying what he was going to do with his estates; he was going to bequeath them to Charles, and, of course, if that had stood alone Charles would have had them absolutely after the Wills Act. Then there are some intermediate words as to there being mortgages, and as to there being a right to sell, or power of sale, and as to giving Lord Lincoln, the eldest son, the power to purchase the estates. Then I think the scheme of the codicil is to pick up again what was to be done with the property which is first referred to, because there is a direction that the money which is to take the place of one property is to go with the limitations of this will. I read that as picking up again the sentence which commenced with the words "I bequeath to Charles"—that is to say, to my son Charles—"if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants." Now it was not disputed that there would be an estate tail in the issue; at least it was not substantially disputed. The real question, and the important question, we have got to consider is, Do these words constitute an estate tail in Charles? I do not think, speaking for myself, if the words had been "to my son Charles if he marry a fit and worthy gentlewoman and has issue male," and if there had not been a previous difficulty raised by the gift to Charles, the case would have been arguable; but I think, looking at the sentence as a whole, it is quite clear that he was speaking throughout of the limitations in his will, and meant to limit the estate whether it was the estate which he bequeathed or the money which represented the estate to his son Charles and to his issue male after him if he married a fit and worthy gentlewoman. Therefore, I think that the same line of reasoning on which the learned judges in the three cases which I have referred to came to the conclusion that those words were sufficient to confer an estate tail, and not a mere life estate or other estate, is equally cogent to bring us to the conclusion that Buckley, J., arrives at.

VAUGHAN WILLIAMS, L.J.—I have come to the same conclusion. The case is a difficult one, but after all it is a case in which we have to construe the terms of a particular will, and it is not a case in which we have to lay down, according to my understanding of the case, any general rule; and that being so, I am content to deliver judgment now without further consideration. I give, as I think one ought to do in such a case—that is, in the case of the construction of a will of doubtful terms—all weight to the conclusion which has been arrived at by the judge of first instance, and I am not prepared to differ from his conclusion. But I say of this case, as Lord Cranworth says of all such cases in *Roddy* v. *Fitzgerald* upon p. 871: "I must begin by saying that the decision of these cases is never very satisfactory because one cannot but feel that the real intention which the testator had in view is very frequently defeated instead of being carried into effect, but the duty of the court is only to interpret the language of the will attending to certain well-known rules or canons of construction." I have no inclination to favour such rules one jot more than previous authority compels me to favour them, because I am very strongly of opinion that such rules have a very constant tendency to prevent the courts that have to construe wills from giving effect to what is often the obvious intention of the testator so far as his words are concerned; if one leaves out of consideration the technical meaning or the technical canon of construction which judges have thought fit to adopt, and which very often is not present to the mind of the testator at all, even though that testator's will may have been drawn with the assistance of a professional lawyer.

I make these observations here because it seems to me that it is very difficult to doubt in the present case but what one is defeating by the conclusion to which one comes the manifest intention of the testator. Can anyone doubt that the real object of this testator was to cut out of his inheritance a son of whose conduct he did not approve, and to substitute for him one after the other his younger sons and their descendants one after the other in succession taking estates tail. That was, so far as I can see, the plain intention of this father, and we are putting a construction upon this will which facilitated the very contrary happening, and in fact has led to the very contrary happening, because we are holding that all these estates tail might be barred by suffering a recovery in the way in which they have been barred, and by that means the general intention of the testator would be utterly defeated. But still, as Lord Cranworth says, the duty of the court is only to interpret the language of the will according to certain well-known canons of construction, and we have to determine here according to those canons of construction whether the children here take as purchasers, or whether they really take under the limitation established by the user of the words "issue male." Before I have done with that, I want to say this with regard to some authorities that have been cited—I am going to base my decision on *Roddy* v. *Fitzgerald*. I of course do not say that strong arguments might not be based on the other authorities which have been cited. My lord has expressed very strongly his view that an argument may be based upon those authorities, but I do wish to say one word about one of them. So far as *Page* v. *Hayward* is concerned, you start with the creation of a plain estate tail in respect of the issue begotten of the body of Mary Price. Now, having got those words you go on, and you get words which not only *primâ facie* are conditions, but which are by the very terms of the will expressed to be conditions; and then it was held that notwithstanding that—that is to say, notwithstanding the words being express

condition, the words might be taken as a limitation. It was a very strong thing to do that in that case—at least so it seems to me; but it is not to be forgotten that it was a case in which there clearly was an estate tail immediately upon the death of Nicholas Searle, and, therefore, the question was really not a question merely of construing the condition as a condition on the happening of which there was to come into existence on the death an estate tail, but a question of the application of a condition which was a condition to defeat the estate tail. If one looks at the resolution one sees that the third resolution says that the estate tail of Mary and Elizabeth or either of them does not cease by marrying one that is not a Searle. Therefore, it is obvious that you have got an estate tail wholly independently of the words of that condition, and then what is said is, having got an estate tail wholly independently of that condition, are we to treat the words which formally are conditional as conditional, or as words of limitation? And it is said, having regard to that fact, that you start with an estate tail, that you are in such a case entitled to treat the words as words of limitation and not as a condition. I do not say that that prevents the case applying. I have not thought it out sufficiently to see whether—the judgment is very short—the terms of the resolution are such as make it a case of general application, but I do say that that difficulty made me look about to see whether there were any more cogent reasons than the application of that case which would lead me to the same conclusion.

Now with regard to the case in 2 Wils. of *Dodson* v. *Grew* I want to say that there Wilmot, C.J., decides the whole case upon the intention of the testator. He points out that the testator really has made an inconsistent will and that you cannot carry it out as a whole. He then looks about for what he calls the general intention, and for what he calls the particular intention, and then he proceeds to say that no one can doubt what that general intention was, and that you cannot carry that out unless you so construe the words as to create an estate tail. That is what seems to me to have been the intention of the judgment of Wilmot, C.J. Then, having arrived at that conclusion, the Chief Justice said the word "issue" is either a word of purchase or a word of limitation as would best effectuate the intention of the testator. It is a plural word, and takes in all the sons of George Grew, and the words "issue male of his body and heirs male of the body of such issue," mean only that they were not all to take at a time—that is, not to take distributively, but in succession, as if he had said for ever.

Having said that much about those two cases, let me pass on to *Roddy* v. *Fitzgerald*. As I understand that case it is a very strong case to show that the *primâ facie* meaning of the word "issue" is such that it is a word of limitation, and not a word of purchase, and I so read the word here; and it seems to me that when once you read the word in that way and add to it the clause which is found afterwards—that is to say: "to his son Charles if he married a fit and worthy gentlewoman and had issue male, to such issue male and their male descendants, in failure of which"—and then comes the limitation in favour of the testator's son Thomas and a series of other limitations, and I do not think it was denied that each of them in that sequence subsequent to that first one create an estate tail. In that state of things, having got the word "issue" used in that sense, and this clause, "in failure of which," it looks very much as if *Roddy* v. *Fitzgerald* applied exactly. But Mr. Swinfen Eady says, "No, it does not," because, although you have got the word "issue" used as a word of limitation, and it is necessary to look at "issue" exactly as if it were heirs of the body, and although you have got in this case, as in *Roddy* v. *Fitzgerald*, the condition or the provision "in failure of which issue," yet he says, "The word 'issue' in respect of which there might be a failure there refers to a general failure of issue, and here it is not of general failure of issue, but it is something more limited." I am afraid I do not understand the meaning of that observation. As to the issue, there is a limitation that if he married a fit and worthy gentlewoman and had issue male, to such male issue and their male descendants, I do not see anything in that which prevents the same argument arising as would arise from the failure of general issue. But I suppose I have not duly appreciated that argument. At all events, I am perfectly clear myself in this case there is nothing in the words "issue male and their descendants" which gives anything to Mr. Swinfen Eady's clients as purchasers. I say that I have come to that conclusion upon consideration of the arguments which have been addressed to us. Having said that, I have only one more observation to make, and that is this, that I do not read the words following, "if he marry a fit and worthy gentlewoman and have issue male," as words which create a condition at all. It seems to me that the whole of those words are words of limitation and not of condition. Having said that I do not think I can usefully add anything.

ROMER, L.J.—I also think that Buckley, J., has put a right construction upon this codicil, and I need only add a few remarks to what has already been said.

In the first place, I think that the reference in the codicil to the marriage of Charles with a fit and worthy gentlewoman is not a condition properly so called, and that Charles takes some estate in the property devised, whether he marries as mentioned in the codicil or not. The case of *Page* v. *Hayward* is a strong authority to support that view; indeed, that was a much stronger case in that direction than the present. Nor do I think that according to the true construction of this codicil there was a gift in fee to Charles with an executory devise over in case he married as provided and left male issue by that marriage. The codicil clearly speaks of the various successive gifts as being by way of limitation, and where the court can give effect to gifts in a will such as are found in this codicil by way of legal remainders the court will prefer to do so rather than treat the gifts as arising by way of executory devise. That being so, it appears to me that there are left but two possible constructions of this codicil. First, that the codicil created a gift to Charles in special tail male; or, secondly, that it created a gift to Charles for life with remainder to certain of his male issue by the marriage mentioned as purchasers in tail male. Now of these two possible constructions I think the first is the true one. By that you can give effect to what appears to me the true intent of the testator, without adding or implying anything that is not stated on the face of the codicil. I think that the intent was so far as possible to give such an estate to Charles as would on his death if he had married as provided pass to his male issue by the marriage in the ordinary course of succession, and that it was only on ultimate failure of that issue that the next gift was to take effect by way of remainder. In his limitation the testator uses the word "issue," which is a word of well-known legal import, and one peculiarly apt and proper to create an estate tail. Moreover, when the wording of the remainder given to the son Thomas after the determination of the estate given to Charles and his issue is considered it is clear that the testator regarded Thomas's issue by the marriage indicated as

succeeding by virtue of the estate given to Thomas, and I think it is plain on this codicil that at any rate the estate given to Thomas was an estate in special tail male, and I cannot think that the testator intended the estate given to Charles to be different to that which was to be given to Thomas if Thomas succeeded.

On the other hand, the second construction which I have mentioned above gives rise to considerable difficulty. In the first place it is noticeable that the testator does not expressly give to Charles an estate for life, and I do nor think we ought to imply such a limitation, the court not being obliged to do so. Whether, if the testator had used the words "estate for life" in describing the interest given to Charles, that would have been sufficient for the appellant's purposes we need not consider. Secondly, though it is true that the testator speaks of the male descendants of the male issue of Charles by the particular marriage, and that it is unnecessary to do that, if the gift was to Charles in special tail male, yet we know that testators often do add unnecessary words, and if the testator in speaking of Charles's male issue intended to give them an estate tail as purchasers the question arises, which of the issue are meant to be purchasers. It is said the sons of Charles only. But the testator has not said so, and I do not see why the court should imply it unnecessarily, nor do I think he can be taken to have meant that all the issue living at Charles's death should be regarded as purchasers. He has not said so, and I do not think he could have intended sons' sons to take simultaneously as purchasers. Moreover, the gift over is on failure of all the male issue, and their male descendants, and I do not see why the court should be driven unnecessarily to suppose he implied cross-remainders in tail. I think that the limitations of this codicil are more simply and properly carried out by holding that there is a gift to Charles in special tail male as decided by Buckley, J. It is true that by reason of the fact that a special estate tail can be barred the testator's intention may in one sense be defeated, but it is only because that is the legal effect of a special tail male, and a consideration of that kind, that such an estate can be barred, cannot possibly affect in the eyes of the court the legal effect of the words which the testator has used in this codicil. For these reasons I agree in thinking that the appeal should be dismissed.

Solicitors, *Blair & W. B. Girling; Richard Smith & Sons*, for *Marshalls & Bate*, East Retford.

High Court of Justice.

Chan. Div. } July 4, 1901.
Kekewich, J. }

RICHARDS *v.* DE WINTON.
RICHARDS *v.* EVANS. (*a*.)

Common—Compulsory purchase—Extinction of commonable rights—Compensation—Apportionment—Jurisdiction—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 102, 103, 104—*Inclosure of Land Act*, 1854 (17 & 18 *Vict. c.* 97), *ss.* 15, 16, 17.

Where common lands have been taken compulsorily for public purposes, and a committee of commoners has been duly appointed under section 102 *of the Lands Clauses Consolidation Act*, 1845, *and has received the compensation money, the court has no jurisdiction to interfere in determining who are the persons interested in such money, as machinery for determining them has been provided by the various Acts of Parliament relating to the subject.*

The Merthyr Tydvil Urban District Council, under the powers conferred by the Merthyr Tydvil District Council Waterworks Act, 1895, had taken certain portions of two commons for constructing their waterworks. This Act incorporated the Land Clauses Act and also extended the application of section 2 of the Commonable Rights Compensation Act, 1882, by enlarging the list of improvements in which the money so paid might, by the desire of the commoners, be expended.

By two agreements dated the 18th of May, 1895, the council had agreed with D. T. Jefferys, as agent for the commoners of the two commons, to pay £40 per acre for the extinction of the commonable rights. Meetings of the commoners had been duly convened and held, and the defendants had been appointed committees of the respective parishes. The committees had ratified the agreements of the 18th of May, 1895, and had in their hand the moneys paid by the council for the extinction of the rights.

The plaintiff claimed a declaration that he was entitled to these sums as sole commoner.

The defendants raised the objection that the court had no jurisdiction to entertain the action.

Warrington, K.C., and *R. Rowlands*, for the plaintiff.—These commons have been taken for public purposes, under section 104 of the Lands Clauses Consolidation Act, 1845; the committee are authorized to enter into an agreement with the promoters to receive the compensation money, and to apportion it among the persons interested. The court has power under that Act to decide who are the persons interested: *Fox* v. *Amhurst*, L. R. 20 Eq. 403, 24 W. R. Dig. 134.

S. T. Evans, K.C., and *R. J. Parker*, for the defendants.—The committee was elected by the persons having commonable rights over the land, it is part of the plaintiff's case that this committee has been duly elected, and he cannot now be heard to say that he is the only commoner. This action is not maintainable, as the committee have to decide who are the persons entitled, and in case of dispute the matter must be referred to the Board of Agriculture. [KEKEWICH, J., referred to *Nash* v. *Coombs*, 16 W. R. 663, L. R. 6 Eq. 51.]

Warrington in reply.—The Acts are silent as to the way in which the persons interested are to be ascertained, and there is no machinery for determining who are the proper persons qualified to vote at the meeting to determine to which of the improvements mentioned in the Act the money may be laid out. The court therefore has jurisdiction to interfere in settling these questions.

KEKEWICH, J.—Notwithstanding the difficulty and novelty of the question falling for decision, I do not think I shall gain anything by deferring judgment.

Now, what is the question? The plaintiff's counsel has pointed out in his reply that there is no machinery for determining who are the proper persons to say whether or not this money shall be laid out in some of the improvement purposes which are sanctioned by the general and special Acts of Parliament. This is a singular omission, and what it would be right to do, if the question were now before me whether the money be laid out in that manner or not, I need not pause to determine. That is not the question which I have to consider. The plaintiff claims as his the

(*a*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

whole of the money in the hands of the defendants, who are the committee or committees appointed under the provisions of the Land Clauses Consolidation Act, 1845. I shall speak of them as the committee for the sake of simplicity, because though they are two for the purposes of the present action they both stand in exactly the same position. At present the plaintiff claims, not that the money should be laid out in improvement purposes, but that it should be paid to him because he is the sole commoner. It is a strange phrase, but still that is his position. The committee, on the other hand, say that they are prepared to do their duty, that it is for them to determine, and they are prepared to determine for themselves, whether he is or not; or if it becomes a question which they cannot properly determine, that the Act provides machinery by which that can be determined by a competent tribunal. That is the question which I must determine—namely, whether I ought to intervene—in fact whether I have any power or right to intervene—between the plaintiff and the committee, and say that the committee is not to do its duty and fulfil the obligations cast upon it by the Acts of Parliament. Now what are these obligations? The fasciculus of clauses under the head of common lands in the Lands Clauses Consolidation Act, 1845, runs from sections 99 to 107, and except one particular provision—to which I shall presently refer—there is no occasion to go through them in detail. The Act contemplated that in the course of taking lands for the purposes of railways and other public works the promoters of the undertaking—as they are always called—would have to buy up common rights, and those who have had any experience in such matters know very well that the Legislature was well advised in providing for such a state of facts, because it has occurred often and must occur again and again so long as public works are authorized by statute—that is to say, compulsory powers are vested in public bodies. So that the Legislature provided, in short, that there being no trustees, as is often the case when lands are taken compulsorily, or no tenant for life, still less any tenant in fee who can make a bargain, something must be done to ascertain what money should be paid for the acquisition of common rights, and the Legislature provided that a meeting should be summoned of those who claimed to be interested, and they were to determine what should be done. They would appoint a committee and the committee were authorized to make a bargain binding upon the commoners and to receive the money. It was not at all difficult machinery, by no means complicated, and fairly straightforward. No doubt it was contemplated that it would work very well because in most cases there is not any serious doubt who are the commoners. Then the committee having been appointed and having made their bargain with the promoters of the undertaking, of course the money which they had received had to be distributed in some way or another among those whom the committee represented, and section 104 of the Lands Clauses Consolidation Act, 1845, provides thus: "and such compensation when received shall be apportioned by the committee among the several persons interested therein according to their respective interests." That is the whole thing; they were left to do it, and under that, it seems to me, they were bound to ascertain who were the "several persons interested therein." They were bound to ascertain what the particular interests were, not only of commoners but of commoners who had varying rights, and then to distribute the compensation money among those parties according to their respective interests. Difficulties might arise, but the Legislature does not seem to anticipate that any would arise, and as a matter of fact I believe that it is only now and again that difficulties have arisen. What would happen if they arose it is rather hard to say. The case to which I called attention in the course of the argument—*Nash* v. *Coombs*—shows that the court will be open to the committee to come as stakeholder for directions in the character of trustees, and they might come to the court by a bill as it would have been in those days, and now I suppose by an originating summons or at any rate by a writ to ascertain what they should do with the money which was intrusted to their care; and no doubt some means would be found to make them do their duty if they did not show the proper alacrity in performing it. But I do not see how the court could have determined, even under that section, who were the several persons interested therein if it was objected that there was no jurisdiction. I suggested the case of a committee threatening and intending to exclude some person who had an interest, and whether he could maintain an action for an injunction to prevent their distributing the money without making proper provision for him. As at present advised, I think if any such action were brought, and it were resisted, it would fail on the ground that it was not competent for the court to interfere. Of course I am not thinking of a case of fraud or of the committee improperly refusing to hear and determine certain claims, or anything of that kind, for everything that was wrong in that sense no doubt the court would find a remedy. But the duty seems to me to be cast upon the committee to apportion the money "among the several persons interested therein according to their respective interest," and though it is impossible to say it is a new right because of the substitution of the right to money for the right of common, still it is in that sense a new right created by statute with machinery for ascertaining the extent and limits of the right, and to such a case as that it is difficult to apply the common law, and to say that the court has jurisdiction when the particular procedure or remedy has been given by statute. So it seems to me to stand under the Land Clauses Consolidation Act, 1845. The next statute with which I have to deal is the Inclosure Act of 1852. I do not think I need dwell on that. The defendants' counsel has properly called my attention to it because in construing these Acts it is certainly desirable to have them under one's eye and compare them. There is a difference in that Act from the Act of 1845, to which I am next coming, and it is a difference which one must regard in construction; but as regards the general provisions of the Acts and the effect of them, I do not think I need dwell upon the language of that Act, although I have not forgotten it. Then comes the Inclosure of Land Act of 1854, and we must remember that it is really an Act for amending the Land Clauses Consolidation Act of 1845, as regards the fasciculus of clauses to which I have called attention. Section 15 of the Act presupposes that the common rights had been taken by the promoters of the undertaking and that the bargain is complete. The Act does not substitute any new provision at all, or any varied provision for determining how the bargain is to be made. It supposes that the meeting has been called, the committee has been appointed, the committee has met the promoters of the undertaking, and a bargain has been struck, and more than that, that the money has been received by the committee. So far the provisions of the Land Clauses Consolidation Act are not touched at all. But then it seems to have occurred to the Legislature that there might be a difficulty in carrying out that apportionment by section 104 of the Lands Clauses Consolidation Act, with which I have just been dealing. The phrase is

peculiar. It says: "Where . . . the majority of such committee shall be of opinion that the provisions of such Act"—that is, the Land Clauses Consolidation Act—"for the apportionment thereof"—that is, the money—"cannot be satisfactorily carried into effect," and so on. I was somewhat puzzled at first to know what was the meaning of "cannot be satisfactorily carried into effect." I think it means no more than this: if difficulties occur in the apportionment which the committee do not see their way to solve. That is what I think it means. Then what are they to do. They are to make an application in writing to the commissioners—that is to say, a body which was a public office, which was then the Inclosure Commissioners, which is now the Board of Agriculture, to call a meeting of the persons interested in such compensation money. They are to apply to the commissioners to call a meeting, and then the commissioners are to call a meeting if they please. The Act of 1852 distinctly recognized their rights to say Yes or No. There is nothing to interfere with that in this Act, and if the commissioners neglected to call such a meeting—that is to say, did not accede to the application, then again we might possibly have been in a fix; but we have not reached that state yet. As any hesitation on the part of the commissioners of the Board of Agriculture cannot be reasonably anticipated, I think I may pass that by as one of the contingencies with which I am not now called upon to deal. Then the meeting that they are to call is to determine whether or not such compensation money shall be apportioned under the provisions of this Act. Now, up to this time I have failed to find any means of disposing of the money except by apportionment. The provisions, which were much discussed and to which I referred just now, with regard to applying the money to public improvements, had not then seen daylight. They had not occurred to anyone up till then, at any rate had not been mentioned by the Legislature, and the only thing to do, as far as I can see, was either to leave the money where it was, which can hardly be supposed to be right, or to apportion it among the persons interested as directed by section 104 of the Lands Clauses Consolidation Act. Therefore I am sorry to say I do not exactly see what was the point of the meeting being called to determine "whether or not such compensation shall be apportioned under the provisions of this Act." My difficulty in seeing what was in contemplation by the Legislature is increased by this, that there is no provision here for the event—extremely unlikely no doubt, but still a possible event—of the meeting determining that the compensation money should not be apportioned. In that event nothing happens at all and what would really be done in that deadlock I am not fortunately called upon to say and do not propose to attempt to determine. The rest of the Act proceeds on the footing which no doubt is the reasonable and likely one, that the meeting having been called by the commissioners, it will determine that the money shall be apportioned. From that we start. It is of course open to the plaintiff to say that we have not arrived at that, that there has been no application to the Board of Agriculture, that they have not called a meeting and the meeting therefore has not determined whether the compensation money should be apportioned, and, therefore, that it is useless to consider what is to happen when that has been done. I think the answer to that is this, that if unfortunately the deadlock which I pointed out occurs, the court must decide for itself whether there is any solution within the power of the court of such deadlock. It has not occurred and I must deal with the matters as they stand, giving credit to the committee for a desire to do their duty as they say they are prepared to do and of course giving credit to the Board of Agriculture that it will use the discretion vested in it properly and for the benefit of all concerned. Then I must assume, as the Act does for the present purpose, that the meeting will be called, and that the money shall be apportioned. Then what is to happen? The money will be paid into the bank so that it will be under the control of the Board of Agriculture; then section 17 contains the procedure which seems to me to present no difficulty at all when once you have got to it. The Inclosure Commissioners direct an inquiry, and they appoint an assistant commissioner for the purpose, and they, through him, are "to proceed to ascertain, determine, and award the names of the parties who are entitled to such estates, rights, and interests in the said common and commonable lands, and the amount or value of their respective shares, rights, and interest therein, and the proportionate amount of the price so to be paid as aforesaid for such estates, rights, and interests to which each party so entitled as aforesaid is entitled in respect of his share, right, or interest as aforesaid." That is to be binding. When once you get to that stage it seems quite impossible for the High Court or any other court to intervene except perhaps on the invitation of the Board of Agriculture. I do not say they might not have the assistance of the court if they wished, but it is left entirely to them to determine. As I have already said, it does not seem to me to be an objection to these provisions that the Board of Agriculture has not yet been called in, and cannot yet be called in because the preliminary steps have not been taken. Here we have still a stronger provision than even the Lands Clauses Consolidation Act of 1845. In that Act we have only the provision which I have read directing the committee to apportion the money. Here we have not only a direction to the commissioners to do it, but a carefully considered procedure with their duties and powers expressed in very plain as well as elaborate language. With that it seems to me I cannot interfere, and have no right to interfere. Again, the plaintiff must come under the Act as against the committee to claim money which was received by the committee under the procedure appointed by the Act, and claiming under the Act he must claim in the manner pointed out by the Act, and through the tribunals appointed by the Act. That being my opinion on these Acts, I need only give a passing word to the Commonable Rights Compensation Act, 1882, and to the special Act of Parliament by which the Merthyr Tydvil District Council took this land. It had not been thought of before that there was or might be a way of applying the money to be paid for commonable rights which would be equally beneficial to the commoners as dividing between them sums which no doubt in some cases are extremely small; and so this Act of 1882 provides that the money may be laid out in certain improvements, and the special Act, which incorporates the Lands Clauses Consolidation Act, and, of course, these other Acts enlarge those powers. That is all. It says that the improvements which are mentioned in the Act of 1882 shall include also some others which are mentioned specifically in the special Act. That does not affect the apportionment in the least. One is bound to look at those Acts, of course, to see the whole scheme of legislation, but I have not to construe the Act of 1882 at all. I have only to see how far it assists me in determining what is the meaning of the previous Act. There no doubt comes in the plaintiffs' counsel's objection. If the money is to be laid out in this way, who is to say whether it shall be laid out or not, or whether it shall be laid out for any particular purpose? My answer to that is, that

at present I have nothing to do with that. When the question arises, if it unfortunately comes before me, I will do my best to deal with it; but at the present moment all that I have to determine is whether the committee, being willing to discharge the duties cast upon them by Parliament, there being not the slightest objection that they do not intend to discharge those duties honestly and to the best of their abilities, and that if there are any difficulties which they cannot see their way to solve they will not have recourse to the easy means which Parliament has pointed out to them. I think my duty is to say that I cannot interfere with the committee under the present circumstances. The action must be dismissed with costs.

Judgment for the defendants.

Solicitors, *Schultz & Sons*, for *Gwilym James, Charles, & Davies*, Merthyr Tydvil; *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *D. T. Jeffreys*, Brecon.

Chan. Div.
Cozens-Hardy, J. } Aug. 6, 8, 1901.

In re MAGDALEN COLLEGE, OXFORD. (*a.*)

Practice—Brokerage—Compulsory purchase—Payment out of court—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80.

The proceeds of land compulsorily sold were paid into court and invested. On application for the sale of the investments and payment out of the money by the party absolutely entitled,

Held, that the party who paid the money into court must pay the brokerage on the sale of the investments.

Land was compulsorily sold under the provisions of the Lands Clauses Consolidation Act by the President and Scholars of Magdalen College, Oxford, to the London County Council and the London School Board.

The purchase-money was by order of the court invested in railway stock and in Consols.

The college authorities were now desirous of investing the purchase-money in land.

They petitioned the court for the payment of the money to the Board of Agriculture (under the provisions of the Universities and College Estates Act, 1858 to 1880 and 1898) and asked that the council and school board should be ordered to pay the brokerage on the sale of the funds.

Vernon Smith, K.C., and *Borthwick*, for Magdalen College.

Frederic Thompson, for the county council.

C. T. Mitchell, for the London School Board.

COZENS-HARDY, J.—The only question on this petition is whether the parties who paid the money into court are bound to pay the brokerage on sale of the *interim* investments. I expressed some surprise that a point of this kind should be still open. I have caused inquiries to be made of the registrars, and am told that the distinction taken by counsel for the county council has never been, so far as they know, raised before; and in practice the brokerage has in all cases been treated as part of the costs and paid by the party who paid the money in. And though there is no direct authority, the practice seems to me to be right. Section 69 of the Lands Clauses Consolidation Act provides several ways in which the money paid into court may be applied. Now it has been settled long ago that in cases where there has been an *interim* investment in securities, and the money is required to be invested in land, all the costs of getting the money required for investment, including brokerage, must be paid. In other words, the money which is to be applied for the purposes mentioned in the section is the whole purchase-money, or the value of the *interim* investments regarded as a gross sum without any deduction. It is said that this brokerage is not within the reasonable costs the payment of which is provided for by section 80. I think that section means that the person entitled is to have an option whether he will have the stock or the money. If he chooses the latter, I cannot see anything in principle, and certainly there is nothing in the authorities, to make me draw any distinction between a case where the money is to be invested and one where it is to be paid out. The brokerage must be paid as part of the costs.

Solicitors for the petitioners, *Routh, Stacey, & Castle.*

Solicitor for the London County Council, *W. A. Blaxland.*

Solicitor for the London School Board, *C. E. Mortimer.*

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div.
Farwell, J. } Nov. 13.

In re RICHARDS.
UGLOW *v.* RICHARDS. (*a.*)

Will—Construction—Power superadded to a life interest—Insufficiency of income—"To use as she may deem expedient"—Practice—Representation by separate counsel.

Where a testator gave the income of his estate to his wife for her life with remainder to residuary legatees, but directed that "in case such income shall not be sufficient, she is to use such portion of my said real and personal estate as she may deem expedient,"

Held, that she had a general power of appointment during her life over the capital.

In re Pedrotti's Will, 27 *Beav.* 583, 8 *W. R. Ch. Dig.* 100, *distinguished.*

Adjourned summons

By his will dated the 9th of July, 1898, Richard Richards, a retired miner, who died on the 12th of August, 1900, gave the income of all his real and personal estate to his wife, Jane Richards, for her life, and also directed that, "in case such income shall not be sufficient, she is to use such portion of my said real and personal estate as she may deem expedient," and that on her decease what was left of his real and personal estate should be divided in shares among named residuary legatees.

The testator's estate consisted of sums amounting to over £3,000, deposited at a bank at the time of his death in the joint names of himself and his wife.

Shortly after his death his widow had caused the said sums to be transferred into her own name, and, having subsequently withdrawn them, now refused to account for them, but claimed them as her absolute property.

This summons was therefore taken out by an executor of the will, who was also one of the residuary legatees, to have it determined whether the said sums formed part of the testator's estate, or were the absolute property of the widow.

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

J. Austen Cartmell appeared for an executor—the judge having intimated that in cases like the present a trustee or executor could not appear by the same counsel as a beneficiary interested in arguing the case (see similar ruling of Farwell, J., noted in 46 SOLICITORS' JOURNAL, 2).

W. H. Cozens-Hardy, for a plaintiff, who was a residuary legatee.—All that the widow can have at the outside is the income supplemented by so much of the capital as will provide her with a maintenance suitable to her station in life: *Re Pedrotti's Will*, 27 Beav. 583, 8 W. R. Ch. Dig. 100. £1 a week is the sum so suitable; and the residuary legatees are entitled to a declaration that she cannot come upon the capital except for the sum which would make up that needed for her maintenance.

Jenkins, K.C. (*Ashton Cross* with him), for the defendant, the widow.—*In re Pedrotti's Will* is distinguishable, not having the words "as she may deem expedient," which are used in the present case; it is also an old case and does not lay down any principle. The defendant has a general power of appointment over the capital.

FARWELL, J.—The only question causing me difficulty is whether I am bound by *In re Pedrotti's Will*. I have come to the conclusion that the words are different in the two cases, and that here there is a gift with a general power of appointment. In *In re Pedrotti's Will* the testator bequeathed the income of his residue to his wife for life, and proceeded: "And I further devise, in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal." The widow's power of resorting to the capital was there contingent on the happening of some external event. In the present case there are the words "to use such portion as she may deem expedient"; in *In re Pedrotti's Will* there was no such guide, so that the court adjudicated by holding that the testator meant an amount for maintenance suitable to the donee's station in life and gave accordingly. In the present case the apparent contingency depends simply on the will of the wife. the words "in case such income shall not be sufficient" being merely introductory. The phrase is ambiguous; it may mean, as held in *In re Pedrotti's Will*, "sufficient for her wants," or it may mean, as I think it does here, "sufficient for her desires." It is left to her to fix the amount, so that if she deems it expedient to say that the income is insufficient and to add to it, she has a general power of appointment over the capital. There are cases which show that although the words used are words of contingency, yet the gift can be held to be dependent on the will of the donee and not on the contingency. I therefore declare that upon the true construction of this will the defendant is entitled to a general power of appointment by deed or writing during her lifetime over the capital of the testator's residuary real and personal estate, in addition to a tenancy for life of the income, and that the sums mentioned, together with interest thereon, are her absolute property.

Solicitors, *Robbins, Billing, & Co.*, for *Marrack, Nalder, & Hoskin*, Truro; *Kingsford, Dorman, & Co.*, for *E. Lawrence Carlyon*, Truro.

Chan. Div. } Buckley, J. } Nov. 6.

In re FORD.
FORD *v.* FORD. (*a.*)

Administration—Inoperative will—Intestacy—Advances to children—Hotchpot—Statute of Distributions (22 & 23 *Car.* 2, *c.* 10), *s.* 5—1 *Will.* 4, *c.* 10.

Where a will has become inoperative by reason of the sole executor and universal devisee and legatee dying in the lifetime of the testator, there is an intestacy within section 5 of the Statute of Distributions, and the provisions of that statute, as to children sharing in the residue bringing their advances into hotchpot, apply.

Adjourned summons.

The testator in this case devised and bequeathed all his real and personal estate to his wife absolutely, and appointed her his sole executrix. This constituted the whole will.

He died in September, 1900, a widower, having survived his wife, who died in 1892.

Letters of administration with the will annexed had been granted to the two defendants.

The testator left several children, to some of whom he had made advances in his lifetime.

This summons was taken out by two of the children of the testator for the determination of the question whether on the distribution of the residuary estate the persons entitled to share therein ought to bring into hotchpot sums of money or benefits given to them by the testator on his lifetime, and for administration of the real and personal estate.

Terrell, K.C., and *James G. Wood*, for the plaintiffs.—There is no intestacy here within the Statute of Distributions, as there is a will and an appointment of an executor, and the statute does not apply to a partial intestacy: *Vachell* v. *Jeffereys*. Prec. Chan. 169; *Cowper* v. *Scott*, 3 P. Wms. 119; *Wheeler* v. *Sheer*, Moseley, 288; *Edwards* v. *Freeman*, 2 P. Wms. 435; *Walton* v. *Walton*, 14 Ves. 318; *Wilkinson* v. *Atkinson*, Tur. & R. 255. *Williams* v. *Arkle*, 24 W. R. 215, L. R. 7 H. L. 606, turned on a matter of construction. No doubt there was a *dictum* of Jessel, M.R., in *Stewart* v. *Stewart*, 29 W. R. 275, 15 Ch. D 539, at p. 543, to the contrary; but we submit that that *dictum* was not a correct statement of the law. The case of *Harte* v. *Meredith*, 13 L. R. (Ir.) 341, we admit, is against us, but that case is not binding upon the court, and is, we submit, wrong. Immediately upon the appointment of the executor, the executor became a trustee for the next-of-kin in case there should be a lapse, and the court does not permit the trust to fail because of the death of the trustee. The statute 1 Will. 4, c. 40, making the executor trustee of the undisposed-of residue for the persons entitled under the statute does not apply, as here the executor was intended to take beneficially. It is true the executrix died in the lifetime of testator, but how can the amount of the shares of the children be made to depend upon the accident of the executor surviving.

Astbury, K.C., and *Gatey*, for the defendants.—In all the cases cited the executor survived the testator. Here there was a total intestacy. Moreover, the *dictum* of Jessel, M.R., in *Stewart* v. *Stewart* is good law. We also rely on *Harte* v. *Meredith*, where under exactly similar circumstances the advancement provision of the statute was held to apply.

BUCKLEY, J.—I have to decide whether the testator has died intestate within section 5 of the Statute of Distributions (22 & 23 Car. 2, c. 10). To a plain man

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

it would seem that, as he had made an instrument which became wholly inoperative, he had died intestate. But I am told that is not so, and several cases have been referred to as showing this. In all the cases cited, except the Irish case, there was an appointment of an executor who survived the testator and proved the will, and there was therefore no intestacy as to the legal interest in the personalty. There was also in these cases a disposition of some part of the beneficial interest. Now what was the principle of those cases? They discriminate between total and partial intestacy—that is, as to the beneficial interest. Now it is said that the will here is not wholly inoperative, but that it must be read as if a testator had appointed X. Y., an executor, as a trustee for A. B., and then, if A. B. dies in the lifetime of the testator, that there arises a trust for the next-of-kin, and that the will is an operative one. Suppose that is so, and X. Y. survives, and there is therefore a valid appointment of an executor, then the statute 1 Will. 4, c. 40 applies, and the executor is to be deemed a trustee of the undisposed-of residue for the next-of-kin who are ascertained according to the Statute of Distributions. The residue is not distributed among those persons equally, but the widow takes a third and the children two-thirds, according to the provisions of the statute. But it is said I must disregard the provisions of the statute as to advances made by the testator. It is difficult to say that you would follow the statute as to the shares taken by the widow and children, but not as to advances made to the children being brought into hotchpot. As to the *dictum* of Sir W. Grant in *Walton* v. *Walton*, that where the executor holds in trust for next-of-kin a child advanced need not bring the advance into hotchpot, Sir George Jessel in *Stewart* v. *Stewart*, 15 Ch. D., at p. 543, says, "The law is different from what it was supposed to be in his (Sir W. Grant's) time, which was that advancement did not apply to a share of residue." Even if I could treat the case as one of a trust imposed upon the conscience of the trustee who had died in the lifetime of the testator so that the court would not suffer the trust to fail, the trust would be for the persons entitled under the Statute of Distributions, and to be ascertained upon the principles of the statute. But the statute applies to cases where the ordinary or other person is enabled to make distribution. That is exactly the case here. There is no executor, but an administrator *cum testamento annexo*. The exact point before me was decided in *Harte* v. *Meredith*. That case is not binding upon me, but I find nothing in it to differ from and I propose to follow it, and I hold that the children advanced must bring their advances into hotchpot before receiving their shares of residue.

Solicitors, *Douglas Ford & Co.; Rowcliffes, Rawle, & Co; Carr, Scott, Smith, & Gorringe.*

Chan. Div.
Buckley, J. } Aug. 5, 1901.

BARNARD CASTLE URBAN DISTRICT COUNCIL *v.* WILSON AND OTHERS. (*a.*)

Waterworks — Local government — School — Swimming bath—Domestic purposes—Waterworks Clauses Act, 1863 (26 *&* 27 *Vict. c.* 93), *s.* 12—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 56, 65.

The supply of water to a school for the purposes of a swimming bath by a body acting under the Public Health Act, 1875, *incorporating the Waterworks Clauses Acts,* 1847 *and* 1863, *is a supply for domestic, and not for trade or business purposes, within the meaning of those Acts.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Action.

The question in this action was whether the managers of a school were entitled to have water supplied to a swimming bath used for the school at the ordinary water rate, as for a domestic purpose, within the Public Health Act, 1875, and the Acts incorporated therewith.

The school in question was a school at Castle Barnard, in Durham, called the "North-Eastern County School," and the defendants were the governors of it.

This school was carried on under a scheme sanctioned by the Charity Commissioners. No profits were made, but any surplus funds were invested for the benefit of the foundation.

There was a swimming bath upon the premises which held about 35,000 gallons of water, and which was used by the boys, both by boarders and day scholars. The school had room for 300 boarders and 50 day scholars. It was supplied with water by the plaintiffs, the Urban District Council, who were the local sanitary authority, with water for washing, drinking, cooking, and other domestic purposes.

The plaintiffs had no special Act, but supplied water under the Public Health Act, 1875, and the Acts incorporated therewith.

The plaintiffs had supplied the swimming bath until March, 1899, under a special agreement. They subsequently gave notice to the governors of the school that they should treat the swimming bath as a trade purpose and should for the future charge for water supplied to it at the rate of 6d. for every 1,000 gallons. The governors, however, would not agree to this, and continued to take the water supply for the bath. The plaintiffs brought this action claiming a declaration that the governors of the school were not entitled to a supply of water from the plaintiffs for the swimming bath as for a domestic purpose, within the meaning of the Waterworks Clauses Acts, 1847 and 1863, as incorporated in the Public Health Act, 1875; that the plaintiffs were entitled to payment from the defendants for the bath at the rate of 6d. per 1,000 gallons; that the plaintiffs were entitled to cut off the water of the defendants until such payment was made; and an injunction to restrain the defendants from taking the water, except as water for purposes other than domestic purposes within the meaning of the above Acts.

S. G. Lushington, for the plaintiffs.—The purpose for which the defendants use the water supplied by the plaintiffs is a public purpose, and not a private one. The keeping of a school is a business—*Wauton* v. *Coppard*, 47 W. R. 72, [1899] 1 Ch. 92; *Doe dem. Bish* v. *Keeling*, 1 M. & Sel. 95; and that is so whether it is a charity school or not—*Rolls* v. *Miller*, 32 W. R. 806, 27 Ch. D. 71; *German* v. *Chapman*, 26 W. R. 149, 7 Ch. D. 271; and the use of the water for the swimming bath is a trade and not a domestic purpose, within section 12 of the Waterworks Clauses Act, 1863, and consequently the plaintiffs are not bound to supply it.

He also referred to *Busby* v. *Chesterfield Waterworks and Gas Light Co.*, 6 W. R. 515, El. Bl. & El. 176.

R. C. Glen, for the defendants.—This school was not carried on for profit by the defendants, and was not their "business": *Smith* v. *Anderson*, 29 W. R. 21, 15 Ch. D. 247. A school is a large family, and its purposes are not public but domestic: *Liskeard Union* v. *Liskeard Waterworks Co.*, 30 W. R.

292, 7 Q. B. D. 505. The plaintiffs cannot charge an extra rate for a fixed bath: *Weaver* v. *The Corporation of Cardiff*, 48 L. T. Rep. 906, 31 W. R. Dig. 215.

Lushington, in reply.—In *Weaver* v. *Corporation of Cardiff* there was a special Act, and special provision as to baths.

BUCKLEY, J.—The fact of the school being carried on at a profit does not make any difference to the question I have to decide—namely, whether under section 12 of the Waterworks Clauses Act, 1863, which contrasts a supply of water for domestic purposes with a supply for trade, manufacture, or business, this is a supply for the one purpose or the other. The only sections bearing upon the question are sections 56 and 65 of the Public Health Act, 1875. The effect of section 56 is that where a local authority supplies water it may charge a water rate to be assessed upon the net annual value of the premises in the manner pointed out. Section 65 enables a local authority to supply water to any public baths or washhouses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on. I have to deal with a series of enactments containing no reference to baths except public baths. In *Weaver* v. *The Corporation of Cardiff*, where there was a special Act requiring the company to supply water for domestic purposes, not including a supply for baths, washhouses, or public purposes, it was held that a fixed bath connected with the water service, and used for a private residence, was within the exception. It is admitted that a supply of water to an ordinary bath-room in a private residence would not be a supply for the purposes of trade, manufacture, or business, and that if the owner of a private residence constructed a swimming bath on his own premises for his own use the supply of water to it would be for a domestic purpose. But the plaintiffs say that the keeping of the school is carrying on a business, and the swimming bath is supplied for the purpose of that business—the business of receiving, feeding, housing, and teaching the boys during the school terms. If this is true, the supply of water for the boys to wash their hands, or for cooking their meals, would be a supply, not for domestic purposes, but for the purposes of a business. This seems an extravagant proposition. I think that it is impossible to say that providing this swimming bath is a business as distinguished from the other purposes for which the school is carried on. Suppose the school authorities taught carpentering or kept a gymnasium upon the premises, could they be said to carry on a business as teachers of carpentry or as gymnasium proprietors? I think not. What is referred to in the Act is the whole business of a school and not the keeping of a swimming bath as a mere incident to it. Directly you find the water supplied is supplied for domestic purposes, even though for the domestic purposes of the business of keeping a school, it is a supply for domestic purposes, and not a supply for a business. The nearest case to the one before me is that of *Liskeard Union* v. *Liskeard Waterworks Co.*, where it was held that a supply of water for the inmates of a workhouse was not for a public purpose. Lord Coleridge in his judgment, after saying that in the prosecution of that which is a public purpose there may be domestic uses, says (7 Q. B. D., at p. 509): "Every large family is partly made up of persons quite unconnected by ties of blood or marriage, and the number of those so connected may bear a very small proportion to the whole number of persons collected together, as, for instance, in the case of a school, where a number of persons of different families are collected from different places, but under one head, and one roof, and are for all practical purposes one family." It seems to me that that is the real way to treat this case. All the boys constitute for the purposes of this question one family, and one establishment, and the supply of water for them is as much a supply for a domestic purpose, as the supply for the masters, or for any other members of the family, and as it is conceded that in a private residence there is no distinction between water supplied for a swimming bath and that supplied for ordinary washing purposes, it follows that water supplied for this bath is supplied for domestic purposes.

Action dismissed.

Solicitors, *Doyle, Devonshire, & Woodhouse*, for *J. Ingram Dawson*, Barnard Castle; *Huntingdon & Leaf*, for *A. T. Piper*, Barnard Castle.

Chan. Div. } Nov. 13.
Wright, J. }

In re THE LEYTON AND WALTHAMSTOW CYCLE CO. (LIMITED). (*a.*)

Company—Winding up—Costs—Compulsory order—Petitioning creditor's debt under £50.

*Where a compulsory winding up order is made on the petition of a creditor whose debt is under £50, he may, if supported by creditors for a larger amount, be allowed his costs.**

A judgment creditor for £35 3*s.* 6*d.* for goods supplied petitioned for the winding up of a trading company, and his petition was supported by other creditors whose debts were of the total amount of £128.

The company had never held it statutory meeting and was insolvent.

Cozens-Hardy, for the petitioner.

The company did not appear.

WRIGHT, J., in making the usual compulsory winding-up order said that the petitioning creditor's debt being under £50 he would not ordinarily have been allowed any costs, but as he was supported by other creditors for a considerable amount the usual order as to costs would be made.

Solicitors, *Reed & Reed.*

K. B. Div.
(Lord Alverstone, L.C.J., and } Nov. 6.
Darling and Channell, JJ.)

STODDART (*Appellant*) *v.* HAWKE (*Respondent*). (*b.*)

Gaming—Betting—Office used for betting—Coupons for prizes for naming winners of horse-races issued from office in London—Money received in Holland—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3, 4.

Coupons were issued in connection with a newspaper from an office in London kept by the appellant. The coupons, which could be obtained on application free of charge, were to be filled in by the competitors in a wagering competition, and when so filled in were to be sent in postal orders to an office in Holland. These postal orders

* See *In re Herbert Standring & Co.*, 39 SOLICITORS' JOURNAL, 603, [1895] W. N. 99.

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

(*b.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

were not payable in Holland, and had to be returned to England to be cashed. The money so sent in by competitors was eventually received by the appellant.

Held, that an offence had been committed under section 1 of the Betting Act, 1853, notwithstanding that the money was received from the competitors abroad, and that the appellant had been rightly convicted.

Case stated.

Appeal from a decision of Mr. Alderman Smallman sitting as magistrate for the City of London.

The material facts as set forth in the special case were as follow:

On the 30th of April, 1901, the appellant, Joseph Stoddart, was convicted on five summonses, the first four of which were that he, being the owner of a certain office or place situate at 10, Red Lion-court, Fleet-street, did, on various dates in March, 1901, open, keep, and use the said office and place for the purpose of money or valuable things being received by or on behalf of him, the said owner, as or for the consideration for an undertaking or promise to pay or give thereafter money on events or contingencies of or relating to horse-races and the game of football, thereby infringing 16 & 17 Vict. c. 119.

The fifth summons charged the appellant with keeping and using the office for the purpose of money, &c., being received by or on behalf of one G. Stoddart.

The five informations were laid by John Hawke, and the appellant was sentenced to six months' imprisonment without hard labour.

The following facts were proved or admitted:

The appellant was the owner of the office and registered proprietor of *Sporting Luck*, and the paper was published and its business conducted at the office in question. The newspaper contained advertisements relating to sporting coupons competitions, and copies of coupons called "International Supplement" were put in evidence. The coupons were procurable at the office by intending competitors either with or apart from the paper free of charge. All the coupons filled up and dispatched by the competitors, together with the remittances, were, in accordance with the instructions, addressed to *Sporting Luck*, Middleburg, Holland. In one case the remittances were to be made payable to the appellant and in subsequent issues to G. Stoddart.

It was proved that remittances were sent to the appellant in Holland and accepted for the competitions, and the authorities at the General Post Office cashed postal orders payable to the appellant or G. Stoddart which were returned from Holland amounting to £9,683, and that between the 28th of February and the 3rd of April no fewer that 87,556 such orders were cashed, English postal orders not being payable in Holland. Numbers of these postal orders were identified as having been sent for the purposes of the competitions.

It was proved that on the 19th of March, 1901, there was an announcement of the dissolution of partnership between the appellant and his son G. Stoddart, as turf accountants at Middleburg, the appellant having been convicted on the 7th of March for similar offences. G. Stoddart was a young man of twenty-one years of age, who had previously assisted the appellant at 10, Red Lion-court, where he carried on a betting business as J. & H. Drew, being guaranteed by his father.

The competitions were described as *Sporting Luck* contests, and the address in Holland was given as *Sporting Luck*, Middleburg.

It was contended on behalf of the appellant that, in order to bring the case within the Act, it was necessary to prove that the appellant had kept or used the office in Red Lion-court for the purpose of receiving money, &c., at that office, and that a receipt of money to be within the Act must be a receipt given at the time the bet was made and the promise to pay given before the events came off.

For the respondent it was maintained that the sending of the money to the appellant and G. Stoddart by way of Middleburg, the bulk being in postal orders which can only be cashed in this country, was merely a subterfuge, and that the real gist of the offence created by statute was the opening and keeping of a house, as the one advertised, for the purposes which it forbids.

The magistrates found that G. Stoddart was acting at Middleburg as agent for, or as jointly interested with, the appellant in the receipt of the moneys posted to Middleburg, and that the appellant had himself received some of the postal orders, and, as has been stated, convicted the appellant.

Lord Coleridge, K.C. (*Montague Shearman* and *Stutfield* with him), for the appellant.—The object of the Act as declared by the preamble is not the suppression of betting, but of betting-houses, and for a conviction it is necessary to show that money was received on the premises in question. Here the money was recieved in Holland, and therefore the office in Red Lion-court is not a betting-house, nor can the appellant be convicted for keeping it as such. If the appellant were to use his office in Red Lion-court for the purpose of receiving money at Smith-street, Westminster, it would be the latter and not the former which would be the betting-house. Moreover, the money, although the appellant got the benefit of it, eventually was not received by him until after the contingency, and it ought not to be considered as a continuing offence. Section 4 of the Act of 1853 makes the receipt of money for bets a special offence, but the receipt of money must be in England, and a receipt of the kind contemplated by section 1 of the Act, and unless the money be received in a house there has been no offence.

He cited from the judgment of Lord James of Hereford in *Powell* v. *Kempton Park Racecourse Co.*, 47 W. R. 585, [1899] A. C. 143, at p. 191; *Davis* v. *Stephenson*, 24 Q. B. D. 529, 38 W. R. Dig. 110; *Bradford* v. *Dawson*, 45 W. R. 347, 66 L. J. Q. B. 191; and *Cox* v. *Andrews*, 32 W. R. 289, 53 L. J. M. C. 34.

Horace Avory, K.C., and *J. K. Mackay*, for the respondent.—The real question here is whether there is evidence upon which the magistrate's finding of fact can be supported. He found, and we submit rightly on the evidence, that the house in Red Lion-court was used by the appellant either for the purpose of betting with persons resorting thereto or for the purpose of receiving money from them in consideration for a promise on his part to pay a prize on a sporting contingency. If the facts proved support those findings then the appellant comes within the mischief of the statute and the conviction must be affirmed. The appellant's contention comes to this: that the court should read into the Act the words "in the house," but the court ought not to read in words unless they must be added in order to give effect to the Act of Parliament which without some such addition would be nugatory or senseless. In *Davis* v. *Stephenson* there was no evidence that the betting man had ever been in the public-house before the bets were made, or that the landlord knowingly allowed his house to be used as a place of deposit for money which had been received on a spot outside the area included in the licence, and the court (Lord Coleridge, C.J., and Lord Esher, M.R.) held that the

indictment charging the landlord of the house with unlawfully "suffering" the said licensed house to be kept and used in contravention of the Act of 1853 failed. In this case the appellant had used the premises for every purpose except that of actually receiving the money from the competitors.

Lord Coleridge, in reply, cited *Macnee* v. *Persian Investment Corporation*, 38 W. R. 596, 44 Ch. D. 306.

Lord ALVERSTONE, L.C.J., in giving judgment, said: Notwithstanding the very able argument of Lord Coleridge, with the assistance of the equally able argument of Mr. Avory, I am of opinion that this conviction ought to be affirmed. The appellant is charged under the second branch of section 1 of 16 & 17 Vict. c. 119. It is clear that he carried on some kind of business at 10, Red Lion-court, and from that place coupons were issued, without which he could not have received the money. I do not think that the statute ought to be confined to money being received at the prohibited place, having regard to the preamble of the Act and the case of *Powell* v. *Kempton Park Racecourse Co.* I entirely agree with the view of the object of the Act expressed in the House of Lords by Lord James of Hereford, and if that is taken to be, as it undoubtedly is for this purpose, a true exposition of the Act, this particular transaction is within the mischief of it. It was said by the noble and learned lords who gave judgment in that case, and I think quite correctly, that the court must find something in the Act of Parliament which, without undue straining, and without construing it otherwise than in its natural meaning, brought the transactions under consideration within the scope of the statute, and that if there is any doubt they must refer to the preamble. The material part of the statute so far as we have to construe it is the second portion of it, and under that the defendant was charged with a keeping a house or office, or having the care or management of it, for the purpose of money being received by him or on his behalf for an illegal consideration—viz., a betting consideration. The facts were that the defendant carried on some kind of business at Red Lion-court, and occupied there a place at which *Sporting Luck* was published. He advertised that from that place people could get coupons, without which the defendant would not have received any of this money at all. I am not going to say for the purposes of this case that there is any evidence of resorting by persons for getting coupons, because the defendant is not charged under the part of the Act dealing with that, but it seems to me that the statute is not to be confined to the moneys to be received at the place. I think that, having regard to the preamble and to the judgment in the case of *Powell* v. *The Kempton Park Racecourse Co.* in the House of Lords, we ought to say that the main substantial offence which it was intended to hit at by the statute is keeping the place for the purpose of the owner of that place receiving money. It would defeat, I think, the intention of the Legislature if we were to add to or imply in the words "for the purpose of the money or valuable things being received," the words "being received at that place." I do not think I can put a better illustration than to say that if we are compelled to do that there would be no offence if the whole transaction had been carried out at Red Lion-court by the issue of coupons and then when a coupon had been delivered to the applicant it had been said, "Don't pay the money to me, but be good enough to pay it into my bank." Taking the fact, however, that it was a necessary part of the system that these coupons should be issued in order that Mr. Stoddart should receive the money, I am clearly of opinion that there was evidence upon which the alderman could convict. I am glad to be able to come to this conclusion, although I do not go so far as to say the case is perfectly clear, because this system might do great and irreparable mischief in a few weeks. I come to the conclusion that the main offence intended to be struck at by the statute is the keeping of a place localizing the business in order to enable the proprietor of that place or business to receive the money. Therefore the alderman, in my judgment, came to the right conclusion, and the conviction must be affirmed.

DARLING, J.—I concur. The words of the statute have reference to using a place "for the purpose of any money or valuable thing being received by or on behalf of such owner," and the contention of the appellant was that he was not forbidden to do what he did, because he did not receive the money in this house at Red Lion-court, nor, indeed, in England. He had done so before and had been convicted, and this was a carefully considered scheme for, in my opinion, evading the statute, because it was admitted by Lord Coleridge himself that what the appellant did was really within the mischief of the statute, and that no doubt the Legislature would—if it had been pointed out to them that anyone would do what the defendant had ingeniously contrived to do—have used apt words to prevent him. Therefore Lord Coleridge said this was a *casus omissus*. I do not think it was. I think the words used by the Legislature are wide enough to cover the case. The statute does not say that the money must be received in the house, and as these words are not in the statute, why should we read them in? I have during the argument heard no reason why we should construe the statute so as to make betting easier. It is notorious that the amount of harm which is done in this country by betting is enormous, and the amount of crime to which it leads no judge who has gone assize can be blind to. It leads to the robbery of employers and all sorts of crimes, and why should the court be careful to narrow down the statute and read into the section words which the Legislature has not put there? It appears to me that what was done at the appellant's house in London was an essential and necessary part of the transaction, and therefore, wherever the money might reach him, he did in fact use this house for the purpose of money being received by or on behalf of the owner of the house. Those are the words of the statute, and therefore we are warranted in affirming the conviction, the more so as there is no reason on the ground of public policy or the like why we should not give to the words their plain meaning.

CHANNELL, J.—I am of the same opinion. I do not think it throws much light upon the question to consider whether the defendant had intended to evade the statute. The real question was whether the act of the defendant was forbidden by statute or not. If it were not forbidden, then he was entitled to do what he had done. What was forbidden by the Act was the use of an office for certain purposes, among which was the use of it for money to be received. The coupons were an essential part of the transaction, and without these documents the money could not have been received, and the house was kept for the purpose of issuing them, and nothing else. The judgments in *Powell* v. *Kempton Park Racecourse Co.* have very great bearing on the present case. It is there clearly shown that the object of the Act was to put down betting houses—in other words, it was the localization of that class of business which was hit at. Now, asking the question whether in this case the house in Red Lion-court was a house for

the localization of betting, the answer is clearly in the affirmative. The coupons were an essential part of the system and without them money could not have been received. The house in my judgment was therefore kept for a material part of the business, and the defendant was rightly convicted.

Appeal dismissed, with costs, and the conviction affirmed.

Solicitors, *Le Brasseur & Oakley; Malkin & Co.*

Consistory Court of Rochester.

Before the Chancellor of the Diocese, Sitting with Assessors. Nov. 2.

SWEET AND OTHERS *v.* GORDON YOUNG. (*a.*)

Ecclesiastical law—Clergy discipline—75th and 109th Canons—"Immoral conduct"—Clergy Discipline Act, 1892, *s.* 2.

If the conduct of a clerk in holy orders is "unworthy of the character of ministers of religion," then he is guilty of "immoral conduct" within the meaning of section 2 of the Clergy Discipline Act, 1892, *notwithstanding that no act of indecency is proved against him.*

This was the complaint of Charles Sweet, Reginald Wynn Rucker, and Wentworth Ewing Cattley, parishioners of the defendant, alleging that on a number of occasions the defendant had been guilty of insobriety, and that (*a*) on an occasion in March, 1897, "after dinner at Chipstead Rectory the defendant uttered the ribald and unclean words, Do you admire my parlourmaid? Did you notice the beauty of her form? Would you like to see her stripped?"; and (*b*) "that on the 4th of July, 1899, at about 1.30 a.m. the defendant was in a dancing-room at the Alsatian Club in Oxford-street, London, with a prostitute on his knee, and was behaving himself in an immoral and riotous manner with the said prostitute and other prostitutes."

The court found that some of the various charges of insobriety were proved, and that both the charges (*a*) and (*b*) had been established, but there was no evidence of any act of indecency having occurred at the Alsatian Club or elsewhere.

Gill, K.C., and *Talbot* contended that it was not necessary to prove any act of indecency. The defendant's conduct, taken as a whole, should be considered. A much stricter test of what was moral should be applied to a clerk in holy orders than to a layman. The case here was that the defendant was, so to speak, making a night of it, and was in a disorderly house which was the resort of prostitutes, and he was there not even out of mere curiosity, but was thoroughly enjoying himself.

They cited *Beneficed Clerk* v. *Lee*, [1897] A. C. 226, 45 W. R. Dig. 52.

Rawlinson, K.C., and *Longstaffe*, for the defendant.—If there were no act of any sort of indecency *a fortiori* there was no "immoral conduct." For a clerk in holy orders to act indiscreetly, as the defendant admits that he did in going to the club at all (he denied that any woman sat on his knee), the Legislature did not intend the words immoral conduct in section 2 to be extended to that. The 75th and 109th Canons are no doubt wide, but they do not apply to the defendant's conduct.

They cited *The Bishop of Rochester* v. *Harris*, [1893] P. 137, 41 W. R. Dig. 73.

THE CHANCELLOR, in delivering judgment, said: The second section of the Act enacts that "if a clergyman either is convicted by a temporal court of having committed an act constituting an ecclesiastical offence, and the foregoing section does not apply to him, or is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit . . . he may be prosecuted, &c. . . ." In *Beneficed Clerk* v. *Lee*, [1897] A. C. 226, at p. 229, Halsbury, L.C., said: "It is provided in section 12, 'the expressions immoral act, immoral conduct, and immoral habit shall include such acts, conduct, and habits as are proscribed by the 75th and 109th Canons issued by the Convocation of the Province of Canterbury in the year 1603.' The language of these canons denounces the offences which the 109th Canon sums up as 'uncleanness and wickedness of life' but it goes further, and condemns acts and conduct hardly to be considered immoral, but certainly dangerous, to the reputation or unworthy of the character of ministers of religion."

The 75th Canon provides: "No ecclesiastical person shall at any time, other than for their honest necessities, resort to any taverns or alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night playing at dice, cards, or tables, or any other unlawful game; but at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God, having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and Christianly, under pain of ecclesiastical censures to be inflicted with severity, according to the qualities of their offences."

The 109th Canon is as follows: "If any offend their brethren either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, or any other uncleanness and wickedness of life, the churchwardens or questmen, and sidesmen, in their next presentments to their ordinaries, shall faithfully present all and every of the said offenders, to the intent that they and every of them may be punished by the severity of the laws, according to their deserts, and such notorious offenders shall not be admitted to the holy communion till they be reformed."

Taking into consideration the whole facts of the case he (the Chancellor) had directed the assessors that if the facts alleged were proved they would constitute the statutory offence intended by the words "immoral conduct."

The court had found that the charges (*a*) and (*b*) were established, and on some of the occasions alleged they found that the defendant had been under the influence of drink.

Solicitors, *Wontners; Sayle, Carter, & Co.*

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div.
(Lord Alverstone, L.C.J., and Vaughan Williams and Romer, L.JJ.) } Oct. 29; Nov. 13.

WARREN v. BROWN. (a.)

Light — Prescription — Extent of right — Light for ordinary purposes—Trade requiring extraordinary degree of light.

There is no standard of light. In considering whether ancient lights have been substantially interfered with, regard must be had to the ordinary uses by way of habitation or business to which the house has been put or might reasonably be supposed to be capable of being put.

A plaintiff is therefore entitled to relief where his extraordinary amount of light has been substantially interfered with, even though sufficient light is left for ordinary purposes.

Decision of Wright, J. (49 *W. R* 206, [1901] 1 *Q. B.* 722), *reversed.*

This was an appeal from the decision of Wright, J. (reported 49 W. R. 206, [1901] 1 Q. B. 722).

The facts of the case were these: Two of the three plaintiffs were the owners, and the third was the lessee and occupier, of a factory in a street in the town of Leicester, the business carried on in the factory being that of a hosiery manufacturer.

In the factory, which was built in 1860, there were windows which had, down to the obstruction complained of in the action, enjoyed the access of light in greater quantity than was necessary for ordinary purposes.

From 1860 to 1884 the factory was used as a boot and shoe factory—a purpose which required only an ordinary amount of light.

From 1884 downwards it was, with a few short intervals, used as a hosiery manufactory. That manufacture required an unusual degree of light, especially during the time next before the obstruction complained of, owing to improvements in the kind of machinery employed, which rendered necessary a very exceptional quantity and quality of light for the continual and accurate adjustment of filaments to fine needles moving by machinery at speed in bundles of some hundreds.

In 1899 the defendant, who had an old building on the opposite side of the street to the factory, raised his building considerably above its original height, and so diminished the light through the plaintiffs' windows, though still allowing the passage through those windows of enough light for all ordinary purposes.

The action was tried by Wright, J., without a jury, and owing to the conflict of authority his lordship at the conclusion of the arguments reserved judgment.

On giving judgment on the 4th of August, 1900, his lordship found that the plaintiffs had suffered substantial damage and he assessed that of the tenant at £100 and that of the owners at £200, but he held that as the plaintiffs had abundance of light left for all ordinary purposes of habitation or business they were not entitled to the relief claimed by them, on the ground that their extraordinary use had been interfered with.

The plaintiffs appealed.

Hugo Young, K.C., and *W. R. Stevenson*, for the plaintiffs, contended that they were entitled to have preserved to them the whole of the extraordinary amount of light their windows had received during the statutory period, although that extraordinary amount of light had been actually required for their hosiery business during a portion only of the twenty years.

Warmington, K.C., and *A. Neilson*, for the defendant, argued that the plaintiffs as owners of ancient lights were entitled to so much light as was necessary for the ordinary purposes of life and no more.

Cur. adv. vult.

Nov. 13.—ROMER, L.J., read the judgment of the court, which was as follows: In this case Wright, J. has found that certain of the plaintiffs' ancient lights have been substantially interfered with by the defendant's new building. He has also found that the plaintiffs have in fact thereby suffered substantial damage, for he assesses their losses, as to the tenant at £100, and as to the reversioners at £200. On these findings one would have expected judgment entered for the plaintiffs; but the learned judge has made an additional finding, and by reason of that he has dismissed the action. This finding is to the effect that, notwithstanding the substantial diminution of the ancient lights caused by the defendant's new building, abundant light remains for all ordinary purposes of inhabitancy or business. We felt some doubt at first as to what this additional finding meant, and whether it was not contradictory to the other findings; but after further consideration of the judgment, and after consulting Wright, J., we have no doubt as to the meaning of the additional finding. It means that, though the light coming from certain of the ancient lights has been substantially diminished, and though the rooms thereby lighted have been so darkened that both the tenant and the reversioners have suffered substantial damage, yet the darkened house is still as useful for purposes of habitation or business as what we may term the average run of houses. In other words, the learned judge appears to think that, as a matter of law, there is a sort of standard in the matter of light, and that if a particular house is by its ancient lights extremely well lighted, those lights may with impunity be substantially interfered with so long as the house in its darkened condition does not fall below the standard. In our opinion that is an erroneous view of the law. We do not propose to go through all the numerous cases which were cited before us and before Wright, J. It is not necessary to do so for the purposes of this case. No doubt, before *Kelk* v. *Pearson*, 19 W. R. 665, L. R. 6 Ch. App. 809, was decided, and still more so before the judgment of Lord Cranworth in *Yates* v. *Jack*, 14 W. R. 618, L. R. 1 Ch. App. 295, some inaccurate views as to the nature of the right to light acquired under the statute were entertained and expressed by various judges; and in some of the earlier cases, and, indeed, even in some later ones, language has been employed in some judgments which would appear to support the view of the law taken by Wright, J. But we think that in recent times the law has become settled, and we propose to state shortly, so far as is material for the immediate point arising in this case, what we understand the law to be. The statute in its terms might appear to sanction the view that the right to light once acquired was absolute as to every part of it, so that any interference, however slight, would be wrongful. But it was soon established that the statute had not altered the character of the right, though it had altered the method by which it could be acquired; and it was held that the right would not be interfered with if there were no substantial diminution of the light such as to cause substantial damage to the

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

tenant or owner. And, in considering what would be a substantial diminution and substantial damage, it is held that the proper point of view is to pay regard not to what some person having fantastic or peculiar views might choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment. And, in particular, in considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put. We do not say that in the recent cases the law has been expressed exactly in the language we have used, but we mean that, though various expressions have been used by different judges, yet in substance, and as the result of what are now regarded as binding authorities, the above is a fair statement of the law as it is to be gathered from those judgments which are now to be regarded as sound. And at the present day, if ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief. With regard to the exact point arising in this case, we think that, since the case of *Kelk* v. *Pearson*, it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house may still come up to some supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business. Some houses, owing to their having numerous or particularly advantageous ancient lights, are extremely valuable for purposes of habitation or of business. In these cases an owner of the servient tenement cannot justify a substantial interference with these lights, or (it may be) a complete stoppage of some of them causing great damage to the house, on the ground that other houses in the neighbourhood, or even the majority of those houses, or some imaginary standard house, are or is not better lighted than the injured house after the injury. Nor is the fact that, owing to the house being very well lighted, certain special businesses requiring much light are being or can be carried on, to be wholly disregarded in considering the effect of an interference, merely because after the interference other businesses not requiring much light can be carried on. Yet it is to an opposite conclusion that Wright, J., appears to have come. Immediately after stating, with regard to the room on the ground floor affected by the interference with its lights, "that abundant light remains for all ordinary purposes of inhabitancy or business," he proceeds to point out what he means by that by observing that "the room in its present state is better lighted than the ground-floor front rooms in many of the principal streets"; and accordingly he gives no relief to either tenant or reversioners. And it is especially noticeable, as to the reversioners, that he considers they have in fact suffered damage to the extent of £200, and that could only be on the ground that the house had been permanently affected in its letting value; and even as to the tenant we may observe that a very well lighted house is not being unreasonably used because a business requiring much light is being carried on there. The precise point arising in this case was clearly dealt with by Mellish, L.J., in *Kelk* v. *Pearson*, where he says: "I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of comparison, whether by reason of deprivation of light the house is substantially less comfortable than it was before." This statement has been since approved of and followed in many cases, and we believe it accurately states the existing law on the subject. So far as other judges have in their judgments used expressions which appear to, or do in fact, conflict with what Mellish, L.J., has said, those expressions cannot, in our opinion, be justified. And in particular we may say that the opposing views expressed by Malins, V.C., in *Lanfranchi* v. *Mackenzie*, 15 W. R. 614, L. R. 4 Eq 421, and *Dickinson* v. *Harbottle*, 21 W. R. 115, 28 L. T. Rep. 186, cannot now be regarded as sound. That being so, we think that in the present case the plaintiffs are entitled to relief. The case has been treated before us by both parties as one turning solely on the findings of Wright, J. He has found substantial interference with light, and substantial damage to the plaintiffs; and, that being so, there should be judgment for them for the damages assessed. The defendant ought to pay the costs of the action and of this appeal.

Appeal allowed.

Solicitors, *Law & Worssam*, for *R. H. Buckby*, Leicester; *J. A. Collins*, for *J. & S. Harris*, Leicester.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 5.

BEVAN v. CRAWSHAY BROTHERS (CYFARTHA) (LIMITED). (*a*.)

Master and servant—Employers' liability—Accident—Compensation—Dependants in part dependent on earnings of deceased workman—Funeral expenses—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1) (a) (*ii.*) (*iii.*)—*Workmen's Compensation Rules*, 1898, *r.* 4 (3).

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the deceased workman was at the time of the accident living with his father and mother, and that he was in the habit of paying his weekly earnings of* 8s. *to his mother to put into the common family fund. Shortly after the accident the father left his wife and family, and the mother gave notice of request for arbitration, claiming compensation as having been partly dependent on her son's earnings. No steps were taken for making the father a respondent to the arbitration proceedings in accordance with rule* 4 (3) *of the Workmen's Compensation Rules*, 1898. *The county court judge made an award in favour of the mother for a weekly payment of* 3s. *for the period of three years, and the sum of* £6 8s. *for funeral expenses.*

Held, that, even if the father ought to have been made a respondent to the proceedings under rule 4 (3), *which was doubtful having regard to rule* 2, *the employers, not having taken the point before the county court judge, were not entitled to take it on appeal.*

Held, also, that the county court judge, in determining what sum was reasonable and proportionate to the injury to the dependants under Schedule I. (1) (a) (*ii.*), *was entitled to take into consideration the funeral expenses and to award a named sum in respect of those expenses, subject to the limitation imposed by the maximum mentioned in the schedule.*

Appeal from a decision of the judge of the Merthyr Tydvil County Court in an arbitration under the Workmen's Compensation Act, 1897.

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The applicant for compensation, Margaret Bevan, was the mother of a boy named David Bevan, a collier, who was killed by an accident on the 3rd of December, 1899, in the Cwm Pit Colliery, belonging to his employers, Crawshay Brothers, Cyfartha (Limited). It was admitted that the accident arose out of and in the course of his employment.

It appeared that the deceased boy at the time of the accident was living with his father and mother, though the father was only occasionally at home, and that he was in the habit of paying his wages, amounting on the average to about 8s. a week, to his mother, who kept the common family fund and maintained him. The other members of the family household were a brother and sister of the deceased.

On the 7th of January, 1900, the father made a claim for compensation. The employers refused to admit any liability under the Workmen's Compensation Act except for funeral expenses. No further step was then taken in the matter, and in April the father left his wife and family.

On the 12th of June, 1900, the mother gave notice of request for arbitration, claiming compensation as having been in part dependant upon the earnings of the deceased at the time of his death.

At the hearing before the county court judge the evidence showed that the total cost of maintaining the family was 30s. a week, the cost of maintaining the deceased boy alone being 5s. 6d. a week, that the fathsr earned from 15s. to £1 a week, the other son 14s., and the deceased 8s.

The objection was taken that the mother was not entitled to make a claim under the Workmen's Compensation Act, because she was not a "dependant" wholly or in part dependent upon the earnings of the boy within the definition in section 7.

That section provides that "'dependants' means (*a*) in England and Ireland such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death." By section 1 of the Act the employer is liable to pay compensation in accordance with the first schedule to the Act, and in that schedule the scale of compensation to "dependants" is laid down. A "parent" is one of the persons specified in the Fatal Accidents Act, 1846, and "parent" is defined as including both father and mother.

The county court judge held that the mother was a dependant in part dependent on her son, and awarded her the sum of 3s. a week for the period of three years, if she should so long live, and the sum of £6 8s. for funeral expenses.

The employers appealed.

It was stated that since the hearing the father had died.

Francis Williams, K.C., and *S. T. Evans, K.C.*, for the employers.—First, the mother is not entitled to claim under the Act. The only person who legally filled the position of "dependant" to the deceased at the time of his death was his father: see *Main Colliery Co.* v. *Davies*, [1900] A. C. 358, 48 W. R. Dig. 13. If the father and mother were both dependants, then the father ought to have been made a respondent as required by rule 4 (3) of the Workmen's Compensation Rules, 1898. Secondly, the mother was not in fact partially dependent on the deceased; for the evidence shows that the cost of maintaining the deceased boy was 5s. 6d. a week, and the total cost of living of the family was 30s. a week, and the earnings of the father and the other son were more than sufficient to maintain the family apart from the deceased. Thirdly, the county court judge had no power to allow a sum for funeral expenses. By Schedule I. (1) (*a*) (iii.) an allowance for funeral expenses can only be made where the deceased left no dependants.

W. D. Benson, for the applicant.

COLLINS, M.R.—This is an application under the Workmen's Compensation Act made by a person who claims as a dependant of the deceased workman. The deceased was the son of a Mr. and Mrs. Bevan, both of whom survived him. The family consisted, besides the deceased boy, of another brother and a sister. The father instituted proceedings by making a claim to compensation under the Act, but he did not pursue them beyond a certain point. The proceedings were, however, continued by Mrs. Bevan, who gave notice of her desire for an arbitration, and went before the county court judge and asked for compensation on the footing of partial dependency. It is now said that it was not competent to the county court judge to deal with the matter in the absence of the husband. We are told that the husband left his wife, and has since died. In fact, the county court judge entertained the application, and, taking into consideration the earnings of the family and how far they had been diminished by the death of the son, came to the conclusion that dependency had been established, and made an award in favour of the applicant. It is argued that this award was bad, being vitiated by reason of the fact that the husband was not made a party to the proceedings.

It is provided by rule 4 (3) of the Workmen's Compensation Rules, 1898, that "if there is any conflict of interest between the dependants themselves, the application may be made by such legal personal representative on behalf of some only of such dependants, or if there is no such legal personal representative the application may be made by some only of such dependants, the other dependants in either case being named as respondents." But in my opinion this provision for making dependants parties is not so absolute as is contended for. I find that rule 2 says as follows: "When application is made for the settlement by the judge, or by an arbitrator appointed by the judge, of any matter which under the Act is to be settled by arbitration, the party making such application shall be called the applicant; and, subject to these rules, all other persons whose presence at the arbitration may be necessary to enable the judge or arbitrator effectively and completely to adjudicate upon and settle all the questions involved shall be made parties to the application, and shall be called the respondents." In this case the county court judge proceeded with the arbitration without the presence of the husband. I am not sure that the presence of the husband was necessary to enable the county court judge to adjudicate effectively and completely on the questions involved in the arbitration. But, however that may be, no point was made before the county court judge of the fact of the father not being present before the court. I doubt whether the father's presence was necessary, and, the point not having been raised at the hearing, it seems to me that no injustice has been done by the award.

I come now to the second point which has been raised —viz., that no dependency has in fact been established. It is argued by the employers that, having regard to the sums received by the mother from the deceased and from the other members of the family, and to the family expenditure, it follows, as a matter of arithmetic, that no loss pecuniarily has been sustained by the mother in consequence of the death of the son. But the question of dependency is a question of fact, and where the evidence is not clear and undisputed, but is given by the witnesses subject to differences of opinion, as in this case, it is not

the province of this court to say that the decision of the county court judge should not stand.

Then, thirdly, the objection is taken that funeral expenses are mentioned in the award. It is contended that the county court judge exceeded his jurisdiction in awarding a specific sum for funeral expenses, and reliance is laid on the express terms of Schedule I. Paragraph 1 (*a*) (iii.) says that, where the workman leaves no dependants, the amount of compensation shall be "the reasonable expenses of his medical attendance and burial." Sub-paragraph (i.) provides the scale of compensation where the workman leaves dependants wholly dependent upon his earnings. Sub-paragraph (ii.) deals with the case where he leaves dependants in part dependent upon his earnings, and says that in that case the compensation shall be such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants. Then comes sub-paragraph (iii.) which I have read. It is said that the earlier words, which relate to the case where the deceased leaves dependants partially dependent upon his earnings at the time of his death, are not distinguishable from the words of Lord Campbell's Act, and that under that Act no allowance could be made for funeral expenses: *Dalton* v. *South-Eastern Railway Co.*, 6 W. R. 574, 4 C. B. N. S. 296. But this Act expressly says that an allowance for funeral expenses is to be made where there are no dependants. I think the Act assumes that even where there are no dependants a sum would have to be paid for the funeral expenses by the legal representative of the deceased, and it accordingly enacts that in such a case he shall be reimbursed. But if an allowance for funeral expenses is made in cases where there are no dependants, why are not such expenses a factor to be taken into consideration where there are dependants, and where the arbitrator is considering under sub-paragraph (ii.) what sum is reasonable and proportionate to the injury to the said dependants? The Act shows that funeral expenses are intended to be the subject of compensation in some cases. And I see nothing to eliminate them from being a factor to be considered in such a case as this, subject to the limitation imposed by the maximum mentioned in the schedule. In my opinion the county court judge has not acted *ultra vires*. He has not awarded the *maximum* compensation and then awarded a further sum for funeral expenses. He has awarded a sum which it was within his power to award, and he appears to have been right in taking the funeral expenses into consideration. The appeal must therefore be dismissed.

STIRLING and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the employers, *Schultz & Sons*, for *Gwilym James, Charles, & Davies*, Merthyr Tydvil.

Solicitors for the applicant, *Ullithorne & Co.*, for *D. W. Jones*, Merthyr Tydvil.

From Chan. Div.
(Lord Alverstone, L.C.J., and Vaughan Williams and Romer, L.JJ.) } Oct. 30.

INDERWICK v. TATCHELL. (*a*.)

Will—Construction—Gift over in default of issue—Surviving brothers and sisters—Children of deceased brother.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

A testator by his will devised and bequeathed his property in seven shares to his seven children for life, with remainder to each child's children or child. The share of any child dying without children was to go to his then surviving brothers and sisters as tenants in common for their respective lives, with remainder to their respective children, and if there should be but one surviving brother or sister, then to him or her absolutely. If any child left no child him surviving, but left grandchildren, the grandchildren were to take such child's share. In default of grandchildren, such child's share was to go to his then surviving brothers and sisters as tenants in common, and if there was but one to that one absolutely.

Held, that the word "surviving" was to be taken in its natural meaning, and that the children of a deceased child of the testator were not entitled to participate along with the surviving children of the testator in the share of a child of the testator who had survived their father and died without issue.

Per Romer, L.J.—*The decision of* Cozens-Hardy, J., *in* Harrison *v.* Harrison (49 *W. R.* 613, [1901] 2 *Ch.* 136), *dissenting from the third rule in* In re Bowman (37 *W. R.* 583, 41 *Ch. D.* 525), *approved.*

This was an appeal from a decision of Kekewich, J.

The testator, John Inderwick, by his will dated the 17th of April, 1867, devised and bequeathed his real and leasehold properties to trustees upon trust in seven distinct specified portions, one portion for each of his seven children, Edward Samuel, John, George, Walter, Ann (afterwards Mrs. Lindner), Louisa Hannah, and Emily (afterwards Mrs. Tatchell), with remainder to each of such child's children or child living at the death of such child equally as tenants in common.

In the case of Edward Samuel the gift over on his death was limited to children by his first wife.

Then came an accruer clause which provided that the share or shares original and accruing of any child dying without leaving children should go among his, her, or their "then surviving brothers and sisters" equally as tenants in common for their respective lives, with remainder amongst their respective children. And if there should be but one surviving brother or sister then to him or her absolutely, subject to an annuity of £50 for life to any wife or husband of any brother or sister so dying as aforesaid.

Then came a proviso that on the death of any child without leaving a surviving child or children, but leaving a grandchild or grandchildren him or her surviving, the child's share should go over to the grandchild or grandchildren.

This proviso was followed by a second accruer clause in the following terms: "But if there shall be no such then surviving grandchild or grandchildren, then it is my will and I do hereby declare and direct that the estate, part, share, and property of my said deceased child or children respectively shall go and be conveyed, assigned, and assured unto and equally between his, her, or their then surviving brothers and sisters in equal shares as tenants in common if more than one, and if there shall be but one of my children then surviving the whole of such accruing part, share, estate, and property shall go and be conveyed, assigned, and assured to that one, his or her heirs, executors, administrators, and assigns, and to whom I hereby give, devise, and bequeath the same accordingly." The will also contained a stringent forfeiture clause on the alienation or incumbrance of any share.

The testator died in 1867. His seven children named in the will all survived him.

The testator's sons John, George, and Walter died in the years 1868, 1874, and 1876 respectively, without ever having had issue.

In 1877 a deed of arrangement was entered into between the surviving children of the testator, the husbands of Mrs. Lindner and Mrs. Tatchell joining as such, and the children of the testator's eldest son Edward Samuel by his first wife (all of whom were *sui juris*), who joined in respect of their reversionary interest in their father's original and accrued shares. By this deed the surviving children agreed that the first accruer clause correctly represented the testator's intention, and that the will should, as regarded their original and accrued shares, be construed as if the second accruer clause had not been contained therein. And the children of Edward Samuel Inderwick agreed *inter se* that in the event of any of them predeceasing their father, leaving children him surviving, such children should take between them the shares original and accruing of the child so dying. Both these provisions were made subject to the operation of the forfeiture clause in the will, but were to take effect as far as possible.

In 1895 Alfred, a son of Edward Samuel Inderwick, died, predeceasing his father, leaving a widow and two infant children.

In 1899 Edward Samuel Inderwick died, leaving him surviving four children, and the two children of Alfred.

In 1900 Louisa Hannah Inderwick, the testator's unmarried daughter, died.

Questions then arose as to the disposal of her original and accruing share.

The plaintiffs, the children of Edward Samuel Inderwick and the children of Alfred, contended that they were entitled between them to one-third of her original and accruing shares.

The defendants, Mrs. Lindner and Mrs. Tatchell, contended that they were entitled to have those shares divided into moieties to be held in trust for themselves for life, leaving for future determination the question of the rights of the survivor upon the death of either.

Kekewich, J., decided in favour of the defendants' contention.

The plaintiffs appealed.

Eady, K.C., P. O. Lawrence, K.C., and *Daunay*, for the appellants.

Warrington, K.C., and *S. Dickinson*, for the respondents, were not called upon.

The following cases were referred to in the course of the argument: *Waite* v. *Littlewood*, 21 W. R. 131, L. R. 8 Ch. App. 70; *Eyre* v. *Marsden*, 4 My. & Cr. 231; *In re Bowman, Whytehead* v. *Boulton*, 37 W. R. 583, 41 Ch. D. 525; *Beckwith* v. *Beckwith*, 25 W. R. 282; *In re Benn*, 34 W. R. 6, 29 Ch. D. 839; *In re Walker's Estate, Church* v. *Tyacke*, 28 W. R. 91, 12 Ch. D. 205; *In re Bilham, Buchanan* v. *Hill*, 49 W. R. 483, [1901] 2 Ch. 169; *Harrison* v. *Harrison*, 49 W. R. 613, [1901] 2 Ch. 136.

Lord ALVERSTONE, L.C.J.—In this case I think that Kekewich, J., has arrived at the right decision. I need scarcely say that I should feel the greatest difficulty in dealing with the various authorities that have been cited if it were necessary to deal with them. If I thought that this case depended upon any general rule to be deduced from those cases, as, for instance, whether it falls within the general rule laid down by Kay, J., in *In re Bowman*, I should have required further argument, and, speaking for myself, a great deal more time for consideration. In my view, the general result of the authorities is that at any rate for the purposes of this case there is no hard-and-fast general rule which would force us to put a construction on this will which I think the words do not bear. I think the cases of *Eyre* v. *Marsden* and *Beckwith* v. *Beckwith*, which were referred to, turned upon the terms of the particular will, and I think that the judgments first of Baggallay, L.J., in *Beckwith* v. *Beckwith*, and then of Cotton, L.J., in *In re Benn*, show clearly that in their opinion there was no such general rule, and that the rule which had been applied in such a case as *Waite* v. *Littlewood* depended upon considerations that are not material at any rate for the purposes of the present case. I say no more about those authorities because I do not think I should serve any useful purpose by discussing them. I only refer to the judgments of Cotton, L.J., and Baggallay, L.J., because they seem to me to negative the view of there being any general rule which would apply to this particular case. Lastly, with regard to the supposed general rule, you have only to read the judgment of Kay, J., remembering it was founded on those two cases of *Eyre* v. *Marsden* and *In re Benn*; and the subsequent judgments of Cozens-Hardy, J., in *Harrison* v. *Harrison*, and Joyce, J., in *In re Bilham*, to see how extremely difficult it is to say that there is any general recognized principle or general rule which might force us, so to speak, to put a different construction upon the words than their natural meaning, assuming that we look at the terms of the will only. I decide this case upon the terms of this will and I come to the conclusion, upon the terms of the will, that in the clause to which our attention has been directed the words "their then surviving brothers and sisters," mean their then surviving brothers and sisters, and do not include the *stirps* of a pre-deceased brother or sister. I may be wrong, but I should have thought, apart from authority, that such words as "their surviving brothers and sisters" ought to receive their natural meaning, and that you ought not to turn "surviving" into "other" brothers and sisters, whether surviving or not, unless there is something in the will to lead you to the conclusion that the word "surviving" is to be construed as "other." Speaking for myself, I think that such words ought to have their natural meaning unless from the whole of the will, or from other clauses in the will there is an indication that they are to have a different meaning. I do not find in this will any indication that they are not to have their natural meaning. But I go further. I think there are two clauses of the will (which certainly is a difficult will to construe, and from the point of view of the argument addressed to us on behalf of the appellant, very properly, may be said to be an ambiguous will) which seem to me to confirm the view that this testator, by the language he used, was using the words "brothers and sisters surviving" in their natural sense. The first question is, what is to happen to the last share but one? If the testator was not using the words "then surviving brothers and sisters" in their natural meaning, I feel it difficult to understand why in the clause which immediately follows he should have spoken of one such surviving brother, and should have left the share whether accrued or not—for this purpose it does not matter—to him absolutely. Then again I see very great difficulty in understanding the grandchild clause unless the words "then surviving brothers and sisters" were meant to be read with their ordinary meaning, because whatever may be the object of putting in the grandchild or grandchildren clause, there is a distinct provision that if that clause does not apply—if there are no grandchildren, so to speak, to satisfy it—the shares are to go to the then surviving brothers and sisters in equal shares as tenants in common. That is met most ingeniously by saying that really both these two clauses are inconsistent with the original settlement of the original share in the earlier part of the will, and that, therefore, you must consider that, as

both the original settled share and an accrued settled share were to go first to the sons and daughters, and then to their children, you must assume that that is the way in which the share which falls in under the second clause to which I have referred—namely, the last brother but one, and the grandchildren clause, had gone. I cannot think that it is an argument to which I ought to give weight. It seems to me when you find—and you have only to judge from the language of the will—not only the words "then surviving brothers and sisters" but two clauses in which events are to happen according to the survival or non-survival of other brothers and sisters, and the existence or non-existence of grandchildren, the then surviving brothers and sisters are to get certain rights. I think in this will the testator did use the word "surviving" in its natural meaning, and that we ought to hold that effect should be given to it in the way Kekewich, J., has decided. Of course, upon anything else but the construction of the will I say at once that I should pronounce my opinion with the very greatest hesitation, but on the construction of this will, after the consideration I have given to it, and having had the great advantage of hearing it discussed yesterday and to-day, I have a very strong feeling that that is the only construction we can fairly put upon the will, and, therefore, I think this appeal should be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. It was not disputed on behalf of the appellants that if you construed the words literally the appellants had no case. But it was suggested that the words were not to be construed literally. Then it was suggested that you ought to put a construction upon these words in accordance with what I will call Kay, J.'s, third view in *In re Bowman*. But against that it affords me, I must say, some satisfaction to say that it seems difficult, or, as Cozens-Hardy, J., expresses it, beyond the wit of man to discover any rule which will guide you as to when you are to construe and when you are not to construe the word "surviving" literally. That being so one really has merely to look at the will and ascertain what was the intention of the testator. I do not suppose that at any time, however much the tide may be in favour of literal construction, it could be said that you are to follow literal construction if, from the four corners of the will, you can ascertain that the literal construction would be contrary to the intention of the testator. But we seem, in this case, to have arrived at this point, that there is no hard-and-fast rule to enable you to say when you are to follow the literal construction and when you are not. It is a matter always of the intention of the testator to be ascertained from the whole of a will. In this case I entirely agree with what the Lord Chief Justice has said as to the intention of the testator. I think for the reasons he has given it is clear here that the testator intended what he said, and I have nothing to add to the reasons which he has given.

ROMER, L.J.—I agree that in this will the words "surviving brothers and sisters," the words used by the testator, are used by him in their *primâ facie* and literal sense, and that there is nothing in this will to justify us in holding that the words are to have a secondary, or more extended, meaning. I should like to add that I also think there is no such fixed rule of construction as that which is called the third rule in the case of *In re Bowman*, and I have nothing to add on that point to what was said by my brother Cozens-Hardy in his judgment in the case which has been referred to.

Solicitors, *Collison, Prichard, & Barnes; Garrard, James, & Wolfe.*

High Court of Justice.

Chan. Div. Kekewich, J. — Aug. 1, 1901.

In re WOOD.
WOOD *v.* WOOD. (*a.*)

Will—Construction—Gift to illegitimate children by name—Gift to next-of-kin of children.

Illegitimate children cannot be treated as legitimate for the purpose of benefiting those who would have been their next-of-kin if they had been legitimate, even though it is the intention of a testator that this should be done.

In re Standley's Estate, *L. R.* 5 *Eq.* 303, 16 *W. R. Ch. Dig.* 151, *followed.*

Dictum *of* Stirling, J., *in* In re Deakin, 43 *W. R.* 70, [1894] 3 *Ch.* 565, *not followed.*

Originating summons.

The testator by his will, after bequeathing legacies to each of his seven children by name, devised and bequeathed his residuary estate to trustees upon trusts for conversion and investment, and for the payment of the income to his widow during her life, and directed that after her death the trustees should stand possessed of his residuary estate in trust in equal shares for such of the said seven children as should then be living, and should have attained or might attain the age of twenty-one years, and for all or any of the issue—who being a male or males should attain the age of twenty-one years or being a female or females should attain that age or marry—of any of his said children who should die in the lifetime of his widow leaving issue living at her death, and so that such issue should take through all degrees according to their stocks and in equal shares the share or shares which their parent would have taken if living at the time aforesaid, and so that no issue should take whose parents should be living at the time aforesaid and capable of taking.

He also directed his trustees to retain the legacy or other bequest and also the share of his residuary trust estate which any daughter of his might take under those provisions and to hold the same upon trust to pay the income of each such daughter's legacy and share to her during her life for her separate use during any coverture and after her death in case she should leave a husband surviving her upon trust to pay the income to the husband for life or any less period if she should so direct or appoint, and subject thereto upon trusts for the benefit of her children; and if there should be no such child then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes.

After the death of the testator it was discovered that three of his children were born before his marriage.

The widow of the testator died in December, 1900, and six of the seven children survived her.

One of the testator's illegitimate children, a daughter, died in January, 1901, without having had any issue or exercised the power of appointment given to her by the will in favour of her husband (who survived her).

The question raised by the summons was whether

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

her legacy and share of residue upon her death without issue (1) devolved upon the persons who would have been her next-of-kin at the time of her death in case she and the other persons described in the will as the testator's children had all been legitimate, or (2) passed to her legal personal representative as if it had been absolutely bequeathed to her, or (3) became divisible amongst the persons entitled in right of the testator's widow and legitimate children as if he had died intestate in relation thereto.

Warrington K.C., and *Lyttelton Chubb*, for the plaintiff, one of the legitimate children of the testator, referred to *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265; *In re Deakin*, 43 W. R. 70, [1894] 3 Ch. 565; *In re Standley's Estate*, L. R. 5 Eq. 303, 16 W. R. Ch. Dig. 151; *In re Haseldine*, 34 W. R. 327, 31 Ch. D. 511.

P. O. Lawrence, K.C., and *Peterson*, for the legal personal representative of the deceased daughter; and

Renshaw, K.C., and *F. Thompson*, for the persons entitled on an intestacy, were not called upon.

KEKEWICH, J.—It seems to me I shall best perform my duty be rejecting Mr. Warrington's contention. There is little doubt, and none of us can doubt, that the rules which obtained in the younger days of some of us, and which were handed down from the time of Lord Eldon, if not earlier, have been modified, and benevolently modified, in later years. For example, a case which has just been mentioned to me, which I have more than once had occasion to refer to, *In re Haseldine*, was a very strong case of extracting from the language used by a testator an intention to include illegitimate children under a phrase or terms which otherwise would be strictly construed as meaning children only in the ordinary sense of the word. There is another case, one before Stirling, J., of *In re Deakin*, and I have myself not hesitated to adopt the same line in the case which Mr. Warrington intended to cite but did not cite, of *In re Parker*, 45 W. R. 536, [1897] 2 Ch. 208.

Now the question I have to decide is whether we should go a step further than those cases. Here I am asked to go still further and say that illegitimate children are to be regarded as legitimate for the purpose of giving to those who are not in law their next-of-kin under the statute, but to those who would have been their next-of-kin under the statute if they had been legitimate, the property which was settled upon these illegitimate children. It must not be forgotten that in order to arrive at that conclusion I must introduce words into the will. The words in the will are: "In trust for the persons who at the death of such daughter would have become entitled to such share under the statute for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married." I must, in order to support the construction which I am asked to support, add "in case she had died possessed thereof legitimate and without being married." Am I to read those words into the will? The view I take of it is that to do so would be to take another step in the benevolent view—which may hereafter be adopted for aught I know to the contrary by the Court of Appeal and the House of Lords—of letting in illegitimate children where the court sees that that is the testator's intention. I think that is a step which ought not to be taken by a judge of first instance, but ought only to be taken by the Court of Appeal or the House of Lords for our guidance. Mr. Warrington cannot cite a case where it has been done. He says the principle carries it the whole length, but he does not say the particular thing has ever been done however strong the case has been. The very point came before Wood, V.C., in *In re Standley's Estate*, and he declined to interpret the law in that way. The words there were to the son's "Next-of-kin under the statute for the distribution of intestates' estates, in case he had died intestate and unmarried," with the result, the child being illegitimate, that only those who were the next-of-kin in blood without being so in law would take, if anybody was to take at all, a fact which I also act on in this case. The words do not exclude the possibility of children to him, and therefore if anybody were to take at all it must be those who were next-of-kin according to the statute, on the hypothesis of the child being illegitimate. Wood, V.C., is, I need hardly say, a very high authority, but he declined to adopt that. He says at p. 309: "The only cases in which effect has been given to a limitation in favour of illegitimate children (who, in the eye of the law, are no children at all) are cases where it can be distinctly ascertained that the testator pointed out those children as *personæ designatæ* although he did not name them." Now, I do not understand that to be in the least touched by the decision in *Hill* v. *Crook*, and the other cases to which I have been referred. Still, in order to give illegitimate children anything under the term "children," you must ascertain from the testator's will the intention (construed, of course, according to the evidence of the surrounding circumstances), and you must find that he must have intended them to have been included in the clause. Wood, V.C., declined to go further and say that the next-of-kin (though the children themselves are to be taken as children, notwithstanding the illegitimacy) would be let in. He expresses a decided opinion upon that. He says: "What the testator has attempted to do is this"—apparently he gives him credit for having intended it, and that is the real point upon which I want to lay stress—"to declare his children, though illegitimate, are to be taken as legitimate, and then to say under the description "next-of-kin" there shall be let in all the persons who could have been their next-of-kin if they had been legitimate. I apprehend that is an attempt which the law will not permit to succeed."

Now what have I here? I assume, and it is a very fair assumption to make from what I know of the case, that the testator wished to recognize all these children as legitimate though some of them were illegitimate. That he was entitled to do. Then he wishes to do as the testator in *In re Standley* did—namely, to say, "that under the description 'next-of-kin' shall be let in all the persons who would have been their next-of-kin had they been legitimate." That is what Wood, V.C., says. He intended to do it, I recognize it was his wish, on the proper construction and language of his will, yet I cannot give that effect to it, because I apprehend that is an admission which the law will not permit to succeed.

Now I am a little puzzled I confess by the reference to that case by Stirling, J., in *In re Deakin* because although Stirling, J, of course would not overrule a decision of Wood, V.C. (I take care to refer to the learned judge as Wood, V.C., not as known now as Lord Hatherley, because the decision was given when sitting as Vice-Chancellor); yet that is a very technical way of putting it. He might have examined the case, and said it was distinguished by other authorities, and that it was not now a case which could be followed. If he had said that of course it is quite possible I might have found ground to follow Stirling, J., but this is what he does say, [1894] 3 Ch., at p. 573: "The case of *In re Standley's Estate*, decided by Lord Hatherley when Vice-Chancellor, was relied upon as an authority adverse to the conclusion at which I have arrived. I must confess

myself unable effectually to distinguish it, but it was decided before *Crook* v. *Hill*. The reasoning on which the decision was based appears to me to be inconsistent with the principles there laid down, and notwithstanding the weight justly due to any decision of Lord Hatherley I am unable to follow it, having regard to the more recent authorities which are binding on me." That is what Stirling, J., says in the case of *In re Deakin, Starkey* v. *Eyres*.

Now the learned judge held that, in the case of an attempt, such as the Vice-Chancellor points out, to bring in as next-of-kin under the statute those who were not, according to the eye of the law, the next-of-kin, the two cases in that respect were not the same. They were not on similar lines. In many respects no doubt they were, and I quite follow Stirling, J., in saying that before *Crook* v. *Hill* the line of reasoning which was adopted by the Vice-Chancellor was inconsistent in some respects, at any rate, with the principle of *Crook* v. *Hill*, but neither in *In re Deakin* nor in *Crook* v. *Hill*, nor any other case, have we got a decision on that point that the law will not permit a man to do that which the testator in *In re Standley* attempted, and which the testator here attempted. I cannot read Stirling, J.'s, judgment as saying that that attempt has been legalized and made possible and successful by the subsequent cases, and therefore finding a direct decision on that neat point by Wood, V.C., I think, sitting here as a judge of first instance, I am bound to follow it. I must leave it to a higher court to say if I am wrong.

[It was admitted that the result was that there was no intestacy but an absolute gift to the deceased daughter, and consequently her legal personal representative was entitled to her legacy and share of residue.]

Solicitors, *Indermaur, Clark, & Palmer; Field, Roscoe, & Co.*

Chan. Div.
Farwell, J. } Nov. 8.

SMITH v. NORTHLEACH RURAL DISTRICT COUNCIL. (a.)

Practice — Costs — Action against public authority — Payment into court as to part of claim — Discontinuance—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (c).

The provisions of the Public Authorities Protection Act, 1893, *s.* 1 (c), *as to the payment of solicitor and client costs by the defendant, do not apply when an action has been discontinued.*

Adjourned summons.

This was an action to restrain the defendants from abstracting or interfering with the flow of water to the plaintiff's mill called the Northleach Mill, and for damages.

The defendants had constructed works with a view to supplying the town of Northleach with water pursuant to the provisions of the Public Health Act, 1875.

The plaintiff claimed that the defendants had abstracted the water under three different heads.

The defendants with regard to the plaintiff's claim for an alleged wrongful continuance of abstraction of water authorized by a revocable licence, contended that the alleged abstraction, if continued after the date of the alleged revocation, did not in any case continue after the month of March, 1899, and while denying all liability for the same, they brought into court the sum of £10, and said that the same was sufficient to satisfy that part of the plaintiff's claim.

On the 25th of October, 1901, the plaintiff accepted the sum of £10 paid by the defendants into court in full satisfaction of the causes of action mentioned in the statement of claim.

The case now came before the court on the question of costs.

The Public Authorities Protection Act, 1893, provides: Section 1.—Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect—

(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

(*c*) Where the proceeding is in an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action.

Butcher, K.C., and *Ashworth James*, for the plaintiff, referred to *McIlwraith* v. *Green*, 14 Q. B. D. 766, 33 W. R. Dig. 61; R. S. C., ord. 26, r. 1.

Jenkins, K.C., and *William Wills*, for the defendants, referred to the Public Authorities Protection Act, 1893, s. 1 (c).

FARWELL, J., in giving judgment referred to *McIlwraith* v. *Green*, and said that the defendants were to pay the plaintiff one-third of their taxed costs up to the date of the payment into court; that the plaintiff was to pay the defendants their taxed costs since the date of payment into court, without disturbing any order as to costs already made. The defendants were not entitled to solicitor and client costs. [His lordship referred to the Public Authorities Protection Act, 1893, s. 1 (*b*) (*c*)] As there was no judgment in this case, and there could not be having regard to the discontinuance, the Act did not apply as regards solicitor and client costs.

Solicitors, *Peacock & Goddard*, for *Mullings, Ellett, & Co*, Cirencester; *Blyth, Dutton, Hartley, & Blyth*, for *Thomas Mace*, Chipping Norton, and *Henry Temple Ravenor*, Witney.

K. B. Div.
(Wills and Kennedy, JJ.) } Aug. 9, 1901.

PEARKS, GUNSTON, & TEE (LIMITED) (*Appellants*) v. KNIGHT (*Respondent*).

SAME (*Appellants*) v. VAN TROMP (*Respondent*). (a.)

Adulteration—Food and drugs—Article not of the nature, substance, and quality demanded—Butter—Adding milk to—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

A provision merchant who sells to a purchaser, who demands butter, a compound consisting of butter made by the ordinary process, in which a large proportion of the water in the cream or milk is eliminated, to which was added milk from which no water was eliminated, in consequence of which the compound contains an excess of water, is guilty, under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality demanded by the purchaser.

These two cases were stated, the first by the stipendiary magistrate for the Staffordshire Potteries District, and the second by a stipendiary magistrate for South Staffordshire.

In each case informations were preferred by the respondent charging the appellants, grocers and provision merchants, with having unlawfully sold to the prejudice of the respective purchasers certain butter which was not of the nature, substance, and quality demanded by them, contrary to the provisions of section 6 of the Sale of Food and Drugs Act, 1875.

PEARKS & CO. *v.* KNIGHT.

In this case the following are the facts as set out:

On the 20th March, 1901, the respondent caused to be purchased by Charles Gifford at the appellants' shop at Fenton one half-pound of butter for the purpose of submitting the same to analysis. The price of the half-pound was fivepence.

All the requirements of the statutes relating to the purchase of an article for analysis were duly complied with.

The public analyst certified that the butter contained 22·53 per cent. of water, and that this was at least 6 per cent. too much.

Water is a natural constituent of butter, and is always present in butter to a considerable though varying extent. Butter is made sometimes from milk, sometimes from cream, sometimes from milk and cream. Milk contains about 88 per cent., cream about 50 per cent of water.

There is no statutory standard for the composition of butter as regards the proportion of water it may contain. The Board of Agriculture have made no regulations as to this under section 4 of the Sale of Food and Drugs Acts, 1899. The standard taken by the analyst certifying in the present instance is 16 per cent.

The 6 per cent. excess of water which the sample of the appellants' butter was certified to contain was not the result of the manufacture of butter from milk or cream, or both, but was caused by the addition to butter already manufactured from milk or cream, or both, of extraneous milk, which milk had been incorporated with the butter by some process subsequent to the manufacture of the butter.

This added milk was not required for the production of butter, but was incorporated with the butter for the purpose of increasing its weight by means of the extra water thereby introduced.

It is not unusual for a butter manufacturer to blend two or three different kinds of butter.

No evidence was called for the appellants, but it was contended on their behalf that an article could not be adulterated by the addition of a constituent from which it was derived, and therefore that the butter in question, having been made exclusively from milk or cream, or both, was in fact not adulterated butter whatever the percentage of water might be, and there being no legal standard as to the quantity of water in butter, the fact that the butter contained 22·53 per cent. of water was, under the circumstance, no evidence of adulteration, and that no offence was committed under section 6 of the Sale of Food and Drugs Act, 1875, by not eliminating a natural constituent of the article.

The magistrate was of opinion that of the 22·53 per cent. of water found in the butter 6 per cent. was excessive and was caused by the addition of the milk, and he held that the process of adding the milk to the butter, being for the purpose of the addition of water, constituted an offence under section 6 of the Sale of Food and Drugs Act, 1875, in that an article was sold not of the nature, substance, and quality demanded by the purchaser, the same being adulterated with water.

The question for the opinion of the court was whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law, and if not, what should be done in the premises.

Joseph Walton, K.C. (*B. D. Bonsey* with him), for the appellants.—The conviction was wrong. The question here is whether the butter as sold was not of the nature, substance, and quality of the article demanded—viz., butter. It matters nothing at all how much water there is in the butter, provided that such water is not added water. The article sold to the respondent was of the nature, substance, and quality demanded by him—*i.e.*, butter. Butter is defined by section 3 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), as "the substance usually known as butter, made exclusively from milk or cream, or both, with or without salt or other preservative, and with or without the addition of colouring matter." The butter in question was made of milk or cream exclusively, but in the course of a certain process more milk, and therein more water, was added. This, however, was only an additional process in the making of the butter. The product was still butter made exclusively of milk or cream. There is nothing in the Act which says there must be a particular mode of making butter so long as it is made of milk or cream, and there is no fixed percentage of water in the case of butter. By section 4 of the Sale of Food and Drugs Act, 1899, the Board of Agriculture may make regulations as to what proportion of water butter may contain, but no such regulations have been made. The article in question could not under section 8 of the Act of 1899 be sold as margarine, because it contained more than 10 per cent. of water, therefore, if it could not be sold as butter it would be impossible to sell it at all. The question of fraudulent intention is irrelevant to the question. The finding of the magistrate was therefore wrong and the conviction should be quashed.

Danckwerts, K.C. (*B. C. Brough* with him), for the respondent, was not called on.

PEARKS & CO. *v.* VAN TROMP.

The facts as stated in this case are as follows:

On the 1st of April, 1901, the respondent caused to be purchased, by T. E. Guilbert, at the appellants' shop at Brierley Hill, half a pound of butter for the purpose of analysis. The butter was labelled "Pure Dairy Butter" and was wrapped in a paper on which were the words "Pure Butter." The butter so purchased was divided into three parts and one was sent to the public analyst. All the requirements of the statutes in that behalf were complied with.

The public analyst certified that the butter contained 21·75 per cent. of water and that this was at least 5 per cent. too much.

Water is a natural constituent, and though the quantity varies in different kinds of butter it is always present in a considerable proportion, but should never exceed 16 per cent. Butter is made by churning either from milk alone or from cream and

sometimes from both milk and cream. Milk contains about 88 per cent. of water, and cream about 50 per cent.

There is no statutory standard for the composition of butter as regards the quantity of water it should contain. The Board of Agriculture has not made any regulation as to this under section 4 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51).

It is a common practice in the trade to blend different kinds of butter, and the process of blending adopted by the appellants is to mix different kinds of butter together and during this process to add to it full cream milk. The butter in question had been blended by the above-mentioned process—that is to say, it was composed of different kinds of butter mixed together, genuine full cream milk being added to it during the process.

The excessive amount of water found in the butter was derived entirely from the milk which was added during this process.

The price of full cream milk is three farthings a pound, and butter about tenpence.

It was contended on behalf of the appellants that until regulations are made by the Board of Agriculture under section 4 of the Sale of Food and Drugs Act, 1899, any article made exclusively from milk or cream, or both, was in fact butter; that there being no statutory standard as to the quantity of water in butter, the fact of the butter containing 21·75 per cent. of water was, under the circumstances, no evidence of adulteration; that no offence was committed under section 6 of the Sale of Food and Drugs Act, 1875, by not eliminating a natural constituent of the article; that the facts disclosed no evidence of adulteration or any offence under section 6 of the Sale of Food and Drugs Act, 1875.

The magistrate was of opinion that the water found in the butter was excessive, and as it was caused by adding milk to an already manufactured article the mixture could not properly be called butter, but was butter adulterated by the addition of water in the form of milk.

He was further of opinion that the said milk was added fraudulently and with intent to increase the bulk of the mixture.

He was further of opinion that the fact that the Board of Agriculture had not exercised the powers conferred upon it by section 4 of the Sale of Food and Drugs Act, 1899, did not warrant the appellants in mixing milk with the butter and so producing an abnormal amount of water in the mixture.

The question for the opinion of the court was whether upon the facts stated the magistrate was right in law in convicting the appellants of the offence charged in the information under section 6 of the Sale of Food and Drugs Act, 1875.

Horace Avory, K.C. (*H. D. Bonsey* with him), for the appellants.

Danckwerts, K.C. (*B. C. Brough* with him), for the respondent, was not called on.

WILLS, J.—I am clearly of opinion that these convictions should be supported and that our judgment should be for the respondent in each of these cases. Section 6 of the Sale of Food and Drugs Act, 1875, provides that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser." In each of these cases the purchaser demanded butter and the appellants supplied him, not with butter, but with an article which had been but was no longer butter; for by some ingenious process, the nature of which is probably a trade secret, cream or milk had been added to it in such a way as not to become butter. This cream or milk was not subjected to the ordinary process by which butter is made. Butter made by the ordinary process contains no doubt a certain proportion of water, but only about 16 per cent. The very object, however, of the process employed by the appellants, was that the cream or milk which was added to the butter should not be turned into butter at all, but that a considerable quantity of the watery parts which in the ordinary process of making butter would be eliminated should be left in the resulting compound. This was a spurious compound and was not genuine butter as demanded by the purchaser. It does not matter what the motive was for adding the cream or milk. The magistrates have found there was an excessive amount of water in the butter and that the cream or milk was added fraudulently. But even if the appellants had added it honestly that would be no answer to the offence under section 6 with which they were charged. Therefore I am of opinion that the convictions were right and that the appeals must be dismissed.

KENNEDY, J.—I am entirely of the same opinion, and for the same reasons.

Judgment for respondents.

Solicitors for appellants, *Neve, Beck, & Kirby.*

Solicitors for respondents, *Thomas White & Sons*, for *M. F. Blakiston*, Stafford.

K. B. Div. (Mathew, J.) — Aug. 5, 7, 1901.

RATCLIFF AND ANOTHER v. MENDELLSOHN. (a.)

Stock Exchange—Broker in default—Liquidation—Completion by jobber with broker's clients—Right of jobber to sue broker for difference.

A broker and member of the Stock Exchange was declared a defaulter, there being then due from him to a firm of jobbers £986. A further sum of £281 became due on the closing at the hammer price. The jobbers completed with the broker's clients and were paid the differences due from them, but by the rules of the Stock Exchange the jobbers had to account for £281 of the amount so received to the official assignee of the Stock Exchange, who was carrying out the liquidation of the broker's estate. The jobbers brought an action against the broker to recover £986 and £281. At the date of trial the liquidation was still proceeding, and the jobbers had paid an interim dividend.

Held, that the action could be maintained, and that the jobbers were entitled to recover the amount claimed, less the amount of the dividend received.

Action in the commercial list tried by Mathew, J., without a jury.

The plaintiffs were jobbers on the Stock Exchange.

At the date of the mid-May settlement, the 13th of May, 1901, there became due to the plaintiffs from the defendant, who was then a broker and member of the exchange, the sum of £986 for differences in respect of contracts for the sale or purchase of shares entered into by the defendant on behalf of his clients with the plaintiffs. These contracts were carried over to the end of May settlement.

On the 16th of May the defendant was declared a defaulter, and all his contracts then open with the

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

plaintiffs were closed at the hammer price of the various shares, in accordance with rule 177 of the Stock Exchange Rules and Regulations, the result being that a further sum of £281 was shown to be due from the defendant to the plaintiffs. At the end of May settlement the defendant's clients either completed with the plaintiffs through other brokers or again carried over, and the plaintiffs received from such other brokers the sums due from the clients in respect of those transactions.

The plaintiffs had been paid by the official assignee of the Stock Exchange a dividend of 2s. 6d. in the pound in respect of the defendant's indebtedness to them, and there were other assets out of which a further dividend would be paid, but the amount thereof was doubtful.

The plaintiffs claimed in this action to recover £986 and £281.

By the points of defence it was pleaded, in substance, as to the whole claim, that the plaintiffs' sole right was to prove in the Stock Exchange liquidation of the defendant's estate; as to the £281, that the transactions had been completed by the defendant's clients with the plaintiffs.

Evidence was given on behalf of the plaintiffs that by the rules and practice of the Stock Exchange the plaintiffs would have to account to the official assignee for £281 of the amount received by them from the defendant's clients.

Rufus Isaacs, K.C., and *Carrington*, for the plaintiffs.—The fact that the plaintiffs have participated in the Stock Exchange liquidation of the defendant's estate is no bar to their taking proceedings at law against him for the recovery of their debt: see *Ex parte Ward, In re Ward*, 30 W. R. 560, 20 Ch. D. 356. Then it is further said that as to the claim for £281 the plaintiffs, having elected to complete with the defendant's clients, cannot now sue the defendant; but that point is concluded by the decision in *Stoneham* v. *Wyman*, 6 Com. Cas. 174. It is clear from the evidence that the plaintiffs have to account to the official referee for the £281 received from the defendant's clients and therefore the plaintiffs are out of pocket to that extent, but the plaintiffs will of course have to give credit for the amount of the dividend they have received out of the defendant's estate.

Bankes, K.C., and *J. R. Atkin*, for the defendant.—*Ex parte Ward, In re Ward*, only decides that after the liquidation has come to an end the defaulter may be sued by his Stock Exchange creditors. It is no authority for saying that he may be sued whilst the liquidation is pending. It is contrary to the spirit and intention of the rules as to liquidation and most inequitable that the defendant should be sued, for by the operation of the rules he has been stripped of all his assets, which are now vested in the official assignee, and he has therefore no means of satisfying the judgment and must inevitably become a bankrupt. If the plaintiffs can sue the defendant it would follow that a defaulter could sue a member of the exchange for credit differences on the closing at the hammer price, but it is clear that he has no such right of action: see *Ex parte Grant, In re Plumbly*, 28 W. R. 755, 13 Ch. D. 667. As to the £281 the position is the same as if there had been no default, for the plaintiffs have elected to complete with the defendant's principals.

Isaacs, K.C., in reply, referred to *Richardson* v. *Stormont*, 48 W. R. 451, [1900] 1 Q. B. 701.

Cur. adv. vult.

Aug. 7.—MATHEW, J.—This is an action in which the plaintiffs, who are jobbers and members of the Stock Exchange, seek to recover two sums of £986 and £281 from the defendant, who was formerly a broker on the Stock Exchange. It appeared that at the date of the mid-May settlement in the present year, which took place on the 13th of May, there were several contracts for the purchase and sale of stocks and shares open between the plaintiffs and the defendant which were carried over to the end of May settlement in the usual way, leaving a balance of £986 due from the defendant to the plaintiffs on the mid-May settlement. On the 16th of May the defendant was declared a defaulter. The hammer price was fixed on that day, and the usual liquidation proceedings under the rules of the Stock Exchange took place. It is not necessary to describe the nature of those proceedings at length; but shortly stated it became the duty of the official assignee of the Stock Exchange to collect the amounts due to the defendant from members of the Stock Exchange, and to consider and adjudicate upon all claims made by members and others against his estate. As to the first part of the claim—namely, that for £986, it has not been argued, and could not be argued, that the liquidation of the defendant's estate under the rules of the Stock Exchange operated as a release of the defendant; that point was settled by the case of *Ex parte Ward*. The contracts between the plaintiffs and the defendant survived the liquidation, and it is not contended that what was done under the Stock Exchange rules released the defendant, or in any way altered or controlled the ordinary law. But it was contended for the defendant that although it could not be said that there was a release there ought to be a suspension of the plaintiffs' remedy at law. The case was put in this way. The official assignee was collecting all the assets of the defendant, and it was said that it would be a great hardship if a judgment was to be recovered against the defendant which he had no means of meeting and which therefore would terminate in his bankruptcy. It was also said that the defendant had various claims against his clients, and that when they had been collected a dividend of twenty shillings in the pound might possibly be paid. On the evidence before me I think this is far too sanguine an estimate. I doubt whether the dividend will be more than three or four shillings in the pound. That being so, and there being no authority to say that the legal remedies of the plaintiffs were suspended, and there being certainly no rule of the Stock Exchange providing for such a result, I have come to the conclusion that the plaintiffs are entitled to enforce their legal remedies on the contracts, and are therefore entitled to succeed on the first part of the claim.

The second part of the claim was for £281. The plaintiffs were entitled to be paid a dividend of the defendant's estate in respect of this £281 as in the the other case. But the contracts which had been entered into with the plaintiffs by the defendant's clients ran on until the settlement at the end of May, then, in accordance with the course of business, other brokers were appointed in the place of the defendant to act for those clients, and their transactions with the plaintiffs were closed and settled. Upon this it was said on behalf of the defendant, What claim can the plaintiffs have against him, their contracts having been fulfilled? and the position was, therefore, it was said, exactly the same as if there had been no liquidation because the plaintiffs had received the whole amount due to them. But if that argument prevails it is clear that the plaintiffs will be in a better position than the other creditors of the defendant, and the course of business of the Stock Exchange is that there shall be so far as possible an equality among the different creditors of the defaulter, and to secure that end there is a rule (No. 155

which provides that "a creditor receiving under any circumstances a larger proportion of differences on a defaulter's estate than that to which each of the creditors is entitled shall refund such portion as shall reduce his dividend to an equality with the others." Now evidence has been given by the official assignee as to the course of business under that rule. He said that the invariable practice is to require a person who has received more than the other creditors to bring the amount so received into the general account of the defaulter's estate; in other words, the plaintiffs have to pay that £281 to the official assignee, which will be treated as part of the assets of the defendant's estate out of which the plaintiffs and the creditors are entitled to be paid a dividend. The result is that the plaintiffs, having to pay in that way, are out of pocket to that extent; but as in the former case the contracts with the defendant survived, and on those contracts the defendant is liable to indemnify the plaintiffs in respect of what they are obliged to hand over to the official assignee in accordance with the rules. In that state of things the defendant is still liable to the plaintiffs, and the plaintiffs are therefore entitled to recover the second sum claimed. There will, therefore, be judgment for the plaintiffs, but allowance will have to be made for anything which has been paid to the plaintiffs as a dividend on the defendant's estate.

Judgment for the plaintiffs for an amount agreed by counsel.

Solicitors for the plaintiffs, *Michael Abrahams, Sons, & Co.*

Solicitors for the defendant, *Osborn & Osborn.*

K. B Div. (Mathew, J.) July 22, 26, 1901.

NIGEL GOLD MINING CO. (LIMITED) v. HOADE. (a.)

Insurance—Products of gold mine—"Arrests, restraints, detainments"—Outbreak of war—Seizure—Property in enemy's territory—Right of assured to recover.

The plaintiffs were a company incorporated and registered in Natal, and owning and working a gold mine in the Transvaal. On the outbreak of the war on the 11th of October, 1899, between the South African Republic and Great Britain, the plaintiffs ceased to work their mine. A few days after the war had begun, gold products which had been extracted from the plaintiffs' mine before that date were seized by the officials of the South African Republic while still in the plaintiffs' possession. The plaintiffs had effected an insurance of the produce of their mine by a policy covering arrests, restraints, and detainments of kings, princes, and people. In an action on the policy to recover the value of the gold seized,

Held, that the plaintiffs were not disentitled by any principle of public policy from recovering the loss.

Action in the commercial list tried by Mathew, J., without a jury.

The action was brought to recover a loss under a policy of insurance subscribed by the defendant and others, underwriters at Lloyd's.

The facts of the case and the arguments of counsel are fully stated in the judgment.

Scrutton, K.C., and *Balloch*, for the plaintiffs.

Joseph Walton, K.C., Lord Robert Cecil, K.C., and *Leohnis*, for the defendant.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The following authorities were referred to: *Brandon* v. *Curling*, 4 East. 410; *The Phœnix*, 5 C. Rob. 20; *The Vrow Anna Catherina*, 5 C. Rob. 161; *The San Jose Indiano*, 2 Gall. 268; *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall. 104; *The Venus*, 8 Cranch. 253; *Bentzon* v. *Boyle*, 9 Cranch. 191; Twiss on Law of Nations in Time of War (2nd ed.). p. 306; Upton on Maritime Warfare and Prize Law, pp. 149, 150; Dicey on the Conflict of Laws, p. 135; *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A C. 535; and *Printing and Numerical Registering Co.* v. *Sampson*, 26 W. R. 627, L. R. 19 Eq. 462.

Cur. adv. vult.

July 26.—MATHEW, J.—This was an action on a policy of insurance effected by the plaintiff company with the defendant, an underwriter at Lloyd's. The subject-matter of the insurance is described in the policy as "amalgam precipitates from cyanide and chlorination processes, lead bullion and gold bars." So small was the apprehension when the policy was effected that peaceful relations with the South African Republic would be disturbed that the premium was only 6d. per cent. The policy provided for the commencement of the risk with reference to the different subjects insured, and protected the property while on the premises at the plaintiffs' mine in the Transvaal and until despatched therefrom. In the ordinary course a second policy would have protected the gold while being carried to England. The risk on the amalgam commenced when taken from the plates and entered in the amalgam register. The policy contained in print the usual capture clause, and there was added in writing the following clause: "This insurance covers and includes risk of theft, larceny, burglary, and all and every risk, whether loss arise from want of integrity of assured's employees or otherwise. To pay average irrespective of percentage. This instrument is not to be deemed a sea insurance policy." The last words appear to be a provision with reference to possible stamp objections. The plaintiff company were the owners of a gold mine in the Transvaal, and on the 17th of October, 1899, after the commencement of the war, the agents of the Transvaal Government seized and carried away from the mine 780 ounces of amalgam, and in February, 1900, there was a further seizure by agents of the Government of 106 ounces of amalgam. This latter quantity had not been entered in the amalgam register until some days after the seizure. In the year 1888 the plaintiff company had been registered in Natal as a joint stock company. Subsequently the company had received a supplemental incorporation in the Transvaal. The object of this proceeding was to enable the company to sue and be sued in the Transvaal in its corporate name and to obviate the difficulty under Transvaal law of representing a foreign company under a power of attorney. I am satisfied from the evidence given in the case that this additional incorporation was supplemental and ancillary only and did not alter the status of the company; a branch office had been opened at Johannesburg, but it was only used for transfers of shares and transacted no other business. The only property of the company was the gold mine in the Transvaal. There was a resident manager and secretary, and the working of the mine was controlled by a committee of directors who went up from Natal for the purpose every month.

The first point made for the defendant was that the loss was not covered by the policy. It was said that the written clause superseded what was in print and that the only losses covered were those described

in writing. This does not seem to me the true construction of the policy. The printed matter is not repugnant to or inconsistent with what is written; both clauses described the risks intended to be insured. As to the second seizure the defendant contended that the policy had not attached by reason of the failure to register the amalgam. The condition of registration was an important protection to the underwriter, and its omission, in my judgment, prevents the loss from being recoverable.

The main contention of the defendant's counsel was that the subject-matter of insurance was enemies' property and that after a declaration of war the policy had become ineffective. It was pointed out that the company had been carrying on their business within the territories of the South African Republic, and had acquired a commercial domicil in the Transvaal, and that the products of their mine were Transvaal and not British property, and it was urged that, from the time when war was declared, the property was stamped with a hostile character and on the high seas would be subject to capture and condemnation as a lawful prize. In support of this contention recourse was had to the authority of cases decided in the English and American Prize Courts in the early part of last century. There can be little doubt that these cases would not be followed now, and even when those decisions were pronounced their authority was rejected by eminent lawyers: see *The Venus*, 8 Cranch. 252, at p. 279. The sounder opinion would seem to be, that the subject of our country surprised by a declaration of war in the country where he has a commercial domicil ought to have time allowed him to free himself from his commercial engagements, and effect a removal of his property. The conflicting opinions upon this subject are discussed with great ability in in Duer on Marine Insurance, vol. 1, lecture 5. In this case there was no indication of any intention on the part of the Natal company to continue their business in the Transvaal after war had been declared. There was no evidence of any intention on the part of the company to continue their mining operations while the war continued. No authority was cited to show that the supposed rule relied upon by the defendant had ever been recognized or adopted in insurance law. I am satisfied that for the purposes of this case the gold products in question are not to be regarded at the time of seizure as enemies' property merely by reason of the commercial domicil of the company when war was declared.

But the same result was sought to be reached in a different way. It was said that the plaintiff company had a two-fold character. It was a British company and a Transvaal company; it was amphibious and was at once friendly and hostile. It was urged that the goods should be deemed to be Transvaal goods, and that the company should be deemed to be a Transvaal company, and that to indemnify the plaintiffs should be deemed to be an addition to the resources of the Transvaal Government, and therefore to be against public policy. But this argument seems to me to offer a series of fictions in lieu of the plain facts. I am of opinion that the gold products in question were British goods, and were seized by a hostile force, and that the loss is covered by the policy. My judgment is therefore for the plaintiff company.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Loughborough, Gedge, Nisbet, & Drew.*

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

K. B. Div. (Phillimore, J.) — July 10, 11, 12, 15, 1901.

ROBINSON GOLD MINING CO. (LIMITED) AND OTHERS v. ALLIANCE MARINE AND GENERAL ASSURANCE CO. (LIMITED). (a.)

Insurance—Bullion—Perils—"Arrests, restraints, and detainments"—"Warranted free of capture, seizure, and detention"—Bullion taken possession of by assured's government—Subsequent declaration of war.

Gold bullion the property of a Transvaal company was insured during transit from the Transvaal to the United Kingdom by a policy which covered the risks of "arrests, restraints, and detainments" of rulers, and which contained a clause "Warranted free of capture, seizure, and detention." The gold while in transit in the Transvaal was, on the 2nd of October, 1899, removed from a railway train and taken possession of by officials acting under the orders of the Transvaal Government. At that date it was anticipated that war would shortly break out between the Transvaal and this country, and war did in fact begin on the 9th of October. According to the law of the Transvaal the taking of the gold was in the circumstances a legal act. In an action on the policy,

Held, that the gold had been seized within the meaning of the warranty, and that the plaintiffs could not recover a loss under the policy.

Action in the commercial list tried by Phillimore, J., without a jury.

The plaintiffs, who were mining companies, incorporated and registered under the laws of and carrying on business in the South African Republic, claimed to recover a loss under a policy of insurance dated the 12th of September, 1899, by which gold was insured at the plaintiffs' mines in the Witwatersrand goldfields and in course of transit therefrom to the United Kingdom.

The perils insured against included "arrests, restraints, and detainments of all kings, princes, and people," and the policy contained the following clause: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

Consignments of gold to which the policy attached were on the 2nd and 9th of October, 1899, seized in the Transvaal by officials of the South African Republic acting under the authority of the Executive Government of the Republic.

War broke out between the Republic and this country on the 11th of October, 1899.

The defence raised the same points as those in *Driefontein Consolidated Mines* v. *Janson*, 49 W. R. 660, [1901] 2 K. B. 419; and in addition thereto the defendants pleaded that the loss was not caused by any peril insured against, and, alternatively, that the "warranted free of capture" clause exempted the defendants from liability.

Evidence was given on behalf of the plaintiffs that the seizure of the gold was legal according to the law of the Republic.

Lawson Walton, K.C., and *J. A. Hamilton, K.C.* (*Campbell Johnston* with them), for the plaintiffs.—The act of the Government of the South African Republic in seizing the gold comes within the language of the policy. The words "arrests, restraints, and detainments" must not be construed as applying merely to the acts of a hostile power; they are equally applic-

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

able to an act committed by the orders of the assured's own government: see *Aubert* v. *Gray*, 11 W. R. 27, 3 B. & S. 163; Phillips on Insurance, ss. 1109, 1111; *Rotch* v. *Edie*, 6 T. R. 413. There has, therefore, been a loss by perils insured against. Then it is said that the defendants are protected by the warranty. It is submitted the warranty is confined to belligerent risks. Its phraseology is not appropriate to include the lawful actions of the assured's government. The facts of the case clearly do not constitute a capture, nor are they seizure and detention. Seizure involves the exercise of something in the nature of physical force, an act either of violence pure and simple, or of legal force to punish a breach of the law. The taking possession of this gold can only be said to be forcible in the sense in which every act of a government in the nature of taxation may be said to be carried out by force.

They cited *Cory* v. *Burr*, 31 W. R. 894, 8 App. Cas. 393; *Kleinwort* v. *Shepard*. 7 W. R. 227, 1 E. & E. 447; *Powell* v. *Hyde*, 4 W. R. 51, 5 E. & B. 607; *Johnston* v. *Hogg*, 31 W. R. 768, 10 Q. B. D. 432; *Rodocanachi* v. *Elliott*, L. R. 9 C. P. 518; *Greene* v. *Pacific Mutual Insurance Co.*, 9 Allen, 217; *Brunner* v. *Webster*, 5 Com. Cas. 167; *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 1 Q. B. 326, 45 W. R. Dig. 147; *Kidston* v. *Empire Marine Insurance Co.*, 15 W. R. 769, L. R. 2 C. P. 357.

Joseph Walton, K.C., and *Lochnis* (*Lord Robert Cecil, K.C.*, with them), for the defendants.—If the loss comes within the perils insured against, then it is clearly within the words "seizure and detention" in the warranty. The suggestion that these words must be confined to the acts of a belligerent or penal character is one for which no authority can be shown. On the other hand, if the warranty does not cover this case, the loss is equally not within any of the perils insured against.

Lawson Walton, K.C., replied.

Cur. adv. vult.

July 15.—PHILLIMORE, J., read the following judgment: This case is remarkable by reason of the large sum at stake. It is remarkable in its features, and still more remarkable from the position and juxtaposition of the two witnesses who have given evidence. But the circumstances are so peculiar that it is not likely to give rise to any guiding rules of general importance. I am about to decide it as one of construction. The plaintiffs, who are several mining companies incorporated according to the laws of then existing South African Republic, and therefore to be deemed to be subjects and citizens of that Republic, sue upon a policy of insurance on gold in transit from the mines to a bank at Johannesburg, at the bank, and thence by land and sea conveyance to France and England, and they declare upon two losses—one on the 2nd of October at Vereeniging, a frontier railway station of the then Republic; the other at Johannesburg, also in the Republic, on the 9th of October; and they aver that these losses were caused by perils insured against, to wit, "arrests, restraints, and detainments of kings, princes, and people." These perils are in the policy. The defendants, while denying that the losses were by perils insured against, also rely upon a clause of exception which is in these words, "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." I have no doubt that the gold was in each case forcibly taken by officers of the South African Republic within the territory of the South African Republic from the custodians of the gold who were carrying it or holding it for the plaintiff companies. The actual officials or servants of the plaintiff companies were not present, but if they had been they could not have effectually resisted. As it was the custodians submitted without resistance. At this time war had not broken out; it did not break out till the 11th of October, nor had martial law been proclaimed. But commandoes had been called out, and the Volksraad had passed a resolution which had the force of law, vesting the legislative power for the time being in the executive. I have further no doubt that the gold was legally seized according to the laws in force in the South African Republic. I shall best explain my meaning by saying that it was constitutionally seized. The evidence of the two witnesses satisfied me that when once a commando was in the field it was in the power of the Executive Government to seize any chattels which it might deem necessary to be seized for the purposes of the war, and that for that purpose it had a discretion which could not be inquired into or traversed. This power might be, and may have been, capriciously and arbitrarily exercised, and the fact that, except in the cases of cattle and wagons, no compensation was given, and the only recompense offered to the sufferer was a share in possible booty, made it a crude and hard law. But the circumstances of the South African Republic beginning its history with most of its frontier exposed to sudden incursions of savage tribes made it not unnatural. The Romans, the fathers of all Western laws, had a not dissimilar provision in the case of a *tumultus Gallicus*, our own law contains cases where entry upon a subject's lands was held justified by the necessity of making ramparts against an invading enemy; and other similar cases are to be found in the report of *Rex* v. *Hampden*, 3 State Trials, 825, at pp. 903-905, the case of ship money, and elsewhere. International law recognizes this right *flagrante bello* even as exercised against the citizens of a neutral state. This is the *jus angariae* which will be found treated of in Sir R. Phillimore's Commentaries on International Law, vol. 3, ss. 29-31, and by other authors. But it is unnecessary to inquire whether this law be natural and reasonable, according to precedent or not. I am satisfied that it existed, and upon the whole I think that the taking was made under it. It is true that originally there were two motives for the taking, and that one of them was to keep the resources of the country from going away, not to appropriate for commando purposes; but the other motive was also present, and the subsequent acts of the executive in confiscating in a literal sense this gold may be deemed to relate back and to cover the taking. Moreover, the former motive might perhaps afford a good cause under the principles of law applicable to all nations in case of emergency, which are well laid down in the American case of *Mitchell* v. *Harmony*, 13 Howard 115, at p. 134. This brings me to the two questions, Was the taking of this gold an arrest, restraint, or detainment of rulers? If so, was it also a capture, seizure, or detention, or a consequence of warlike operations? I am in some doubt upon the first point. Restraint of princes and rulers is more often exercised by a government against the citizens of another state. It generally arises in a war, or at least as an act of retortion such as embargo or blockade. It is not a restraint of princes when a ship or cargo is arrested by civil process at the suit of a subject. This was decided upon the construction of a bill of lading in *Crew, Widgery, & Co.* v. *Great Western Steamship Co.*, 3 Times L. R. 394, 738. On the other hand, the case of *Aubert* v. *Gray* decided that where the Queen of Spain took within her own territory a vessel belonging to

her own subjects for military purposes in a war against Morocco, the loss by this taking was a loss by restraint of princes, and that case would look very like the present one if it were not for a reservation in the judgment. Phillips on Insurance, s. 1109, says that "The policy extends to captures, arrests, and detentions . . . by the government of which the assured is a subject for any cause other than a violation of law, as the taking of a vessel by government to be used as a fire ship." Arnould on Insurance (6th ed.), p. 761, speaks to the same effect. I do not propose to decide this point at present, and I pass on to the next question, Was this taking a capture, seizure, or detention within the terms of the clause of exception? It has been suggested that these words point to hostile taking and to hostile taking only. That is probably true of capture. But seizure is an additional word. It means more than capture; and in good sense and according to the precedents it should cover this case. So I think of detention. It has been contended that seizure implies force. So it does, and as I have said, I think this was force. It has been contended further, alternatively (1) that force excludes law; (2) that at any rate seizure is not where the taking is by lawful force. The first proposition seems to me radically unsound. I can perhaps dispose of it by a single citation from the decision of Sir W. Scott (afterwards Lord Stowell) in the case of *The Maria*, 1 C. Rob. 340, at p. 361: "It is wild conceit that wherever force is used it may be lawfully resisted; a lawful force cannot be lawfully resisted. The only case where it can be so is in the state of war and conflict between two countries, where one party has a perfect right to attack by force and the other has an equally perfect right to repel by force." As to the second proposition it is in direct conflict with the decided cases. Seizure signifies "the taking of a ship by the act of governments or other public authority for a violation of the law of trade or some rule or regulation instituted as a matter of municipal police or in consequence of an existing state of war." This is the language of Bigelow, C.J., in *Greene* v. *Pacific Mutual Assurance Co.*, 9 Allen 217, at p. 222. In *Cory* v. *Burr* the seizure was not, as it was at first contended before me, an act of mere force. It was a legal seizure. This was substantially admitted throughout the course of that case, and is clearly pointed out by Lord Blackburn in the House of Lords. In fact the doubt among lawyers at one time was whether an unlawful taking was a seizure. This doubt gave rise to the arguments in *Kleinwort* v. *Shepard* and *Johnston* v. *Hogg*. The cases I have cited further show that seizure is not confined to hostile acts. Nor is the word detention. Phillips in the passage cited by me puts detention with captures and arrests as a peril insured against by the ordinary words of a policy, and enumerates among the causes of detention acts of the assured's government. In fact when we come to look at the words enumerating the loss side by side with the words of exception, it is pretty evident that in some cases the words of the exception, though written in different language, do not merely qualify but delete some of the words of enumeration. The language of the body of the policy, as I was reminded, is ancient, that of the exception comparatively modern. But "takings at sea" must be eliminated by the exception of "capture," "detainment of princes" by "detention." Phillips heads the section of his work devoted to this class of peril insured against not "Arrest, restraint, and detainment of princes," but "Capture, arrests, restraints, and detention." This argument may be put this way: There is no arrest or restraint of princes except by capture, seizure, or detention, the most outlying case of restraints of princes, *Rodocanachi* v. *Elliott*, being a case of detention. In other words, if the risk is one covered in the body of the policy it is necessarily excluded by the clause of exception, a clause which probably excludes this risk and some others. I have not thought it necessary to dwell upon the words "consequence of warlike operations before the declaration of war." It is not necessary; but I am not sure that in this very peculiar case these words would not also apply. Lastly, it has been suggested that here there is no seizure because the subject must be deemed to have acquiesced, and, perhaps, even agreed in accordance with his duty to the appropriation of his goods. This argument pushed to the extreme would make the assured cause his own loss and pushed not so far it makes this taking a kind of irregular taxation, and then there would be no more a loss by restraint of princes than there would be if the ship were sold under a levy for taxes. I do not take this view of the facts To my mind the very singular facts of this case are more like those suggested in *Mitchell* v. *Harmony*, to which I have already referred, but if I did take this view I should say there was no loss by perils insured against. Another defence is raised by paragraphs 4, 5, and 6 of the defence. A similar defence has been disallowed by the majority of the Court of Appeal, affirming Mathew, J., in the case of *Driefontein Consolidated Mines* v. *Janson*. I understand that that case is on the way to the House of Lords; but at present I am bound by the decision of the Court of Appeal. This case is not the same case; and I am by no means sure that the facts which the plaintiffs have had to prove to launch this case do not conclude some of the doubts which weighed with the majority of the Court of Appeal, and prove some steps in the defendants' argument which were at that time and in that case unproved. But I have not gone sufficiently deeply into the former case to be sure of this and it is not necessary to do so, as on other grounds my judgment must be for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Ingle, Holmes, & Sons.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

IN BANKRUPTCY.

K. B. Div. (Wright, J.) — Nov. 7, 8.

MELLOR'S TRUSTEE v. MAAS & CO. (a.)

Bankruptcy—Bill of sale—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 8—*Hiring and purchase agreement.*

Mellor, a publican, being in want of money to complete the purchase of a hotel, applied to the defendants for a loan of £2,000. They refused to lend on a fourth mortgage of the hotel, and Mellor refused to give them a bill of sale It was therefore arranged that the defendants should buy the furniture in the hotel from the vendor for £2,000 instead of Mellor, and should let the furniture to Mellor under a hiring and purchase agreement. Mellor subsequently became bankrupt, and the furniture was claimed by the trustee in the bankruptcy.

Held, that the defendants had purchased the furniture as trustees for Mellor, who was the real owner, and that they had no title to the goods except under the hiring and

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

purchase agreement, which was void for want of registration as a bill of sale.

Beckett *v.* Tower Assets Co., 39 *W. R.* 438, [1891] 1 *Q. B.* 638, *followed.*

Action assigned to Wright, J., as the judge having jurisdiction in bankruptcy.

Upon the 4th of May, 1899, Mellor, the bankrupt, entered into an agreement with one Sykes whereby Sykes agreed to sell and Mellor to buy the Crown Hotel, Leamington, together with the furniture, fixtures, and stock therein, save certain specially excepted furniture, for the sum of £30,000, whereof £750 was paid by Mellor as a deposit at the time of signing the agreement.

The purchase was to be completed on the 15th of May.

As the time for completion drew near Mellor found himself short of the sum required to complete the purchase by £2,000.

He called on Maas & Co., the defendants, who are wine and spirit merchants, and asked them to lend him that amount upon a fourth mortgage on the hotel.

They declined to lend on mortgage, but offered to lend the sum required on a bill of sale, which was refused by Mellor. Maas & Co. then suggested that they should buy the furniture at the hotel from Sykes for £2,000 and let it to Mellor.

This suggestion was agreed to, and accordingly, on the 15th of May, Maas & Co. bought the furniture for £2,000 from Sykes and executed a hire-purchase agreement of the furniture to Mellor.

Mellor also signed an agreement whereby in consideration of Maas & Co. granting the hire-purchase agreement he undertook to purchase all his wines and spirits from them so long as any sum should remain due under the said agreement.

Maas & Co. did not take possession of the furniture, which remained in the hotel, and the hire-purchase agreement was not registered as a bill of sale.

A receiving order was made against Mellor on the 13th of December, 1900, he was adjudicated bankrupt on the 19th of December, and a trustee of his estate was duly appointed. Maas & Co. seized the furniture on the day before the receiving order was made, and gave notice thereof to the official receiver. The trustee in bankruptcy laid claim to the furniture as being the property of the bankrupt, and upon his claim being disputed by Maas & Co. he commenced the present action. By agreement between the parties the furniture was valued at £1,730, and that amount was paid into a bank by Maas & Co. to abide the result of the trial. By his statement of claim the trustee asked for a declaration that the hire-purchase agreement of the 15th of May, 1899, was a bill of sale and void for want of registration, and for an order for the payment to him of the sum of £1,730.

Muir Mackenzie and *H. J. Rowlands*, for the plaintiff, called the bankrupt, who gave evidence of the facts above set forth.

Reed, K.C., and *Frank Mellor*, for the defendants.—The plaintiff has made out no case. Even if he obtains a declaration that the hire-purchase agreement is void, he does not thereby make out his title to the furniture, because it never was the property of Mellor. By the contract of the 4th of May Sykes had only agreed to sell the furniture to Mellor, no property in it was to pass until payment. Upon the 15th of May so much of that contract as related to the furniture was rescinded by mutual consent, and Sykes sold the furniture to Maas & Co., as he had a perfect right to do. The defendants' title rests upon their purchase from Sykes, and not upon the hire-purchase agreement. Therein lies the distinction between this case and the cases of *In re Watson, Ex parte The Official Receiver*, 38 W. R. 567, 25 Q. B. D. 27, and *Beckett* v. *The Tower Assets Co.*, 39 W. R. 438, [1891] 1 Q. B. 638, in which, apart from the hire-purchase agreements, the claimants had no title to the goods in question.

Muir Mackenzie, in reply.—The property in the furniture passed to Mellor by the agreement of the 4th of May: see *Coburn* v. *Collins*, 35 W. R. 610, 35 Ch. D. 373. Further, if the whole transaction be looked at, it is obviously a mere device by Maas & Co. to obtain security for a loan to Mellor. The hire-purchase agreement is merely a licence to seize, and a security for the repayment of £2,000. The case falls within the principle of *Beckett* v. *The Tower Assets Co.*

Frank Mellor was further heard.

Cur. adv. vult.

Nov. 8.—WRIGHT, J.—In this case the question is whether Maas & Co. had the title to certain furniture and goods in a hotel at Leamington, and it raises a somewhat nice question more of fact than of law.

I agree with Mr. Reed to this extent, at any rate, that Sykes, the former holder of the public-house, had not, at the time of this transaction—that is, at the time of the giving of the supposed bill of sale—parted with his title to the goods. It is not a case like the case of *Coburn* v. *Collins*, to which I was referred. Sykes had given to Mellor only a contractual right to have a conveyance of the goods, which was contingent on payment by Mellor. Sykes was still, therefore, in a position to sell to Maas & Co. There might be a breach of contract, but even that would be avoided if the contract were altered by the consent of all parties before breach, and if in fact there was a real sale by Sykes to Maas it is immaterial for the purposes of the present case whether the hiring agreement is good or void, because, as Mr. Reed said, if void it would still leave the property in Maas & Co.

The question is, Was there a real sale to Maas & Co. in their own right? The object of all the parties was a loan on security, but Maas & Co. would not accept the security of a fourth mortgage, and Mellor refused to give a bill of sale. It was therefore proposed that Sykes should sell to Maas & Co., and Maas & Co. should transfer to Mellor by way of hiring agreement. It is obvious that the sale to Maas & Co. was to be solely for the purpose of such a transfer. It was to be a sale only on the terms of leaving the goods in the public-house for Mellor at a price of £2,000. No one can suppose that Maas & Co. were to become absolute beneficial owners, free to remove the goods and deal with them as they pleased. Sykes would not have agreed to that; nor would Mellor have agreed to it. That would have defeated the common purpose of selling the business as a going concern. Nor was there any separation of the £30,000, nor any fresh valuation. It seems to me clear that Sykes and Mellor could have prevented Maas & Co. from removing the goods or from selling to any one but Mellor.

Under these circumstances I think that Maas & Co. must be regarded as trustees for Mellor, and Mellor as being the real owner, unless the property is taken out of Mellor or charged by the hiring agreement. But if Mellor is to be regarded as the real owner, then the hiring agreement was an assurance to Maas & Co. or was an essential part of his title, and it operated as a licence by Mellor to Maas & Co. to take possession of the goods as against Mellor's equitable interest and it was a security for a loan. *Beckett* v. *The Tower Assets Co.* seems to me to be in point.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Wellington Taylor.*

Solicitor for the defendants, *Betteley.*

Court of Appeal.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 8.

REEKS v. KYNOCH (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Serious and wilful misconduct—Contributory negligence—Where a sudden impulse rather than wilful disobedience caused the accident—Workmen's Compensation Act, 1897, *s.* 1, *sub-section* 2 (c).

The applicant was a lad who worked at a machine used to cut slits in the heads of screws. He had been frequently warned not to put his hand near the wheel while it was in motion. There was no guard on the wheel. A screw having fallen out on to the table before it was cut, he leaned over the machine to pick it up and replace it, and two of his fingers were cut off.

The county court judge found that though the lad was negligent, he was not "guilty of serious and wilful misconduct."

Held, that the element of wilfulness did not enter at all into what the lad did, as he seemed to have acted on a sudden impulse, and therefore the award could be supported.

This was an appeal by the employers from an award in favour of the workman made by the learned judge of the Birmingham County Court.

The applicant was nineteen years of age, and worked at a slitting machine used to cut slits in the heads of screws.

To do the work there was a circular saw, driven by a belt from an overhead shaft.

The screws were put loosely into holes which were in the slot, and the workman brought them into contact with the saw by turning a handle on a wheel.

There was no guard on the saw, and the applicant had been warned not to put his hand over the wheel while it was revolving.

A screw fell out, and he attempted to pick it up while the wheel was in motion, with the result that two of his fingers were sliced off.

The lad brought an action for damages against the company, under the Employers' Liability Act, 1888, claiming damages on the ground of want of proper fencing to dangerous machinery.

The jury returned a verdict to the effect that the accident had been brought about by the boy's own fault, and judgment was entered for the defendants.

The lad's counsel thereupon applied to the learned judge to award compensation under the Workmen's Compensation Act, 1897, and the masters opposed it on the ground that the lad had been guilty of serious and wilful misconduct.

The learned county court judge held that however negligent it was for the applicant to reach over the wheel to pick up the screw, it was not such serious and wilful misconduct as to disentitle him to relief, and he made an award accordingly in his favour.

The employers appealed.

Stamford Hutton, for the employers.

J. B. Mathews, for the applicant.

COLLINS, M.R.—I do not think that on the facts as found by the learned judge there has been any miscarriage of justice in this case, and I see no reason for reversing his decision or ordering a new trial. I think the *primâ facie* inference arising on the facts is that the lad acted on a sudden impulse, and the essential element of wilfulness is therefore entirely absent. For these reasons the appeal fails.

STIRLING and MATHEW, L.JJ., gave judgment to the same effect.

Appeal dismissed.

Solicitor for the employers, *W. Morris*, Birmingham.

Solicitors for the applicant, *Ford & Ford*, for *A. J. O'Connor*, Birmingham.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 7.

KNIGHT v. CUBITT & CO. (b.)

Master and servant—Employers' liability—Accident—Compensation—Sub-contractor—Work ancillary to the business of the undertakers—Height of building—Work of demolition—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The appellants, who were builders, entered into a contract to demolish and rebuild a house which exceeded thirty feet in height. They then made a sub-contract with one Clements to do the work of demolition. A workman in the employment of Clements was killed by an accident while engaged in the work of demolition, the building at that time being only eleven feet in height, with the exception of the party-wall, which remained standing and exceeded thirty feet in height. It appeared that the appellants habitually entered into contracts to demolish and rebuild houses, but they never did the work of demolition themselves, always sub-contracting with another person to do that part of the work. In proceedings by the widow of the deceased man to recover compensation from the appellants under the Workmen's Compensation Act, 1897, *the county court judge found that the house at the time of the accident exceeded thirty feet in height, and that the work of demolition was not merely ancillary to but was part of the business of the appellants, and he held that they were liable as "undertakers" to pay compensation under section* 4 *of the Act.*

Held, that there was evidence upon which the county court judge was justified in finding that the house at the time of the accident exceeded thirty feet in height, as the party-wall which exceeded that height was standing; and, further, that the work of demolition was part of and not merely ancillary to the business of the appellants, and that they were therefore liable as undertakers under section 4.

Appeal from the award of the deputy-judge of the Brompton County Court under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who was killed by an accident arising out of and in the course of his employment.

Messrs. Cubitt & Co., who are builders, had entered into a contract to demolish and reconstruct a house, which exceeded thirty feet in height. Cubitt & Co. entered into a sub-contract with a housebreaker, named Clements, whereby the latter undertook the work of demolition. Cubitt & Co. habitually entered into contracts to demolish and reconstruct buildings, and it was their invariable practice to contract with a third person to do the work of demolition, as they never did that part of the work themselves.

The deceased man was in the employ of Clements, and he was employed in the work of demolition.

(b.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

While so employed he was killed by an accident. At the time of the accident the work of demolition had proceeded so far that the building was only eleven feet in height, except that the party wall between it and the adjoining house, which wall exceeded thirty feet in height, remained standing.

The county court judge held, first, that the deceased man was employed on a building exceeding thirty feet in height within section 7, sub-section 1, of the Act, on the grounds (1) that the building when the work of demolition commenced exceeded thirty feet in height, and (2) that the party wall, which exceeded thirty feet in height, remained standing at the time of the accident; and secondly, that the work of demolition was not merely ancillary to the business of Cubitt & Co., but was part of their business, and that they were liable to pay compensation under section 4 of the Act.

He accordingly made an award in favour of the applicant for £273.

Cubitt & Co. appealed.

Ruegg, K.C., and *Minton-Senhouse*, for the appellants.—The work of demolition was merely ancillary to the appellants' trade or business, and was not part of their ordinary work. The evidence shows that they never themselves did the work of pulling down buildings, but always let this part of the work out under a sub-contract. Their business was that of building. The case comes, therefore, within the exception at the end of section 4 of the Workmen's Compensation Act, 1897, and the appellants are not liable. [They referred to *Pearce* v. *London and South-Western Railway Co.*, 48 W. R. 599, [1900] 2 Q. B. 100.] Secondly, this building was not at the time of the accident over thirty feet in height within section 7, sub-section 1, of the Act. The height of the building at the time of the accident is the height to be looked at (*Billings* v. *Holloway*, 47 W. R. 105, [1899] 1 Q. B. 70), and at that time the building was only eleven feet in height. The fact that the party-wall between it and the next house remained standing cannot affect the question. [They also referred to *Mellor* v. *Tomkinson*, 47 W. R. 240, [1899] 1 Q. B. 374, and *Rixsom* v. *Pritchard*, [1900] 1 Q. B. 800, 48 W. R. Dig. 112.] Thirdly, the appellants were not the "undertakers" in respect of the work of demolition within the meaning of the definition in section 7, sub-section 2. That means the persons who are on the spot and have the control of the operations and execute the work. Clements here had the control of the demolition work.

Edmond Browne, for the applicant, was not called upon.

COLLINS, M.R.—I am of opinion that this appeal should be dismissed. The points taken on behalf of Cubitt & Co. are that they are not the "undertakers" in respect of the work of demolition; that the work of demolition was merely ancillary to and was no part of their trade or business; and that the building did not exceed thirty feet in height at the time of the accident. I will take the points in their inverse order. First, did the building at the time of the accident exceed thirty feet in height? We have a finding of fact by the county court judge that it did. We have only to consider whether there was any evidence upon which the county court judge could reasonably so find. I do not impugn anything decided in *Billings* v. *Holloway*. The finding of the judge stands independently of that case. It is said that there is no evidence to support that finding. The man was employed in the demolition of a building, a substantial part of which—namely, the party-wall, was at the time of the accident over thirty feet in height. I am not prepared to say that in that state of facts there was no evidence upon which the county court judge could find that the man was at the time at work on a building which exceeded thirty feet in height. That objection therefore fails. The two other points may be taken together. It was said that Cubitt & Co. were not liable as "undertakers" because they themselves never did the work of demolition, but always employed a sub-contractor to do it, and that this was merely ancillary to their business as builders. The answer to that is that it is part of their ordinary business to undertake to demolish buildings and rebuild them, though for their own convenience they do not themselves do the actual work of demolition. They contracted to demolish and re-construct this building. They undertook both obligations, and that is their usual practice. Therefore I can see nothing to exclude Cubitt & Co. from the position of "undertakers." This particular question arises under section 4 of the Act, which deals with contractors who are undertakers, and the undertakers there dealt with are those who *ex hypothesi* have sub-contracted with another person to do that which they themselves have undertaken to do. That is clear from the last clause in the section, because that clause excepts from the operation of this section work which is merely ancillary to and no part of the trade or business of the undertakers. Upon the evidence, this work of demolition was part of their business, and not merely ancillary to it. The appeal therefore fails.

STIRLING, L.J.—I am of the same opinion. The question whether Cubitt & Co. were the "undertakers" in respect of the work of demolition depends upon the definition of "undertakers" given in section 7, sub-section 2, of the Act. It is said that Cubitt & Co. were not the undertakers because from the wording of the definition the person who executes the work or a substantial part of it is the undertaker. That section ought in this case, however, to be read along with section 4, and when that is done one sees that the Act contemplates that persons may be undertakers though they do not themselves execute the work or a substantial part of it, but enter into contracts with other persons to execute it. Therefore I think that Cubitt & Co. were undertakers.

It is then said that the concluding clause in section 4 covers the present case and takes Cubitt & Co. out of the operation of that section. It is said that the trade or business carried on by Cubitt & Co. is not that of demolishing buildings. The evidence shows that Cubitt & Co. in fact always employ other contractors to do the work of demolition. That, however, is not the question. The question is, is it part of the trade or business of Cubitt & Co. The evidence shows that they entered into a contract to do work of which the demolition of the building formed part, and that it is their usual form of contract. I infer from that that it is part of the business of Cubitt & Co. to pull down buildings with a view to rebuild them, though they find it more convenient not to execute that part of the work themselves, but to contract with others to do it. Therefore that point fails. As to the height of the building, I agree with what the Master of the Rolls has said.

MATHEW, L.J.—I am of the same opinion. I have not the least doubt that the work of pulling down the building was part of the business of Cubitt & Co., because this form of contract was the ordinary contract they entered into. As a matter of convenience they make a sub-contract for this part of the work, and the sub-contractor carries it out. They were, therefore, the undertakers, and under section 4 they became liable to pay compensation. The only other

question was as to the height of the building; and upon this point the county court judge had, in my opinion, abundant evidence to justify his finding of fact.

Appeal dismissed.

Solicitors for the appellants, *Leighton & Savory.*

Solicitors for the respondent, *Pattinson & Brewer.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 6.

AYRES *v.* BUCKERIDGE.
WHEALE *v.* RHYMNEY IRON CO. (LIMITED).
JONES *v.* RHYMNEY IRON CO. (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Weekly earnings—Employed less than two weeks—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.*

A workman was employed to work in the demolition of a building, the terms of his employment being that he should work sixty hours a week—viz., eleven hours a day on five days of the week and five hours on Saturday, at the wages of 7½d. an hour, and that he should be liable to be discharged at an hour's notice. When he had worked for four days, for a period altogether of forty-four hours, he was accidentally injured.

Held, that, as there was a presumption that his employment would continue from week to week, there was evidence to support the finding that his average weekly earnings within the meaning of the Workmen's Compensation Act were sixty times 7½d.

A workman was employed to work as a haulier at the wages of 5s. 2d. a day. He began to work on a Wednesday and he continued to work every day, Sunday included, till the following Wednesday, when he was accidentally injured. He received as wages for the eight days £2 1s 4d.

Held, that, as he had worked for a period of more than a week at 5s. 2d. a day, although that period was partly in one calendar week and partly in another, there was evidence to support the finding that his average weekly earnings were six times 5s. 2d.

Appeals from awards in arbitrations under the Workmen's Compensation Act, 1897.

In the case of *Ayres* v. *Buckeridge*, which was an appeal from the judge of the Brentford County Court, the applicant for compensation was the widow of Francis Ayres, a labourer, who met with an accident in the course of his employment, and suffered therefrom personal injury which resulted in his death.

The deceased man was engaged by the foreman of Mr. R. S. Buckeridge to assist in the demolition of a building at Ealing.

He was at the time of the engagement in work at Whitechapel, and the question arose what rate of wages would be remunerative to him, taking into account the fact that he would have to travel to and from his work.

In the result it was arranged that he should be employed for eleven hours a day for five days in the week and for five hours a day on Saturday, making altogether sixty hours a week, and that he should receive payment at the rate of 7½d. per hour.

He was not engaged for any specified number of weeks, and he was liable to be discharged from the employment at an hour's notice.

He did, in fact, work in his employment for four days, including the day on which he met with the fatal accident, and he worked for eleven hours on each of the four days.

It was stated that an ordinary workman in the position of the deceased would probably be employed for from forty to fifty hours a week.

The county court judge made an award in favour of the applicant for £292 10s. He calculated this sum on the basis that this was the amount which the deceased would have earned if he had worked for sixty hours a week at the rate of 7½d. an hour for a period of three years.

The employer appealed.

Atherley-Jones, K.C., and *H. Kisch*, for the employer.—The amount of compensation ought to be based on the amount of wages in fact received by the deceased during the time that he was actually employed. By paragraph 1 (*a*) (i.) of the first schedule to the Act the compensation in such a case as this is to be "156 times his average weekly earnings during the period of his actual employment under the said employer." The period of this workman's actual employment was forty-four hours in the first week of the employment. Wages at 7½d. an hour for forty-four hours amount to £1 7s. 6d. On this basis the award ought to have been for £214 10s.

They referred to *Lysons* v. *Andrew Knowles & Sons*, 49 W. R. 636, [1901] A. C. 79; *Hathaway* v. *Argus Printing Co.*, 49 W. R. 113, [1901] 1 K. B. 96; and *Williams* v. *Poulson*, 16 Times L. R. 42.

Bray, K.C., and *W. M. Thompson*, for the applicant.—The county court judge was right in having regard to the contract, which was for employment by the week. Where there is an employment for weekly earnings, the man's "average weekly earnings" are what he would have earned if he had worked for a week. It is immaterial that he was prevented from actually working for more than three or four days.

In the case of *Wheale* v. *Rhymney Iron Co.* (*Limited*), which was an appeal from the judge of the Tredegar County Court, the applicant for compensation was a workman who had sustained personal injuries from an accident in the course of his employment as a haulier, which incapacitated him for work.

There was no regular contract of employment, but the applicant was engaged to work on a Wednesday, and continued to work every day, including Sunday, until the following Wednesday, when the accident happened. His rate of wages was 5s. 2d. a day, and he in fact received altogether £2 1s. 4d.

The county court judge took the average weekly earnings as being six times 5s. 2d.—viz., £1 11s.; and he made an award for a weekly payment of half that sum—viz., 15s. 6d.

The employers appealed.

Ruegg, K.C., and *A. Bertram*, for the employers.—The applicant in fact earned £2 1s. 4d. in two weeks—that is to say, during parts of two weeks—and his average weekly earnings were, therefore, half that sum—viz., £1 0s. 8d.—and the award ought to have been for a weekly payment of half that sum—viz., 10s. 4d.

They cited *Williams* v. *Poulson* and the Scotch case of *Cadzow Coal Co.* v. *Gaffney*, 3 Ct. Sess. Cas., 5th series, 72.

Atherley-Jones, K.C., Lloyd Morgan, and *R. Vaughan Williams*, for the applicant.—The Scotch case assumes that a week means a calendar week; but the Act says nothing about a calendar week. A week naturally means a period of seven days, and if the court puts that construction on the Act it is clear that this man's average weekly earnings were six times 5s. 2d.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

In the case of *Jones* v. *Rhymney Iron Co.* (*Limited*), which was also an appeal from the judge of the Tredegar County Court, the workman began to work in his employment as a haulier on a Tuesday, and continued to work every day, except Sunday, till the Wednesday in the following week, when he met with an accident which incapacitated him for work. His wages were 5s. 2d. a day.

The county court judge made an award similar to that in the last case—viz., for a weekly payment of 15s. 6d.

The employers appealed.

Ruegg, K.C., and *Bertram*, for the employers.

Abel Thomas, K.C., and *Lloyd Morgan*, for the applicant.

COLLINS, M.R.—These cases raise nearly the same point upon the construction of the Workmen's Compensation Act. In the first case, that of *Ayres* v. *Buckeridge*, it seems to me that the deceased workman was employed under circumstances which might fairly raise the inference which I think was drawn by the learned county court judge, that the employment was to continue from week to week. He was to work for sixty hours a week, and having regard to the fact that he was living at a distance from his work, special terms were made with him, which raised the inference that he was to be employed for a week. In fact he only worked for four days, including the day of his death. There was, therefore, not a complete week, still less a fortnight. But since the case of *Lysons* v. *Andrew Knowles & Sons* has been decided in the House of Lords we have got rid of the idea that it is necessary for the workman to have been in his employment for two weeks at least in order that his average weekly earnings may be ascertained. We have to fall back on the principle that the tribunal must use the materials which are at its disposal to make the best calculation it can of what the average weekly earnings were. The Act does not give complete compensation as the law does in an action of negligence. No such intention is apparent in the scheme of the Act. There need be no negligence at all, and, further, a certain nexus is established between the person injured and the employer in whose service he is injured. The only compensation given by the Act is that which is measured by the earnings in the employment of that particular employer. The problem is to find out what we are justified in supposing those earnings would have been. The Legislature has prescribed a comparatively easy method for ascertaining that where the facts admit of its being applied. Schedule I. (1) says that, where the injured workman dies and leaves dependants, the amount of compensation shall be a sum equal to his earnings in the employment of the same employer during the last three years, or, if he has been employed less than three years, then it shall be 156 times his average weekly earnings during the period of his actual employment under the same employer. Here the workman was employed for only four days, and it is impossible to apply strictly the rule laid down in the schedule. In these circumstances, on the principle laid down in *Lysons* v. *Andrew Knowles & Sons*, the workman is still entitled to compensation, and we have to use such materials as are before us for determining what his average weekly earnings would have been. The average must be arrived at by taking the actual facts and from them arriving at a hypothetical sum, because we have not the materials to arrive at anything else. I think it is fair to do as the county court judge did—*i.e*, to treat this workman as a person whose standard of wages at the time of his death was sixty hours a week at 7½d. an hour. I think the county court judge dealt with the case in accordance with the law as laid down in the House of Lords.

In the second case, that of *Wheale* v. *The Rhymney Iron Co.*, the injured workman had worked for eight days, from a Wednesday to the following Wednesday, at wages at the rate of 5s. 2d. a day. The county court judge awarded him compensation on the basis of his having been employed for a whole week at 5s. 2d. a day—that is to say, at the rate of £1 11s. a week. It is said that he ought to have divided that sum by two, because the employment lasted over parts of two weeks. But the Act contains no suggestion whatever of a calendar week. And, apart from that consideration, it seems to me that, on the principle laid down in *Lysons* v. *Andrew Knowles & Sons*, you must not measure the compensation, where the period of work has been less than two actual weeks, by the standard of actual facts only. To do so is to confound the actual with the hypothetical. Where you have actually two weeks, you can base your calculations according to the rule of the schedule. But where you have not two whole weeks, then you are just in the same position in point of law as if you had only a week or less; you must use the actual as a step to the hypothetical, and not as itself measuring the whole possible earnings. In other words you are obliged to use the materials before you in forming a conclusion as to what he would have earned had he had the opportunity of working for two complete weeks. In this case I think we can form such a conclusion and say what we suppose would have been the man's earnings in a week, or, to put it as I think is better, what would have been his earnings taking one week with another had he had an opportunity of working during two weeks or more. It seems to me that the county court judge was justified in coming to the conclusion that the amount which this man might have expected to earn per week in this employment, if he had had the opportunity, was six times 5s. 2d.

In the third case, that of *Jones* v. *Rhymney Iron Co.*, the same reasoning applies, but a difficulty is caused by the fact that the House of Lords in *Lysons* v. *Andrew Knowles & Sons*, though they held that there was no necessity for the workman to have been in employment for two weeks, yet made an order based on the hypothesis that the workman in that case had worked for parts of two weeks. But there the workman was in no sense a weekly labourer, he was merely employed for one day on two occasions. It seems to me that there is nothing in that order which obliges us in this case to divide the sum received by the workman by two, because in fact the period during which he was employed covered parts of two different weeks.

STIRLING and MATHEW, L.JJ., concurred.

Solicitors for the employers, *Beyfus & Beyfus*; *H. P. Becher*, for *Simons & Powell*, Pontypridd.

Solicitors for the applicants, *Griffith & Gardiner*; *Holt-Beever & Co.*, for *D. Evans*, Brecon.

High Court of Justice.

Chan. Div. } Nov. 27.
Byrne, J. }

In re COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL'S CONTRACT. (a.)

Vendor and purchaser—Real estate—Conveyance by personal representatives under the Land Transfer Act—Executors appointed for property outside the jurisdiction—Land Transfer Act, 1897, *ss.* 1, 2, *sub-section* 2; 24, *sub-section* 2.

A personal representative in the sense in which the expression is used in the Land Transfer Act, 1897, *means a personal representative in whom, prior to the Act, a chattel real belonging to the deceased would have vested.*

Executors appointed solely for the foreign property of a testator are not, under the Land Transfer Act, 1897, *necessary parties to a conveyance of testator's English real estate.*

Summons.

This was a vendor and purchaser summons, in which the London County Council claimed that a good title had not been shown to certain property which they had agreed to purchase.

The facts of the case, as agreed by the parties, were as follows:

Abraham Cohen, of Sydney, New South Wales, temporarily residing at the Tudor Hotel, Oxford-street, London, duly made and executed his will bearing date the 11th of July, 1900, whereby he appointed David Nathan and E. L. Samuel executors of his will as to property and premises thereinbefore given to them (which property and premises were in Australia), and his sons S. B. Cohen and Nathan M. Cohen and his son-in-law L. H. Nathan general executors of that his will. Testator died shortly afterwards, and the will was proved in the principal registry of the Probate Division on the 16th of July, 1901, by the said S. B Cohen, N. H. Cohen, and L. H. Nathan.

By a contract in writing dated the 8th of July, 1901, and made between "the executors of the will of A. Cohen" by their agents of the one part and the County Council of London of the other part, the former agreed to sell to the latter certain freehold premises of testator situate in Hackney and required for purposes authorized in the London County Council (Improvements) Act, 1900.

On the investigation of title the council requisitioned that the persons mentioned in the will as executors of testator's Australian property should join the conveyance.

F. Thompson, for the purchasers.—The question is whether under the Land Transfer Act, 1897, s. 1, sub-section 2, the real estate of the testator did not vest in all his executors alike, those nominated for his Australian property and those appointed executors for general purposes. What is necessary under section 1 of the Act is to find out who are testator's personal representatives. By the old law a testator's personal estate vested in the executors before probate, and it is now the same as to real estate. It is not enough to say that no grant of probate could be made to the Australian executors, for a Court of Probate is not a court of construction. The point for a Court of Probate to decide is what testamentary documents shall be admitted to probate: *In re Parker's Trusts*, [1894] 1 Ch. 707; *In the Goods of Coode*, L. R. 1 P. & D. 449. 16 W. R. P. Dig. 11; *In the Goods of William Harris*, 18 W. R 901, L. R. 2 P. & D. 83; *In the Goods of Wallich*, 3 S. & T. 423. So far as creditors go all executors are equally liable in respect to debts, though each is appointed executor of a different part of testator's property: *Rose* v. *Bartlett*, Cro. Car. 292, at p. 293; Williams on Executors (9th ed.), p. 200; *In re Pawley and London and Provincial Bank*, 48 W. R. 107, [1900] 1 Ch. 55.

Vaughan Hawkins, for the vendors.—By the common law a man might appoint executors for different parts of his property, and might in fact die testate as to his goods in one diocese and intestate as to his goods in another. All sections in the Land Transfer Act relating to personal representatives subsequent to section 2, sub-section 2, imply that the personal representatives are personal representatives within the jurisdiction. If the purchasers' view is correct, it would be necessary for all special executors to disclaim.

F. Thompson replied.

BYRNE, J., after stating the facts, said: The general question I have to decide is, Are the Australian executors necessary parties to the conveyance? There are two facts to be borne in mind. In the first place, the Australian executors are not entitled to a grant of probate here. In the second place, it is open to a testator to appoint different executors of different parts of his property. In the present case, then, the testator did what was lawful. He appointed executors of his Australian property and he appointed general executors. Now it is said that the Land Transfer Act by constituting a real representative has in fact had the operation of vesting the English real estate in the general and colonial executors jointly, and that no title can be made without their all joining in the conveyance. Now Part I., section 1, sub-section 1, of the Land Transfer Act provides: "Where real estate is vested in one person without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." Section 24, sub-section 2, of the same Act provides that the expression personal representative in this Act means an executor or administrator. Therefore in section 1 the words "devolve to and become vested in his personal representatives" mean devolve to and become vested in his executors or administrators. Then section 2, sub-section 2, provides: "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives without the authority of the court to sell or transfer real estate."

The question is, are the words in the Act "become vested in his personal representatives or representative from time to time," so large as to force me to hold that in all cases real estate vests in persons named in the will as foreign executors in respect of foreign assets, jointly with those named as executors in respect of assets in England? The true object of the Act was to provide that the persons already

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

having or being entitled to the control of personal estate should also have or be entitled to the control of real estate. I think it not unfair with a view to try to ascertain the meaning to ask, would chattels real have vested in the colonial executors jointly with the other executors? The answer is that they would not. Would it not, then, be going against the meaning of the Act to hold that the real estate vested in persons not entitled to English probate and not entitled to chattels real. I think that the true meaning of section 1, when it speaks of personal representative, is a personal representative in whom chattels real would vest. I think, therefore, that a good title can be shown without joining the colonial executors.

Solicitors, *W. A. Blaxland; Edwards & Cohen.*

Chan. Div.)
Buckley, J.) Nov. 12, 13.

BENNETT *v.* STONE. (*a.*)

Vendor and purchaser—Conditions of sale—Wilful default—Form of conveyance—Honest mistake—Vendor in possession—Account of rent and profits not on the footing of wilful default—Occupation rent—Losses incurred by vendor in carrying on business.

A vendor who delays the completion of a contract by attempting to insert a clause in the conveyance which he honestly, though erroneously, believes it to be his right to insert is not guilty of wilful default so as to disentitle him to interest on the unpaid balance of the purchase-money.

Where, in an action for specific performance, the decree is simply for an account of rents and profits received by the vendor or for his use while in possession, he will be charged with the rents which he actually received, but not with occupation rent in respect of land which he did not let; and he will be allowed any necessary disbursement in connection with taking over the property from an outgoing tenant, but not losses incurred by him in carrying on a farming business on the property when so taken over.

Adjourned summons.

By an agreement dated the 26th of September, 1898, the defendants agreed to sell to the plaintiff some land in Surrey for £75,000, of which £1,000 was to be paid immediately as a deposit and the residue on the 2nd of January, 1899.

By article 2 it was provided that on the purchaser paying his purchase-money on the date aforesaid he should as from the 25th of December, 1898, be let into possession or into receipt of the rents and profits, and up to that day all rents, rates, taxes, and outgoings should (if necessary) be apportioned, and if from any cause whatever other than the wilful default of the vendors the completion of the purchase was delayed beyond the 2nd of January, 1899, and the agreement should not be cancelled and the deposit forfeited by the vendors under the last clause thereof, the purchase-money should bear interest at the rate of 5 per cent. per annum to the day of actual payment thereof.

The deposit was paid, but the purchase was not completed on the 2nd of January, 1899. The draft conveyance furnished by the plaintiff contained words securing to him the benefit of certain covenants which had been entered into by one William Cunliff with the defendants to do certain things with respect to the land. The defendants added to this clause words restrictive of this assurance. The plaintiff objected to this addition, and, on the 22nd of June, 1899, commenced an action for specific performance.

On the 2nd of February, 1900, Buckley, J., holding that the defendants were wrong in insisting on this addition, pronounced judgment for specific performance, and ordered that interest, if any, be computed at the rate of 5 per cent. on the £74,000, or at such lower rate as the same might be reducible to under the contract, from the 2nd of January, 1899; the judgment also ordered "an account of the rents and profits of the said hereditaments received by the defendants or by any other person or persons by the order or for the use of the defendant" since the 2nd of January, 1899.

By his certificate dated the 13th of June, 1901, the master found that the amount of the interest due from the plaintiff to the defendants was £8,661 12s. 6d., and that the defendants had received on account of the rents and profits of the hereditaments £776 18s., and that they had paid, or were entitled to be allowed on account thereof, £1,797 6s. 10d. It appeared that the tenant of about two-thirds of the land had given up possession on the 29th of September, 1899, and that the defendants, instead of letting his farm, had entered into possession themselves, and, for the purpose of working it, had purchased quantities of farming stock and utensils; the sums paid for these, as well as £469 11s. 9d. paid to the outgoing tenant in respect of his tenant rights, were included in the £1,797 6s. 10d.

The plaintiff now took out a summons to vary the certificate (1) by disallowing the amount allowed for interest; (2) by disallowing such of the expenses comprised in the £1,797 6s. 10d. (including the £469 11s. 9d.) as were incurred by the defendants in consequence of their farming the land themselves; (3) by charging the defendants with an occupation rent in respect of the land which they did not let.

H. Terrell, K.C., and *Sheldon*, for the plaintiff.—The delay was due to the defendants not having accepted the draft conveyance without alteration; it was held at the trial that they ought to have done so. A vendor owes to a purchaser the duty of doing all that he is bound to do under the contract; if he does not do that he is in default. "Wilful" means that the person whose action or default is in question is a free agent and knows what he intends to do or not to do: *In re Young and Harston's Contract*, 34 W. R. 84, 31 Ch. D. 168. If, therefore, a vendor knows all the facts, and honestly, it may be, puts a wrong construction on those facts, he is guilty of wilful default. Honest mistake by a vendor in relation to a matter of title is an exception to this rule. In all the cases where a mistake by a vendor has been held not to be wilful default it has been as to a matter of title; on the other hand, wherever the mistake has has been in relation to the execution of the conveyance, the vendor has been held to be guilty of wilful default. A mistake as to the form of conveyance is covered by the same principle. [They also cited *De Visme* v. *De Visme*, 1 Mac. & G. 336; *Sherwin* v. *Shakspear*, 2 W. R. 668, 5 D. M. & G. 517; *In re Hetling and Merton's Contract*, 42 W. R. 19, [1893] 3 Ch. 269; *In re Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524; *In re Wilson's and Steven's Contract*, 43 W. R. 23, [1894] 3 Ch. 546; *In re Woods and Lewis's Contract*, 46 W. R. 643, [1898] 2 Ch. 211; *North* v. *Percival*, 46 W. R. 552, [1898] 2 Ch. 128.] On the question of rents and profits the defendants made no effort to procure a tenant from year to year, and ought, therefore, to be charged with an occupation rent. In an account of rents and profits of an estate they cannot charge the plaintiff with losses incurred in a business: *Phillips* v. *Silvester*, 21 W. R.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

179, L. R. 8 Ch. App. 173; *Earl of Egmont* v. *Smith*, 6 Ch. D. 469, 25 W. R. Dig. 79.

Astbury, K.C., and *Dunham*, for the defendants.—This was an innocent mistake on the part of the vendor. A vendor is not guilty of wilful default unless he omits to do something intending thereby to make a default; a man cannot intend to make a default unless he knows that what he omits to do will be a default. On the question of rents and profits, an occupation rent cannot be charged to a vendor remaining in possession unless he is guilty of wilful default. The losses incurred by the defendants in carrying on the farm ought to be allowed to the defendants because, being in possession, they were in the position of trustees and, therefore, bound to keep the land in cultivation.

BUCKLEY, J., after stating the facts as above set out, continued: The neat point in this case is, Whether, when a vendor is wrong as to some words to be contained in the conveyance, that is a wilful default for the purpose of such a clause as this? The authorities as to what is wilful default in such a clause as this are very numerous. The parties have contended before me on authorities up to a very recent date from *In re Young and Harston's Contract*, and they have cited to me some half-a-dozen cases of which that is the commencement. Now in *In re Young and Harston's Contract* Bowen, L.J., used words, which have always been referred to and cited since, as to what, in such a contract as this, is the meaning, first, of the word "wilful," and, secondly, of the word "default." Those words stand wholly untouched, so far as I can see, by any subsequent decision, except that they are modified by the language which the Court of Appeal used in *In re The Mayor of London and Tubbs' Contract*, where Lindley, L.J., after referring to what Lord Bramwell had said in *Lewis* v. *Great Western Railway Co.*, 26 W. R. 255, 3 Q. B. D. 195, and to what Bowen, L.J., had said in *In re Young and Harston's Contract*, goes on to say that Lord Bramwell's words are, in his opinion, "quite consistent with Bowen, L.J.'s observations in *In re Young and Harston's Contract*, if it be borne in mind that Bowen, L.J., presupposed knowledge of what was done and intention to do it, and was not addressing himself to a case of honest mistake or oversight." I think, after that expression in Lindley, L.J.'s, judgment, Bowen, L.J.'s words in *In re Young and Harston's Contract* are to be read as modified, if there be any modification in it, in the sense that Bowen, L.J., was not addressing himself to an honest mistake or oversight; and if there be an honest mistake or oversight, that will not be a wilful default.

The result of the authorities, I think, comes to this, that by the word "wilful" is meant that the vendor, being a free agent and in a position to do either of one of two acts, chooses to do the one and not to do the other; and that "default" includes the case where the vendor, owing to the purchaser the duty to act reasonably in all matters relating to the completion, does an act in breach of that duty. The vendor owes to the purchaser, among other things, the duty of acquainting himself with all the material facts, and it will be a breach of his duty if, knowing the facts, he elects to do an act which is not reasonable, or if he neglects to acquaint himself with the facts and, consequently, does an act which is not reasonable. It is not necessary to show intentional delay or wilful obstruction; but it is necessary to show that the vendor has committed an act of default. This is not satisfied by showing that by mistake or oversight he has done or omitted to do something which he ought to have done. Lord Bramwell, in the words to which I have referred in *Lewis* v. *Great Western Railway Co.*, was dealing with the words "wilful misconduct" and not "wilful default"; and therefore what he says is only applicable by way of analogy. His words are these: "'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful." If I may venture to appropriate that language to myself with variation I should say that "wilful default" means that, not the act, but the default, must be wilful. You must predicate of the act that it is a particular class of act; it is not enough to show that the act is wilful. What you must show is that the default is wilful, which means that you must predicate that the default is one of a particular kind. Now just a word as to the half-a-dozen cases which have been cited, in three of which it was held that there was not, and in three of which it was held that there was, an act of wilful default. It was held in *In re Young and Harston's Contract* that it was wilful default for a vendor to go abroad two days before the date fixed for completion, with the result that he could not execute the contract because he was not there to execute it; it was held in *In re Hetling and Merton's Contract* that the vendor, who knew he had to complete and who relied upon a power of attorney enabling somebody else to sign his name for him, which was not, in point of fact, sufficient for the purpose, had been guilty of wilful default; and it was held in *In re Wilson and Steven's Contract* that a vendor who did not obtain admittances to certain copyholds, so as to be in a position to complete at the date of completion, was guilty of wilful default. Contrasted with those cases are these: *In re Mayor of London and Tubbs' Contract*, where the mistake was that the vendor, in describing his title, erroneously described his title to some part of the premises; *In re Woods and Lewis's Contract*, which was a case of an unknown defect of title; and lastly, *North* v. *Percival*, where the question between the parties was whether the contract included 36 acres or 42 acres—the purchaser insisted that it was 36 acres only; the vendor said he must take the 42 acres or nothing—the purchaser was held entitled to specific performance—the purchaser succeeded, but it was held that the vendor's repudiation of the contract by resisting the claim to specific performance did not constitute such wilful default as to disentitle him to interest. Now when one comes to see what those several decisions are, one must come to this conclusion, that in each case where it was held to be wilful default the vendor was doing an act, intending not to do the contrary, which was not a reasonable act to do with a view to completion. The man ought not to have gone abroad; the man ought not to have neglected to look at his power of attorney to see if it was good enough or not; the man ought not to have run the risk of neglecting to get in the copyhold admittances—it was his duty to have prepared himself to complete and he did not do so. As to the others, it has been argued before me, as to two of them, at any rate, that they were cases in which the vendor had made a mistake in his title (and we know the courts are easy to people who make a mistake in title, because it is not easy to know whether you have a good title or not) and that it was upon that ground that the vendor succeeded. It seems to me that in *In re The Mayor of London and Tubbs' Contract* the court did not put it upon the ground that the mistake was a mistake of title; it put it upon the ground that the vendor had been the victim or had been guilty of honest mistake or oversight; Lindley, L.J.'s, judgment upon that seems to me plain, because, if he was going to put it upon the ground of a mistake of title, that

ground was enough for the whole decision; and what was the reason of qualifying Bowen, L.J.'s words in *In re Young and Harston's Contract*, by saying that they did not refer to oversight, if he was going to decide on the other ground? It was not a mistake of title, and, therefore, the man was not to be excused on that ground. It seems to me that what I have got to look to is whether the vendors in this case have made an honest mistake. Now during the argument I asked the question once or twice whether there is any case to be found in the books in which the question has arisen between purchaser and vendor as to the form or language or contents of the conveyance, in which ultimately on the litigation of the question it turned out that the purchaser was right and the vendor was wrong; and there was no case to be found. Such a question must have arisen over and over again, and if such an action could be maintained I should have expected to find an authority to that effect, but it is not to be found. The particular matter here is simply this: the agreement having been executed in September, 1898, the vendors had been pressing the plaintiff repeatedly from that time onwards to complete, and he did not complete. I think he could not complete because he had not got the money. The conveyance had been arranged on the 23rd of May, 1899, and had been approved of on behalf of both parties. It came back on the 22nd of June, in a form which, as I held at the trial, the vendors had wrongly made. On the same day the plaintiff issued his writ in this action. The result was that he got specific performance, and he got his costs, because, in my view, the party who was in the wrong must pay his costs; if he was in the wrong, honestly or not, he has occasioned the costs and must pay them. But when you come to the question of wilful default, it is a different one altogether. I think the conduct of these vendors was not wilful default within the meaning of the contract. That is not the only ground on which I decide this case; it is quite plain after *In re The Mayor of London and Tubbs' Contract* that what I have to look to in this case is not necessarily solely whether there was wilful default, but whether the wilful default was the *causa causans* of the delay; because the court there, although they differed, Kay, L.J., dissenting, as to what was wilful default, were all of opinion that if there had been wilful default the delay was not attributable to that cause. I am satisfied that from 1898 until the 22nd of June, 1899, the vendors had been repeatedly pressing the purchaser to complete his contract. He had not got the money to do so and was seeking to get it here and there, and they were unable to obtain completion, and the completion did not take place really because the purchaser had not got the money. The writ was issued on the 22nd of June, 1899. The matter was not completed and the draft conveyance was first sent in on the 5th of March, 1901, more than a year after the judgment; and for all that appears the plaintiff, up to the present moment, is not provided with the purchase-money to complete the purchase. I do not think if there was a wilful default, which I think there was not, that that was the *causa causans* of the delay. The purchaser has not been kept out of his money, he has simply been keeping the vendors out of their money, and I see no reason to deprive them of the 5 per cent. interest which they contracted for in 1898. I think, therefore, the summons to vary the master's certificate as to interest fails.

Then the next point is as to the account of the rents and profits. It will be noticed that this decree contains no account upon the footing of wilful neglect or default, it is simply an account of rents and profits received by them or for their use. It seems to me that, in taking that account, they are to be charged, of course, with the rents which they received; but I find no machinery there for charging them with an occupation rent of the land which they did not let, that would be chargeable under a decree for wilful neglect and default; but it is not in this decree; they are chargeable, therefore, only with the rents they received. Then what are they to be allowed as against that? It seems to me they must be allowed the £469 11s. 9d. which they had to pay to the outgoing tenant upon his leaving the premises; that was a necessary disbursement in connection with the taking over of that property from that tenant. But they ask for something more than that—they ask for losses incurred by carrying on the business after they had taken it over and when they did not let it. Evidence has been filed in which it is in dispute whether they could have let it or not. That would have been material if there had been an account on the footing of wilful neglect and default, but I do not think it is material on this account. It seems to me that as a result of this I cannot say, and I do not mean to say, that the defendants are not entitled to get from the plaintiff anything in respect of this expenditure, but I do say that they are not entitled to it under this decree. I do not see how in a decree directing an account of rents and profits they can have an account of business carried on by them upon the premises which has resulted in a loss. Whether it was necessary or not I do not know; it is not in the decree,

Solicitors, *R. Davies & Son; Henry White.*

K. B. Div. (Lawrance, J.) — Aug. 12, 1901.

LONG EATON RECREATION GROUNDS CO. (LIMITED) v. MIDLAND RAILWAY CO. (*a.*)

Lands Clauses Acts—"Injuriously affected"—Breach by statutory body—Railway works—Owner of adjoining property — Damages for depreciation to such property by reason of breach of restrictive covenants—Lands Clauses Consolidation Act, 1845, *s.* 68.

A railway company purchased land from grantees of the plaintiffs, with notice of restrictive covenants entered into by such grantees with the plaintiffs, for the benefit of other lands retained by the plaintiffs. The railway company did certain specific acts which, if done by a private purchaser, would admittedly have been breaches of the restrictive covenants for which such purchaser would be liable to be restrained by injunction.

Held, following Metropolitan Board of Works *v.* McCarthy, 23 *W. R.* 115, *L. R.* 7 *H. L.* 243, *at p.* 253, *that although no part of the plaintiffs' land had been acquired, nevertheless the plaintiffs could recover compensation from the railway company, because by the construction of the railway there had been an interference with their rights under the restrictive covenants, which rights added to the market value of their property, and by the interference of the defendants this property, as property, had been lessened in value.*

This was an action upon an award which was tried before Lawrance, J., at Derby, and further argued on questions of law before the learned judge in London, when judgment was reserved.

Hugo Young, K.C., and *W. H. Stevenson*, for the plaintiffs.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Baggallay, K.C., W. J. Noble, and *C. H. Sargant,* for the defendants.

The facts and arguments sufficiently appear from the judgment.

LAWRANCE, J.—The defendants in this case are owners in fee simple of certain land situate on the north-west of Springfield-avenue, at Long Eaton, which they purchased from grantees of the plaintiffs. The conveyances from the plaintiffs to these grantees contained covenants by the grantees that they would not erect or permit to be erected any erection or building of any kind except a fence wall not more than two feet high, with suitable iron palisades, nearer to Springfield-avenue than a line which on the plan is marked "building line," and would not erect any buildings on the land conveyed other than private dwelling-houses with proper conveniences thereto fronting Springfield-avenue of a certain value; and would not carry on upon the land conveyed any trade or business of a noisy or offensive character. The defendants purchased with notice of these restrictive covenants. They have constructed a railway embankment with a permanent railway on the land, and it is admitted that the embankment encroaches beyond the building line. Instead of a two-feet fence wall they have erected a post and rail fence nearer Springfield-avenue than the building line and they intend to run trains along the railway. In my opinion these specific acts if done by a private purchaser of the defendants' land would have been a breach of the restrictive covenants for which such purchaser would be liable to be restrained by injunction. It was argued for the defendants that a railway embankment was not a "building" within the meaning of the covenant, and several cases—*Child* v. *Douglas*, 2 W. R. 461, Kay 560; *Bowes* v. *Law*, 18 W. R. 640, L. R. 9 Eq. 636; *Manners* v. *Johnson*, 24 W. R. 481, 1 Ch. D. 673; and *Frith* v. *Tryer*, [1893] 3 Ch. 158—were cited in support of that contention. In my view these cases do not materially assist the discussion, and in the absence of any conclusive authority upon the point, I hold, without much hesitation, that a railway embankment alone—*i.e.*, even without its possible appurtenances such as signal boxes and the like, is a building within the meaning of the covenant, the object of which is to maintain a uniform range of buildings: see *dictum* of Sir W. Page Wood, V.C., in *Child* v. *Douglas*, Kay 560, at p. 567. But it can hardly be contended that if a private owner were to make and use a railway on this land he would not be carrying on a "business of a noisy character" within the meaning of the covenant. However, the defendants have not taken any part of the plaintiffs' land, which lies entirely on the east of Springfield-avenue, and the question therefore is whether the land of the plaintiffs has been "injuriously affected" by the execution of those works within section 68 of the Lands Clauses Act, 1845.

Now the test for answering the question whether the land has been "injuriously affected" was proposed by Mr. Thesiger and adopted by Lord Cairns in the *Metropolitan Board of Works* v. *McCarthy*, 23 W. R. 115, L. R. 7 H. L. 243, at p. 253, and it is this: "Where by the construction there is physical interference with any right public or private which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which gives an additional market value to such property apart from the uses to which the particular owner or occupier might put it, there is a title to compensation if, by reason of such interference the property as a property is lessened in value." It seems to me the present case falls within that definition.

The plaintiffs are the owners and occupiers of land on the east side of Springfield-avenue, there has been a physical interference by the defendants with the right of the plaintiffs to have no buildings other than those of a certain size and description as specified in the conveyance erected on land which the defendants have taken; there has been a similar interference with the plaintiffs' right to have the building line regarded and the brick wall built as provided if built at all, and there has also been an interference with their right by express covenant that this land shall not be used for any business of a noisy character. I think all these rights were rights which the plaintiffs were entitled to make use of in connection with their property on the east side of Springfield-avenue. They only exist for the purpose of maintaining and improving that property, and any covenants entered into with them must necessarily be entered into with a view to and in connection with the land to which the plaintiffs are indebted for their name and existence. I have no doubt whatever that the covenants by the defendants' predecessors in title gave an additional market value to the plaintiffs' property, and that by reason of the defendants' interference the plaintiffs' property, as a property, is lessened in value apart from the uses to which they are at present putting it. In fact, as far as regards the present uses I think probably less damage would be done to the property when used as a recreation ground than if it were put to the more ordinary uses of property of this description.

The real question on this point of the case is whether the benefit of a restrictive covenant is matter for compensation if none of the land is taken for the benefit of which the restrictive covenant is imposed. There seems to be no direct authority on this point. The question must therefore be dealt with on principle.

Now, there can be no doubt that interference with an easement is matter for compensation, though no part of the dominant tenement is taken, and this is so, not because an easement is land (for an easement cannot be taken compulsorily under the Lands Clauses Act: see *Duke of Bedford* v. *Dawson*, L. R. 20 Eq. 353, 24 W. R. Dig. 236), but because by the interference the dominant tenement is injuriously affected. But for the purpose of compensation it seems to make little difference whether the owner of the servient tenement has granted a right of light over his tenement to the owner of the dominant tenement, or whether he has covenanted not to erect any obstacle on his tenement which will obstruct the access of light to the dominant tenement. Derogation from the grant in the former case, and breach of the restrictive covenant in the latter, would both be wrongs for which a remedy by injunction would be available. The damage to the dominant tenement would be the same in either case. In the case of *In re Masters and the Great Western Railway Co.*, 49 W. R. Dig. 20, [1900] 2 Q. B. 677, and in the Court of Appeal in 49 W. R. 499, [1901] 2 K. B. 84, the owner of one plot of land covenanted with the owner of an adjoining plot, a mine owner, that the latter should have the right to sink a shaft in the first-named plot subject to the reasonable approval of the owner of that plot. This right was held to be one, for interference with which the mine owner was entitled to compensation, on the ground that his land, though no part of it was taken, was injuriously affected. No doubt in *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180, Hannen, J., delivering the judgment of the Court of Queen's Bench, seems to have expressed the view that interference with the

benefit of such covenants as those in the present case would not give a right to compensation, but those observations were not necessary to the decision of that case, and they seem to be directed more to the right of action at law than to the right to compensation under the Lands Clauses Act. They were not treated as conclusive in *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, 44 W. R. Dig. 144, where restrictive covenants are contemplated as a basis of compensation and are put upon the same footing with easements. *Manchester, Sheffield, and Lincolnshire Railway* v. *Anderson*, 46 W. R. 509, [1898] 2 Ch. 394, 47 W. R. Dig. 168, and *Fleming* v. *Newport Railway Co.*, 8 App. Cas. 265, tend in the same direction, and I think that upon principle, land which is entitled to the benefit of a restrictive covenant, a right highly analogous to the benefit of an easement, is injuriously affected if that benefit is extinguished, although no part of the land itself is taken.

Three points made by counsel for the defendants require notice. First, that these breaches were matter for action at law, and therefore not matter for compensation under the Lands Clauses Act. I am clearly of opinion that this contention is not well founded. The acts done by the railway company were, I think, reasonably necessary for their authorized railway and were therefore not matter of action: see *Hammersmith Railway Co.* v. *Brand*, 18 W. R. 12, L. R. 4 H. L. 171; *Kirby* v. *Harrogate School Board*; and *Manchester, Sheffield, and Lincolnshire Railway* v. *Anderson*.

The second point requiring notice is this. It is argued by counsel for the defendants that no land can be injuriously affected unless some land or some interest in land is taken. It is clearly not necessary that any land should be taken, because by section 68 of the Lands Clauses Act if the lands are taken "or injuriously affected" compensation is payable. Then is it necessary that some interest in land should be taken? That depends upon the meaning of "interest in land." If the phrase excludes an easement such as a right of way or right of light, then it is clearly not necessary that such an interest in land should be taken. But if an interest in land includes a right of light, I cannot see why it should not equally include a restrictive covenant which is for many purposes very analogous to an easement. The plaintiffs are owners of land entitled to the benefit of a right very analogous to an easement, and differing but slightly from the right in *In re Masters and the Great Western Railway*, which was held to be the subject of compensation. I am of opinion, if it is necessary that an interest in land should be taken, these rights of the plaintiffs are a sufficient interest. That interest has been taken, and the land of the plaintiffs has been injuriously affected in consequence.

The third point arises upon the covenant not to carry on any business of a noisy character, and the compensation claimed, and in my opinion recoverable, on account of that covenant. It is argued, and no doubt it was held in *Hammersmith Railway Co.* v. *Brand* that no compensation could be recovered by the owner of the land, no part of which had been actually taken, for annoyance caused through the ordinary working of a railway, although it is to be observed full compensation for such annoyance could be recovered if any part of the land were taken: *Cooper Essex* v. *The Acton Local Board*, 14 App. Cas. 153, 37 W. R. Dig. 104. But no case has decided that where land, being under an express covenant that it shall not be used for a noisy business and that covenant being for the benefit of other land, is taken by a railway or other statutory body carrying on a business of a noisy character, the owner of the land for whose benefit the covenant is imposed is debarred from recovering compensation for the loss and consequent injurious affecting of his land. I think that upon principle he ought to be entitled to compensation: see *Fleming* v. *Newport Railway Co.*, 8 App. Cas. 265, at p. 278. Where land is taken which is bound by a covenant restricting its user for the benefit of other lands, the owner of that other land suffers an injury which is special and apart from that which the rest of the community are exposed to. His right is, as I have said, hardly distinguishable for this purpose from an easement, which would unquestionably, if disturbed, give a right to compensation. The presence of the restrictive covenant distinguishes such a case as this from cases of the class of *Rex* v. *Pease*, 4 B. & Ad. 30; *Vaughan* v. *Taff Vale Railway Co.*, 8 W. R. 549, 5 H. & N. 679; and *Hammersmith Railway Co.* v. *Brand*, the principle of which is in my opinion inapplicable.

I think, therefore, that upon all these claims the plaintiffs are entitled to compensation, and I give judgment for them for £650, the amount of the award, with interest.

Solicitors, *Lee & Watts*, for *Whittingham & Williams*, Derby; *Beale & Co.*

K. B. Div.
(Ridley and Phillimore, JJ.) } May 21, 22, 1901.

GRAHAM AND OTHERS v. COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS. (a.)

Crown—Commissioners of Works and Public Buildings—Contract by—Liability of commissioners—Principal and agent.

The Commissioners of His Majesty's Works and Public Buildings, who were incorporated by 37 & 38 Vict. c. 84, may be sued in an action for breach of a contract entered into by them as such commissioners.

Argument of a question of law raised by the defendants on the pleadings.

The action was for damages for alleged breach by the defendants of a contract contained in an indenture of the 11th of September, 1899, made between the plaintiffs and the defendants.

The plaintiffs were builders and contractors, and the defendants were a corporate body incorporated under the Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), and the Works and Public Buildings Act, 1874 (37 & 38 Vict. c. 84), s. 2.

The plaintiffs in their statement of claim alleged that by an indenture of the 11th of September, 1899, the plaintiffs contracted with the defendants to erect for the latter a post-office at Stalybridge, and to complete the same according to certain specifications and conditions annexed to the said indenture, in consideration whereof the defendants agreed to pay the plaintiffs the sum of £5,743 by instalments; that the plaintiffs commenced to erect the said post-office, but the defendants on the 2nd of January, 1901, served a written notice upon the plaintiffs, wrongfully determining the said contract.

The defendants in their defence alleged that the action was not maintainable, and that the plaintiffs could only proceed (if at all) by petition of right.

The defendants submitted that they were a corporate body incorporated under the Acts above mentioned, and that the contract in question was entered into by the defendants as servants, agents,

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and on behalf of the Crown, as a department of the Government, and not otherwise.

The defendants then stated facts which they alleged justified them in determining the contract.

The plaintiffs in reply denied that the contract was entered into by the defendants as servants and agents of the Crown as a department of Government, and alleged that the contract was entered into by the defendants as principals.

The Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), provides:

Section 1.—The persons who for the time being, under the provisions of the Act passed in the last session of Parliament, chapter forty-two, shall be the Commissioners of Her Majesty's Works and Public Buildings, shall be and they are hereby constituted a corporation, by the name and style of "The Commissioners of Her Majesty's Works and Public Buildings," and by that name shall and may have perpetual succession, and use a common seal, to be by them from time to time altered as they shall think fit, for the purpose of taking and holding all the lands, tenements, and hereditaments whatsoever, of every tenure, by this Act vested in them, or hereafter to be vested in or purchased by them under or by virtue of the provisions of this Act, and of conveying, assigning, leasing, underleasing, or otherwise disposing of the same lands, tenements, and hereditaments, and of entering into any covenants or agreements respecting any such hereditaments vested or to be purchased, taken, or disposed of as aforesaid, but not for any other purpose.

The Works and Public Buildings Act, 1874 (37 & 38 Vict. c. 84)—an Act to regulate the incorporation of the Commissioners of Her Majesty's Works and Public Buildings, and for other purposes relating thereto—recites:

Whereas there are divers corporations created by the various Acts of Parliament mentioned in the first schedule to this Act, and now subsisting under the same name of "The Commissioners of Her Majesty's Works and Public Buildings," and the commissioners for the time being of Her Majesty's Works and Public Buildings are also incorporated under the name of the Battersea Park Commissioners, by the Act mentioned in the second schedule to this Act, and it is expedient that all such corporations should be amalgamated:

Be it enacted:

Section 2.—The commissioners for the time being of Her Majesty's Works and Public Buildings as incorporated by and for the purposes of the Act of the fourteenth and fifteenth years of her Majesty, chapter forty-two, are hereby declared to be and shall be a corporation to all intents and purposes, and as such shall have and hold and may exercise not only all the estates, property, interests, privileges, and powers now vested in or enjoyed by them under that Act, but also all estates, property, interests, privileges, and powers now vested in or held or enjoyed by the Commissioners of Her Majesty's Works and Public Buildings as a corporation under the Act of the fifteenth and sixteenth years of her Majesty, chapter twenty-eight, or any subsequent Act, and in or by the Battersea Park Commissioners.

Sir R. B. Finlay, A.G. (*Askwith* with him), for the defendants.—This action cannot be maintained. When a person contracts as a servant of the Crown and on behalf of the Crown he is not liable on such contract, and no action thereon can be maintained against him: *Gidley* v. *Lord Palmerston*, 3 Br. & B. 275, 7 Moore, 91; *Palmer* v. *Hutchinson*, 6 App. Cas. 619, 30 W. R. Dig. 138; *Dunn* v. *Macdonald*, 45 W. R. 355, [1897] 1 Q. B. 401, 555. The only remedy, if any, in such a case as this, is by petition of right. Further, the fact that the defendants have been incorporated by various statutes makes no difference as regards their being liable to be sued on such a contract as exists in the present case. In none of the various incorporating statutes relating to the Public Works Department is there any clause as to suing and being sued, except where it was expressly intended by the Legislature that there should be such a power, for example, as in section 2 of the Act dealing with Westminster Bridge (16 & 17 Vict. c. 46), where the words "shall and may sue and be sued" are inserted, and also as in the Act dealing with the General Post Office, Edinburgh (21 & 22 Vict. c. 40), s. 22. The prerogative of the Crown cannot be taken away except by express words: *Cushing* v. *Dupuy*, 5 App. Cas. 409, at p. 419, 28 W. R. Dig. 33; *Théberge* v. *Landry*, 25 W. R. 216, 2 App. Cas. 102. The commissioners therefore cannot be sued, and no action in this case lies.

The following cases were also cited: *Reg.* v. *Commissioners of Inland Revenue, In re Nathan*, 32 W. R. 543, 12 Q. B. D. 461, at p. 471; *Reg.* v. *McCann*, 16 W. R. 397, L R. 3 Q. B. 141, at p. 147; *Jones* v. *Mersey Docks*, 13 W. R. 1069, 11 H. L. Cas. 443; *In re Wood's Estate, Ex parte Her Majesty's Commissioners of Works and Public Buildings*, 34 W. R. 375, 31 Ch. D. 607; *In re Mill's Estate, Ex parte Commissioners of Works and Public Buildings*, 35 W. R. 65, 34 Ch. D. 24.

Scott Fox (*J. Andrew Strahan* with him), for the plaintiffs.—The action is maintainable. It is an action upon a contract made between the plantiffs and the commissioners, who are an incorporated body having power to enter into the contract. It is not an action against the Crown. There has been a breach of this contract by the defendants, and by the ordinary law of principal and agent the plaintiffs are entitled to sue the defendants in respect of such breach. The whole question here is whether the defendants contracted for themselves or whether they have contracted as agents for the Crown. If the latter, of course the Crown would be a principal, and the defendants, being agents, could not be sued because there would be no contract between them and the plaintiffs: see *Churchward* v. *The Queen*, L. R. 1 Q. B. 173. But in the present case the defendants were contracting for themselves as principals and not as agents, and therefore are liable upon the contract. In *Nurse* v. *Lord Seymour*, 13 Beav. 254, it is true, it was held that under 7 Geo. 4, c. 77, the Commissioners of Woods and Forests could not sue or be sued for specific performance of contracts entered into by them, but by section 1 of The Commissioners of Works and Public Buildings Act, 1852 (15 & 16 Vict. c. 28) they were expressly incorporated. *Thorn* v. *Commissioners of Her Majesty's Works and Public Buildings*, 32 Beav. 490, and *Corbett* v. *Commissioners of Her Majesty's Works and Public Buildings*, 16 W. R. 889, 18 L. T. Rep. 548, are both authorities showing that the commissioners are liable to be sued. By section 2 of 37 & 38 Vict. c. 84 the commissioners are expressly made a corporation to all intents and purposes. Further, in the case of *In re Wood's Estate* it was held that the commissioners do not represent the Crown. [The court stopped counsel.]

Askwith replied.

RIDLEY, J.—I think judgment in this case ought to be given for the plaintiffs. If the question had turned upon the construction of the Acts of Parliament which were referred to by the Attorney-General, and which deal with the constitutions of the present defendants and of the Commissioners of Woods and

Forests, I should have required time to consider those Acts of Parliament, and to go through them more carefully than it is necessary to do upon the present occasion. I think, however, that the point raised in this case can be decided without special reference to the Acts to which I have alluded. The present question depends upon the general principle which regulates the position of a public officer—I mean the principle that an officer appointed by the Government and treated as an agent for the public is not liable to be sued upon a contract made by him in that capacity. That is the general principle. The question here is, Have the present defendants, the Commissioners of His Majesty's Works and Public Buildings, been in this case acting as agents for the Crown or not? There are several decisions which may guide us upon this question, and I propose to make my judgment turn upon those previous decisions rather than upon the particular instances which were quoted on behalf of the plaintiffs, in which these Commissioners of Public Works and Buildings have been held liable under particular Acts of Parliament. In 37 & 38 Vict. c. 84 there are, no doubt, provisions which might make the liability of the commissioners depend upon those particular provisions and considerations rather than upon the general principle. But the question which arises in this case and which we have to determine is, I think, this: Is the contract sued upon made for and on behalf of the Crown, or is it a contract made by the persons sued, for themselves? Of course, it may be either. Let us now consider the authorities that have been cited on this part of the case. First, there is the early case of *Gidley* v. *Lord Palmerston*, in which Lord Palmerston, the Secretary of State for War, was sued upon his obligation to pay a retiring allowance alleged to be due to the plaintiff. It could not be argued that he became liable to that obligation otherwise than as a servant of the Crown. There was no other liability which could rest upon him. He had made no contract, but it was from his position as Secretary of State for War that the liability was said to rest upon him. It was accordingly held that no action would lie against him. Next let us take the case of *Dunn* v. *Macdonald*. In that case the defendant had been appointed her Majesty's Commissioner and Consul-General for a protectorate in Africa, and he had engaged the plaintiff to serve with him for three years. Before going into what was actually decided in that case, I may make this observation about it. That case, it might be suggested, was a case in which *primâ facie* one would say that, unless the defendant had been a servant of the Crown—in his capacity, that is to say, as Commissioner and Consul-General—he never would have engaged the plaintiff at all as such public servant, so that it is not so strong a case in that way as the case of *Gidley* v. *Lord Palmerston*, because here was a man appointed for a particular purpose engaging another person to serve him in a particular capacity and for a particular purpose. The decision of the Court of Appeal there was that there was no liability upon the defendant, as he had not made, and he was held not to have made, an express contract, and he was held not to be liable upon the implied warranty that he had authority to contract as he did. I do not propose to go through that case at length, because I think it is rather the application of the principle than the principle itself that we have here to consider, for the principle itself seems to be undoubted. I will, however, quote a short passage from the judgment of Lopes, L.J., in which he says: "The liabilities of public agents on contracts made by them in their public capacity are on a different footing from the liabilities of ordinary agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a government is not liable for breach of a contract made in his public capacity, even though he would by the terms of the contract be bound if it were an agency of a private nature." That, I think, means that, although the agent were to put his own name in the contract without stating that he was agent for the Crown, if, from the surrounding circumstances of the case, you can gather that he does contract as agent for the Crown, and in that capacity only, he is not liable upon the contract. It might be, therefore, from the surrounding circumstances of this case, that we ought to conclude that these defendants were contracting as servants of the Crown only, but all the facts in the case point, as I think, in the opposite direction. It is far removed from the two previous cases I have referred to. It is a case in which a public body make these contracts in the course of their duty in all parts of the country in respect of works required for his Majesty's Government, The defendants seem to me to be making these contracts in their own capacity, and that is the inference I should draw here. There is no such special appointment as there was in the case of Sir Claude Macdonald in *Dunn* v. *Macdonald*, and certainly there is no such relation between the defendants and the contractors as existed in the case of *Gidley* v. *Lord Palmerston*. I therefore think that this is a case in which the defendants have expressly contracted for themselves. The funds from which they will have to pay, if judgment is given against them, are, I suppose, the funds which will be granted by Parliament. This is sufficient to decide the case; and the previous decision in the case of *In re Wood's Estate* goes far to show that that is the way in which Lindley, L.J., regarded the position of Her Majesty's Commissioners of Works and Buildings in that case. In the course of his judgment Lindley, L.J., said: "No authority has been cited to show that this particular corporation, incorporated by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position, as regards costs, as the Crown." It is quite true that the precise point did not arise in that case, for there the decision turned on the Act 18 & 19 Vict. c. 95, and the Lands Clauses Consolidation Act, 1845, which by section 1 became incorporated in the subsequent Act when passed. That being so, it was there held that these commissioners were bound by the provisions contained in the Lands Clauses Act, as to costs, by virtue of the Acts of Parliament themselves. The objection that the Crown would not be bound did arise, and it was dealt with by the court in the way I have mentioned. There is no ground for holding that such a corporation, specially incorporated in this way, is in the same position as the Crown. I think, for these reasons, that this case must be treated as one in which the defendants have specially made this contract, and they are liable to be sued upon it.

PHILLIMORE, J.—I am of the same opinion, but I prefer to put my judgment upon a somewhat narrower ground. I think that the Attorney-General rightly treated this case in his argument as a question of determining what the contract was. The Crown cannot be sued, and, as the Crown cannot be sued, so neither can the subject take an indirect action against the Crown by suing a Crown servant in contract as the agent for the Crown. A Crown servant acting as agent for the Crown is no more liable than any other agent acting for a principal. But, for the purpose of the conduct of business, it is extremely convenient that the Crown should establish, with the sanction of

Parliament, officials or corporations, who can speedily sue and be sued, upon business engagements of the Crown, without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable—and otherwise business could not be carried on—that persons who contract with the Crown for business purposes should have the power of appealing from the head of the Government department to his Majesty's courts of justice as any subject may have of appealing against misconstruction of his contract by his fellow-subject. For that purpose the Crown has in certain cases, with the consent of Parliament, established certain officials who are to be treated as though they were agents of the Crown for this purpose, subject to contracting as principals. The Postmaster-General, and apparently the Commissioners of Woods and Forests as being a corporation incorporated for the purpose, are instances of this. There is no doubt that for certain purposes these very commissioners, His Majesty's Commissioners of Works and Public Buildings, are liable to be sued. In the same way the Legislature has, under the Merchant Shipping Act, appointed that a public official may be sued in tort, not for his own tort, but for the tort possibly of the President of the Board of Trade, or of some official at a seaport, in detaining a ship as unseaworthy which in fact is not unseaworthy. In each of those cases the real person sued is the Crown, and the real person sought to be attacked is the Crown, and in such cases, if judgment is given against the public official, the judgment is a declaratory judgment only. No execution can follow upon it, because there are no moneys out of which the damages can be paid, except out of such moneys as Parliament votes for the purpose. It amounts to getting a decision upon a question of this kind: if this were the case of a subject, what would be the decision of the court upon the case brought against him. The principle in the Merchant Shipping Act is a useful one, as it shows conclusively that the Crown is really the person attacked, though through the medium of a subject, because the privileges which the Crown has as to mode of trial apply in such cases. That is shown by the case of *Dixon* v. *Farrer, Secretary of the Board of Trade*, 35 W. R. 95, 18 Q. B. D. 43, in which Sir Thomas Farrer was sued as the official named to be sued—namely, the Secretary of the Board of Trade—not for his own act, but for the act either of his superior or subordinate officer, for detaining a ship supposed to be unseaworthy. The then Attorney-General claimed, and successfully maintained his claim in the Divisional Court and in the Court of Appeal, to treat the action as a suit against the Crown and to lay its venue, as the Crown in such cases can lay its venue, by prerogative, in whatever county it pleases; and in fact he succeeded in removing the trial from Newcastle to London and having such trial in London. The only question for us is whether the Commissioners of Works and Public Buildings are one of that class of persons described by Lindley, L.J., in *Dixon* v. *Farrer* as a "nominal defendant sued as representing one of the departments of the State." There is no reason in principle why they should not be; there is nothing derogatory to the Crown in their so being, and there is very great convenience in establishing such bodies for such purposes. I think it follows that the Commissioners of Woods and Forests are in the same position. The mere fact of incorporation without reservation, it seems to me, confers the privilege of suing and the liability of being sued; and having regard to the fact that they are made a corporation; that there is no restriction upon the ordinary incidents of such a corporation; that in fact their fellows—the Commissioners of Woods and Forests—have been sued, and that they themselves in fact have been sued in cases where their powers are derived under certain Acts of Parliament, I see no reason why we should hold that their liability is restricted to those Acts. It seems to me that they have a general liability to be sued for the purpose of obtaining a decision, but of course no execution can go inasmuch as their property, if they have any, is Crown property, as was held in *Reg.* v. *McCann*. In all probability however, they have none, or none applicable to this purpose. The judgment of the court, if ultimately entered against them, would have to be satisfied, if at all, out of moneys provided by Parliament for that purpose.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Van Sandau & Co.*, for *Mills & Co.*, Huddersfield.

Solicitor for the defendants, *Solicitor to the Treasury.*

C. C. R.
(Lord Alverstone, L.C.J., and Wills, Grantham, Kennedy. and Ridley, JJ.) — Oct. 26; Nov. 9.

THE KING *v.* TIBBITS AND WINDUST. (*a.*)

Criminal law—Preventing due course of justice—Editor and Special "Crime Investigator"—Conspiracy—Comments in newspaper about prisoners awaiting trial—Inference of intent.

It is a criminal offence to publish writings which are calculated or tend to influence the minds of the magistrates or jurors against a person who is to be brought before them for trial.

An act which tends to prevent the course of justice is a contempt of court, but it is none the less an indictable offence.

A conspiracy to publish an article in a newspaper may be inferred if the article could not have appeared in the newspaper without the concurrence of the persons charged with conspiracy.

Held, on a special case stated for the consideration of the Court for Crown Cases Reserved, that the publication of information concerning the antecedents of two prisoners who were awaiting trial was of such a character as to interfere with and obstruct the ordinary course of justice, and that inasmuch as the articles could not have appeared without the co-operation of the editor and the reporter, there was evidence of conspiracy by them.

This was a case stated for the opinion of the court by Kennedy, J.

At the Bristol Assizes the prisoners, Charles John Tibbits, editor of the *Weekly Dispatch*, and Charles Windust, described as a crime investigator of the same journal, were indicted for an alleged attempt to pervert the course of justice in a case in which the prisoners were charged with cruelty to children. Windust supplied and Tibbits inserted in his newspaper sensational articles concerning the antecedents of the prisoners, which was held to be of such a character as to interfere with and obstruct the due course of justice. They were found guilty by the jury, but Kennedy, J., released the prisoners on recognizances pending the decision of this court on the points reserved.

The question the court had to determine was whether all or any and which of the counts of the indictment alleged a criminal offence, and whether there was evidence adduced at the trial upon which

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the accused persons or either and which of them could properly be found guilty upon all or any and which of the counts in the indictment.

The following statements, containing a summary of the indictment, which contained sixteen counts (upon each of which the defendants were found guilty), is taken from the judgment of the court:

Count 1 alleged that the accused unlawfully attempted by the composition and publication of the statements contained in the issue of the *Weekly Dispatch* of the 13th of January to influence and prejudice the mind of the magistrate before whom the charge against Allport and Chappell was pending, and so unlawfully attempted to obstruct and pervert the due course of law and justice.

Count 2, in regard to the same publication, alleged the same offence by a similar attempt to influence, by the same publication, the minds of the jurors who might be returned and impanelled for the trial of Allport and Chappell at the assizes.

Count 3 charged, in regard to the same publication, the doing knowingly and unlawfully of an act calculated and tending to obstruct and pervert the due course of law and justice when Allport and Chappell's case was before the magistrate.

Count 4 was identical with count 3, except that it related to the trial of Allport and Chappell at the assizes.

Count 5 charged, with regard to the same publication, that the defendants, unlawfully devising and intending to injure and prejudice Allport and Chappell and to deprive them of a fair and impartial hearing before the magistrate, unlawfully, wilfully, and maliciously printed and published and procured to be printed and published a malicious and scandalous writing.

Count 6 was identical with count 5, except that it related to the trial of Allport and Chappell at the assizes.

Counts 7-12 (inclusive), in substance, repeated, in regard to the issue of the *Weekly Dispatch* of the 3rd of February, the same charges as were contained in counts 1-6, in regard to the issue of the 13th of January. There was an additional prefatory averment of the preferring on the 17th of February of a further charge against Allport and Chappell of attempting to murder Arthur Bertie Allport, and in counts 11 and 12 was added a charge as to the publication in the incriminated article of a scandalous representation of Allport in clerical garb.

Count 13 alleged an unlawful conspiracy between Tibbits and Windust on the 9th of January, 1901, and on divers other days between that day and the 14th of January, 1901, to obstruct and pervert the due course of law and justice in reference to the hearing before the magistrate.

Count 14 alleged the same unlawful conspiracy in reference to the trial of Allport and Chappell at the assizes.

Count 15, after prefatory averments relating to the further charges against Allport and Chappell, alleged the conspiracy on the 9th of January, 1901, and on divers days between that day and the 4th of March, 1901, setting out the dates of publication, in reference to the hearing before the magistrate and to the trial at the assizes.

Count 16, in regard to the same dates of publications, alleged an unlawful conspiracy to compose, print, and publish articles which were calculated and intended to prejudice the minds of the committing magistrate and the jurors at the trial, and so to prevent and obstruct the due course of law and justice.

At the close of the case for the prosecution counsel for the accused persons submitted: (1) There was no evidence on any of the counts of criminal intent. It was not proved that any of the statements were untrue or that the accused desired or intended to procure a false verdict or to alter the course of justice; (2) there was no evidence of conspiracy; (3) if the printing and publishing did not constitute attempts to pervert and obstruct justice, as charged in corresponding counts for contempts, they constituted nothing criminal; (4) "calculating and tending to obstruct and pervert" did not charge an offence distinct from conspiracy to pervert justice.

Further, the charge against Tibbits was conspiracy or nothing. Proving that he was editor was not proving that he published or caused or procured to be published. The publisher was not his servant or agent.

As to Windust, in 1897 he called himself criminal investigator, and in 1901 was seen reporting in the magistrate's court, which might raise a presumption that he sent in some report. There was no evidence that his report was what appeared in the *Weekly Dispatch*.

Foote, K.C., and *Evans Austin*, for the defendants.—There is no evidence on any of the counts of criminal intent, nor that the articles were not substantially true. The two defendants had not spoken to each other or seen each other about this matter, and there was no conspiracy therefore within the meaning of that word as defined in *Mulcahy* v. *Regina*, L. R. 3 H. L. 306, 17 W. R. H. L. Dig. 4. At p. 317, Willes, J., who delivered the judgment of the court, said: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by an unlawful means." Therefore if the printing and publishing of this matter did not constitute attempts to pervert and obstruct justice, they were not criminal *per se*; and with regard to the last count the words "calculated and tending to obstruct and pervert" did not charge an offence distinct from conspiracy to prevent. The modern law of conspiracy has grown out of the statute of 33 Edw. 1, c. 2, "*de conspiratoribus*," and in conspiracy there must be an element of falsity. [WILLS, J.—Does it not pervert justice to publish something that prevents a man getting a fair trial?—No; unless there was evidence of an intention to deceive the court.] The sole object of publishing these articles was to sell the newspaper.

He cited *Reg.* v. *Grant*, 7 State Trials N. S. 507; *Reg.* v. *Hicklin*, 16 W. R. 801, L. R. 3 Q. B. 360; *Haire* v. *Wilson*, 9 B. & C. 643; *Rex* v. *Jolliffe*, 4 T. R. 285; *Skipworth's case*, L. R. 9 Q. B. 219, at p. 232, 23 W. R. Dig. 74; and *Rex* v. *Fisher*, 2 Camp. 563.

Sir Edward Carson, S.G., H. Sutton, Charles Mathew, and *Guy Stephenson*, for the Crown.—The jury found the defendants had attempted to pervert the ordinary course of justice; that the articles were of a character to interfere with the administration of justice, and were written with intent so to interfere, and that there was conspiracy on the part of the prisoners. On these findings an indictable offence was clearly committed by the defendants. The evidence of conspiracy was conclusive. The articles were written by Windust, and published in the newspaper by Tibbits. Those two facts being proved, it was unnecessary to inquire whether they actually met together and agreed the one to write the article and the other to publish it. The moment a case came before a court of justice there should be no interference with the course of justice from outside. If there was, the offender might be committed for contempt of court, or, as in this case, a jury might be asked to express their opinion on the matter.

Foote replied.

Cur. adv. vult.

Nov. 9.—Lord ALVERSTONE, L.C.J., read the following judgment of the court: This was a case reserved by Kennedy, J., at the last summer assizes at Bristol. Indictments were preferred against two defendants, Charles John Tibbits and Charles Windust. The charge contained in the indictment related to the publication of certain matters in a newspaper called the *Weekly Dispatch*, between the 13th of January, 1901, and the 4th of March, 1901 (inclusive), and particularly to the issues of the newspaper dated respectively the 13th of January and the 3rd of February, 1901. Prior to the publication of the first article, two persons, named Allport and Chappell, had been charged before the magistrate with offences under the Prevention of Cruelty to Children Act, 1894. Further charges of attempting to murder, and of conspiracy to murder a child named Arthur Bertie Allport, and of a conspiracy to commit the offence against section 1 of the Prevention of Cruelty to Children Act, 1894, were preferred against them. On the 8th of February, Allport and Chappell were committed to take their trial at the next Bristol Assizes fixed to commence on the 20th of February. Their trial on the indictment for the attempt to murder commenced before Day, J., on the 1st of March, and terminated on the 5th of March. They were found guilty, and sentenced, Allport to fifteen years' penal servitude, and Chappell to five years' penal servitude. The publications in the *Weekly Dispatch*, which formed the subject of the present indictment against Tibbits and Windust, were statements relating to the case of Allport and Chappell, contained in the issues of the *Weekly Dispatch* during the hearing of the case against Allport and Chappell before the magistrate, and before and during the trial of these persons at the assizes. It is unnecessary to refer in detail to any of the incriminated articles, of which those of the 13th of January and the 3rd of February were the most important. It is sufficient to say that the publication went far beyond any fair and *bonâ fide* report of the proceedings before the magistrate. They contained, couched in a florid and sensational form, a number of statements highly detrimental to Allport and Chappell. Much of the statements relates to matters of which evidence could not have been admissible against them in any event, and purported to be the result of investigations made by the "Special Crime Investigator" of the newspaper. Under these circumstances it was contended on behalf of the prosecution that there was evidence upon which the jury might properly convict both the defendants on all the counts of the indictment. Upon the argument before us we had no doubt upon the main question which had been discussed, but having regard to the nature of the proceedings and the importance of the case, we thought it desirable that we should endeavour to lay down as clearly as possible the law applicable to such a case. Points were raised and argued on behalf of the defendant Windust as distinguished from the defendant Tibbits. It will be convenient to postpone the discussion of those points until we have dealt with the main questions of law raised on behalf of both prisoners.

It was not attempted to be argued by Mr. Foote, who appeared as counsel for both defendants, that the publication of such articles was lawful, and that the persons publishing such articles could not be punished. On the contrary, he contended that the publication of such articles was a contempt of court, and could only properly be punished as such either by summary proceedings or indictment for contempt. He further urged that there was no evidence of any intention on the part of either of the defendants to prevent or interfere with the course of justice, and that any inference, which might otherwise be drawn from the contents of the articles that they were calculated to prevent or interfere with the course of justice, was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted. That the publishing of such articles did constitute a contempt of court and would be punished as such, is well established. One of the sorts of contempt enumerated by Lord Hardwicke, L.C., in the year 1742 (2 Atk. 471) is prejudicing mankind against persons before the case was heard, and he added these important words: "There cannot be anything of greater consequence than to keep the streams of justice clear and pure that parties may proceed with safety both to themselves and their characters." The case of *Rex* v. *Jolliffe* shows that a criminal information lay for distributing in the assize town, before the trial at *Nisi Prius*, handbills reflecting on the conduct of a prosecutor, and, in the course of his judgment, Lord Kenyon, in that case, 4 T. R., at p. 289, made the following very relevant observations: "Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information, but that is a minor offence when compared with that of publishing the papers in question during the pendency of the cause at the assizes and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot in order to prevent any possibility of their being tampered with. But if an individual can break down any of the safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And, therefore, I cannot forbear saying that if the publication be brought home to the defendant he has been guilty of a crime of the greatest enormity." Again, in the case of *Rex* v. *Fisher*, the printer, publisher, and editor were convicted for publishing a scandalous defamatory and malicious libel, intended to injure one Richard Stephenson, charged with assault, and deprive him of the benefit of an impartial trial "and to injure and prejudice him in the minds of the liege subjects of our Lord the King and to cause it to be believed that he was guilty of the said assault and thereby to prevent the administration of justice and to deprive the said Richard Stephenson of an impartial trial." It was urged on behalf of the defendants that this was an indictment for libel, and that, therefore, it was no authority for the indictment in the present case. But, if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of the judgment is that the publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal, and we cannot doubt that, if the attempt so to do be made, or means taken, the natural effect of which would be to create a widespread prejudice against persons about to take their trial, an offence has been committed, whatever the means adopted, provided there be not some legal justification for the course pursued. The case of *Rex* v. *Williams*, 2 L. J. K. B. 30, is another distinct authority for the same view, in which it was laid down that any attempt whatever to publicly prejudge a criminal case, whether by a detail of the evidence or by a comment, or by a theatrical exhibition, is an offence against public justice and a serious misdemeanour. The publication of proceedings publicly held in a

court of justice, if fair and accurate, has now the protection of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 3. The law as laid down in the older cases to which we have referred was summarized by Blackburn, J., in *Skipworth's case*, L. R. 9 Q. B., at p. 232, and with reference to the objection that the more proper proceeding should be by proceedings for contempt of court, we would refer to the judgment of the court in *Reg.* v. *Gray*, 48 W. R. 474, [1900] 2 Q. B. 36, at p. 41, from which it clearly appears that in many cases it is preferable to proceed by information or indictment rather than by motion for contempt. We have no doubt whatever that the publication of the articles in this case, at the time when and under the circumstances in which they were published, constitutes a criminal offence by whomsoever they were published. We think that the facts, which bring the incriminated articles within the category of misdemeanour, abundantly appear upon the face of each count, and that, under the circumstances, it is perfectly immaterial whether the articles be described and charged as libels or contempt or not. With reference to the argument, with which we were pressed, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would, indeed, be far-fetched to infer that the articles were likely to have any effect upon the mind of either magistrate or judge, but the essence of the offence is the conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of court, when the legal proceedings pending did not involve trial by jury, and when no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: see *Reg.* v. *Grant*. We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from their influence upon the minds of the jurors at the trial of such articles as these, justified their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity, and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. I will add only this. A person accused of crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible and which is adduced at his trial in legal form or shape. Assume the accused to be really guilty of the offence charged against him. The due course of law and justice is perverted and obstructed nevertheless if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence. Mr. Foote attempted to restrict conspiracy to matters germane, at least to those referred to in the Statute de Conspiratoribus (33 Edw. 1). It is obvious, however, that the statute is not given an exhaustive definition, and other matters beyond those enumerated in that statute have been adjudged over and over again to be the subjects of criminal conspiracies. As to the expressions of Willes, J., in *Mulcahy* v. *Reg.*, L. R. 3 H. L., at p. 317, upon which Mr. Foote insisted so much, it is plain that Willes, J., was speaking of a case in which the criminal intention had not been carried into effect, and he says that in such a case the very promise to do it—such a promise as would be binding if for a lawful purpose—is an act which negatives the suggestion that the matter rests in intention only. He never said that when the unlawful purpose has been carried out no indictment for conspiracy can be maintained unless the concerted action has been preceded by such a contract between the conspirators as, if the purpose had been lawful, would have given ground for a lawsuit. His definition is not of conspiracy, but of the kind of conduct which is sufficient to make the concerted action pass from the stage of intention into that of action.

We have now only to consider the special points which were taken on behalf of the defendant Windust as regards the first six counts, and as regards both the defendants in regard to the conspiracy counts. We agree that in such a case some evidence must be given that the defendants were really parties to the publication complained of: see *Reg.* v. *Holbrook*, 26 W. R. 144, 3 Q. B. D. 60, 27 W. R. 313, 4 Q. B. D. 42. The evidence against Windust submitted to the jury, as appears from the case stated, was as follows: That in 1897 he was the crime investigator of the *Weekly Dispatch* and was engaged in June of that year in investigating a case then pending at the South London Sessions. That on several of the occasions when Allport and Chappell were before the magistrates Windust was present in court taking notes of the proceedings. He was seen on the 2nd of May, 1901, at the office of the *Weekly Dispatch*, and the articles in question purported to be written by the special crime investigator of the paper. Under the circumstances we are of opinion that there was evidence to leave to the jury that Windust was party to, and concurred in, the publication of the articles and was an accessory before the fact. As regards Tibbits, it was proved that he was the editor of the *Weekly Dispatch* at the time of the publications. He afterwards placed himself as such editor in communication with the Director of Public Prosecutions respecting the inquiries which were being made at Bristol as to the publication of papers. The articles formed an important part of the issues of the paper in question, and we think that in his case there was clearly evidence to be submitted to the jury. It remains only to consider the conspiracy counts, on which the defendants were also found guilty. Inasmuch as they were also convicted on the other counts the point is not very important; but we think it right to say that there was, in our opinion, evidence for the jury as to the conspiracy counts also. Such articles would not be published without the concurrence of someone at Bristol, and the person in fact editing the paper, and we are of opinion that there was evidence to go to the jury on which they might properly draw the conclusion that the defendants combined for the purpose of publishing the articles in question. For the above reasons we think the conviction should be affirmed as against both defendants.

Solicitors for the accused, *Mellor, Smith, & May*; *The Director of Public Prosecutions*, for the Crown.

Court of Appeal.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 25.

CATTERMOLE v. ATLANTIC TRANSPORT CO. (LIMITED). (a.)

Master and servant—Employer's liability—Accident—Compensation—"Factory"—Ship in wet dock—Costs—Action under Employers' Liability Act, 1880—*Action dismissed—Compensation assessed under Workmen's Compensation Act,* 1897—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 113, 186—*Factory and Workshop Act,* 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 4; *s.* 7; *Schedule II*, *cl.* 6, 10.

A workman was killed while employed on a ship lying in a wet dock. An action by his widow under the Employers' Liability Act, 1880, *was dismissed, and the county court judge, upon the plaintiff's application, assessed compensation, under section* 1, *sub-section* 4, *of the Workmen's Compensation Act,* 1897, *holding that the deceased man's employment at the time of the accident was on, in, or about a "factory" within section* 7 *of the Act, and he gave the plaintiff the costs of and incident to the proceedings*

Held, (1) *that the employment being on a ship in a dock was employment in a "factory" within the meaning of the Act; and* (2) *that the county court judge had power to give the plaintiff the costs of the proceedings.*

Appeal from the decision of the judge of the Bow County Court, assessing compensation under the Workmen's Compensation Act, 1897.

The plaintiff was the widow of a deceased workman, who at the time of the accident causing his death was in the employment of the defendants.

The Minnesota, a steamship belonging to the defendants, was alongside the north quay of the West India Docks. She was taking in, at No. 2 hold, a cargo of lime from a schooner lying alongside of her. She was also taking in cargo from the quay at her other holds. The defendants were themselves loading the ship by their own men. The deceased man was employed by them in No. 2 hold in assisting to take in cargo from the schooner when he was killed by an accident.

An action was brought by the plaintiff under the Employers' Liability Act, 1880, but the county court judge held that the defendants were not liable under that Act, and dismissed the action.

Application was then made to him under section 1, sub-section 4, of the Workmen's Compensation Act, 1897, to assess the compensation payable.

The judge thereupon proceeded to do so, and held that the deceased man, being employed in a ship lying in a dock, was employed in or about a "factory." He assessed the amount of compensation at £234, and gave the plaintiff the costs "of and incident to these proceedings."

The defendants appealed.

B. D Kilburn, for the defendants.—The employment of the deceased man on the ship was not employment on, in, or about a dock within the meaning of section 23 of the Factory and Workshop Act, 1895, and therefore the employment was not in a "factory" within section 7 of the Workmen's Compensation Act, 1897. In *Raine* v. *Jobson*, 49 W. R. 705, [1901] A. C. 404, it was held that a workman employed upon a ship, which was in a dry dock for the purpose of being repaired, was employed in a "factory" within the meaning of section 7. There, however, the ship really formed part of the dry dock and physically occupied it. In this case the ship, being afloat, remained a separate entity, and formed no part of the dock. [He also referred to *Flowers* v. *Chambers*, 47 W. R. 513, [1899] 2 Q. B. 142; *Woodham* v. *Atlantic Transport Co.*, 47 W. R. 105, [1899] 1 Q. B. 15; *Hennessey* v. *McCabe*, 48 W. R. 231, [1900] 1 Q. B. 491; *Spencer* v. *Livett, Frank, & Son*, 48 W. R. 323, [1900] 1 Q. B. 498; *Stuart* v. *Nixon*, 49 W. R. 636, [1901] A. C. 79.] Secondly, the county court judge had no power to give any costs when he assessed compensation under section 1, sub-section 4, of the Act of 1897. The action under the Employers' Liability Act, 1880, was dismissed, and therefore he had no power to give the plaintiff the costs of the action: *Foster* v. *Great Western Railway Co.*, 30 W. R. 398, 8 Q. B. D. 515. Nor had he any power to give any costs in respect of the assessment of compensation under the Act of 1897. There is no power to give costs unless by virtue of some statute. The procedure under section 1, sub-section 4, is a new procedure, and that section gives no power to the judge to allow costs. Schedule II., clause 6, does not apply, because there was no arbitration. Clause 3 does not give the judge jurisdiction, because Schedule II. only applies to any matter which under the Act is to be settled by arbitration. That schedule does not apply to a county court judge sitting to hear an action under the Employers' Liability Act. By section 1, sub-section 2 (*b*), a workman must elect whether he will take proceedings under the Act or independently of the Act. He cannot take both: *Edwards* v. *Godfrey*, 47 W. R. 551, [1899] 2 Q. B. 333. Here the workman elected to proceed independently of the Act, and therefore the assessment of compensation under section 1, sub-section 4, was not in an arbitration "under the Act." It is only in mercy to him that the judge is allowed to assess compensation. In *Skeggs* v. *Keen*, 1 Minton-Senhouse W. C. C. 35, Rigby, L.J., expressed the opinion that the judge in such a case had no power to give costs. That is the true view.

W. B. Yates (*W. Lynden Bell* with him), for the plaintiff, was only called upon to argue the second point. Schedule II., clause 6, gives the arbitrator discretion over the costs of and incident to the arbitration. The assessment of compensation here under section 1, sub-section 4, was in fact an arbitration: per Lord Shand in *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, at p. 382, [1901] A. C. 49. The judge had dismissed the action, and he then became an arbitrator to assess compensation under the Act of 1897. There is nothing in section 1, sub-section 4, to cut down this power of the judge sitting as arbitrator.

B. D. Kilburn replied.

Cur. adv. vult.

Nov. 25.—STIRLING, L.J., read the following judgment, in which COLLINS, M.R., and MATHEW, L.J., concurred: This is an appeal of the Atlantic Transport Co. from an award made by the judge of the Bow County Court under section 1, sub-section 4, of the Workmen's Compensation Act, 1897, consequent on the failure of an action brought against the company in the county court under the Employers' Liability Act, 1880, and Lord Campbell's Act. This action was brought by Mary Cattermole, the widow of a workman, in respect of a fatal injury by accident caused to the workman in the course of his employment on board the company's steamship *Minnesota*. At the time of the accident this ship was lying in

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

the West India Docks alongside one of the quays, and was taking in cargo partly from the quay and partly from a schooner which lay alongside the steamer in the dock. The judge determined that the injury in respect of which the plaintiff claimed damages in the action was one for which the defendants were not liable in the action, but that the defendants would have been liable to pay compensation in respect of such injury under the Workmen's Compensation Act, 1897; and thereupon, at the request of the plaintiff, he proceeded to assess the compensation which the company would have been liable to pay under that Act. He assessed such compensation at the sum of £234, and ordered the defendants to pay the plaintiff's costs of and incident to the proceedings. Two points were raised on the appeal. First, that the workman was not employed on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897; secondly, that the judge had no power to give the plaintiff any costs of the proceedings.

As to the first point, the question is whether we ought to follow the decision of this court in *Flowers* v. *Chambers*, or that of the House of Lords in *Raine* v. *Jobson*. In *Flowers* v. *Chambers* it was held by this court that a workman employed on a ship lying in a wet dock was not employed on, in, or about a dock within the meaning of the Act. In *Raine* v. *Jobson* the House of Lords determined that a workman employed on a ship lying in a dry dock was employed on, in, or about a dock within the meaning of the same Act. Now, the Act speaks of a dock in general terms, without reference to whether it is wet or dry; *primâ facie*, therefore, the two decisions are inconsistent, and that of the House of Lords ought to be followed. This view is confirmed when the *ratio decidendi* in the two cases is examined. In *Flowers* v. *Chambers* the late Master of the Rolls said: "If the Legislature had intended that ships should be brought within the purview of the Act, it would have been perfectly simple to have put the word 'ship' in the section; they have, however, chosen words expressive of certain localities to which the application of the Act is limited, and a ship is not one of them." On the other hand, in *Raine* v. *Jobson* the Lord Chancellor says: "I am not able at present to follow the train of reasoning by which the respondents sought to suggest that because the wooden structure, which was inside the dock and to which the work was being applied, was a ship which when floated into the sea would be capable of being treated as a separate entity and would be free from the operation of the Act generally, that conveys to the dock in which the ship is placed the immunity which the ship itself would possess if sailing upon the high seas." In my opinion the decision of the learned judge on this point cannot be disturbed.

The second point raises a question which was left undecided by this court in *Skeggs* v. *Keen*—viz., whether the judge had power to give the unsuccessful plaintiff any costs upon the assessment of compensation under section 1, sub-section 4, of the Act. The effect of section 1, sub-section 2 (*b*), of the Workmen's Compensation Act, 1897, is to compel the workman to elect whether he will claim compensation under the Act or take such proceedings as were open to him before the Act. If he adopts the latter course he cannot make any claim under the Act except by virtue of section 1, sub-section 4, of the Act: see *Edwards* v. *Godfrey*. That sub-section provides that if an action is brought to recover damages independently of the Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of the Act, the action shall be dismissed; "but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act." The sub-section goes on to direct that the compensation awarded and the directions as to deduction of costs are to be embodied in a certificate which is to have the force and effect of an award under the Act, but says nothing further as to the costs; and it is contended that the power of the judge to deal with compensation is entirely derived from this section, and cannot extend beyond what is thereby expressly conferred. In *Skeggs* v. *Keen* Rigby, L.J., stated that the inclination of his opinion was to that effect, but neither he nor any of the members of the court gave a decision on the point. If this contention be well founded, the result will be that the workman not only will be liable to have all costs caused by his bringing the action instead of proceeding under the Act deducted from the compensation, but will have to bear all his own costs, although successful in recovering compensation; whereas, according to the ordinary practice as regards costs, he ought to have the costs of successful proceedings except in so far as such are increased by any part of those proceedings which fails, and ought to bear all costs occasioned by such failure. It is true that in the Workmen's Compensation Act itself (Schedule II., clause 6) express provision is made for the costs of proceedings by arbitration under the Act; but here the Legislature is dealing with proceedings in, and consequent on, an action over the costs of which the court which tries the action would have full control by the exercise of its ordinary jurisdiction. It will be observed that section 1, sub-section 4, treats such an action as one in which it may be determined both that the employer is not liable for damages, and also that he would have been liable to pay compensation under the provisions of the Act; evidence as to the liability under the Act may therefore be adduced in the action. The sub-section does not, indeed, refer to the assessment of compensation as being made in the action, but such assessment certainly arises out of and is consequent upon it; and it would be a refined distinction to hold that, while the determination of the liability to pay compensation is a proceeding in the action, the assessment of the amount is not. In my judgment the effect of the sub-section is to leave the court in which the action is tried full liberty to exercise any power of awarding costs which it may have in the action, and to confer the additional power of deducting from the compensation costs caused by the plaintiff bringing the action instead of proceeding under the Act. Such costs, it may be observed, do not necessarily include all the costs of the action. In general the court to try such actions is a county court. By section 113 of the County Courts Act, 1888, all the costs of any action or matter in a county court, not otherwise provided for by that Act, are to be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction are to abide the event. By section 186 "action . . . shall mean every proceeding in the court which may be commenced as prescribed by plaint"; and "matter shall mean every proceeding in the court which may be commenced as prescribed otherwise than by plaint"; and "prescribed shall mean prescribed by the County Court Rules for the time being." By Schedule II., clause 10, of the Workmen's Compensation Act, 1897, the duty of a county court judge under this Act is, subject to rules of court, to be part of the duties of the county court. I think that under

these enactments the county court judge has power to deal with the costs of the action including the proceedings for the assessment of compensation under section 1, sub-section 4, of the Workmen's Compensation Act, 1897. If the court in which the action is tried be the High Court (as may be the case where the action is originally brought in the High Court, or where, being originally brought in the county court, it is transferred to the High Court—see, for example section 6 of the Employers' Liability Act, 1880) the High Court has full power to deal with costs under section 5 of the Judicature Act, 1890. The learned judge has dismissed the action, but has ordered the defendants to pay all the costs of the proceedings, and has not ordered any costs to be deducted from the compensation. In general this would not be right; but such an order may be justified by special circumstances, as if, for example, the judge were satisfied that no costs had been caused by the plaintiff bringing an action instead of proceeding under the Act. This matter is one within the discretion of the judge; it has not been shown that the judge exercised his discretion on a wrong principle; and in the result the appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitor for the plaintiff, *R. H. Ward.*

Solicitors for the defendants, *Holman, Birdwood, & Co.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 7.

ELLIS *v.* WILLIAM CORY & SON (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation — "Wharf"—Factory and Workshop Act, 1895 (58 *&* 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7.

A workman was injured by an accident while employed in the hold of a ship, which was lying alongside a floating structure in the Thames, assisting in the unloading of the ship. The structure was moored in the river by chains fastened to piles driven into the bed of the river, and was used as a place where cargoes were loaded and discharged. There was no connection or communication with the shore except by means of boats.

Held, that the structure was a wharf within the meaning of section 23 *of the Factory and Workshop Act,* 1895, *and was therefore a "factory" within section* 7 *of the Workmen's Compensation Act,* 1897.

Appeal from an award of the judge of the Woolwich County Court under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman who at the time of the accident was employed in the hold of the steamship *Harberton*, which was lying alongside a structure in the Thames called Atlas No. 3.

The sole question was whether the structure was a "wharf" within the meaning of section 23 of the Factory and Workshop Act, 1895, and therefore a "factory" within section 7 of the Workmen's Compensation Act, 1897.

The structure was moored in the Thames off Charlton, 500 feet from the south shore and 350 yards from the north shore. It was moored by chains fastened to piles driven into the bed of the river. It was 500 feet long, forty-five feet wide, and had a draught of six feet six inches, and was six feet above water level. It had nine hydraulic cranes with grabs attached. The grabs descended into the hold of the coal steamer, and took automatically a ton and a half of coal. The hydraulic crane lifted it up and turned it round into a hopper where it was automatically weighed, and then passed it through a shoot into a barge lying on the other side of the structure. There was a blacksmith's shop, a carpenter's shop, and a plant for generating electricity on the structure, and a coffee shop for the men. There was no connection or communication with the shore except by boats. It was so moored and stationed under the licence of Thames Conservancy.

At the time of the accident the ship was lying on the stream or river side of the structure. The applicant's duty was so to place the coal that the grab might the better get hold of it. While he was stooping, the grab came down and struck him on the head and injured him.

The county court judge held that the structure was not a "wharf," and made an award in favour of the employers.

The applicant appealed.

Ruegg, K.C., and *W. M. Thompson*, for the applicant.—This structure is clearly a wharf within the meaning of section 23 of the Factory and Workshop Act, 1895, and is therefore a "factory" within section 7 of the Workmen's Compensation Act, 1897. It fulfils all the functions of a wharf, the only thing being that it is not connected with the land. That, however, is not material.

They referred to *Haddock* v. *Humphrey*, 48 W. R. 292, [1900] 1 Q. B. 609.

J. E. Bankes, K.C., and *H. Nield*, for the employers.—A wharf must be a place physically connected with the land, and at the same time contiguous to the water. That is the ordinary and natural meaning of the word. They referred to the following dictionaries: The Century, Webster's, Chamber's, Hunter's, and Ogilvie's Imperial.

COLLINS, M.R.—The only question in this case is whether this structure is a "wharf" within the meaning of the Act. It certainly fulfils most of the primary functions of a wharf. It is used as a place for taking cargo out of ships and depositing it somewhere else. It is attached to the bed of the river, though at a distance of 500 feet from one shore and 350 yards from the other. Admittedly it is a structure of such a nature that, if it were capable of being reached from the shore by a gangway or other contrivance, it would be a wharf. It is said, however, that it is so far out in the river that it does not come within the ordinary meaning of the word wharf. It may be that a structure of this kind so placed was unknown at the time when the Factory and Workshop Acts were passed. The courts, however, must recognize the progressive developments of later times. This structure answers the purposes of a wharf; it is used as a wharf, the work done on it being the same as that done on an ordinary wharf; and it is found to be so convenient as a wharf that it has been substituted for the ordinary kind of wharf on the land. The truth is that the wharf has now been brought to the ship instead of bringing the ship in to the land to the wharf. In my opinion, it must be regarded as a wharf within the meaning of section 23 of the Factory and Workshop Act, 1895. It therefore comes within the definition of "factory" in section 7 of the Workmen's Compensation Act, 1897. The county court judge's view was that this was not a wharf in the ordinary sense of the term, but I think

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that we should be unduly narrowing the meaning of the word as used in the Act if we were to hold that this structure was not a "wharf." The appeal, therefore, must be allowed.

STIRLING and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors for the applicant, *Buchanan & Hurd.*

Solicitors for the employers, *Deacon, Gibson, Medcalf, & Marriott.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Aug. 1, 2, 10, 1901.

DIXON v. STEEL. (a.)

Principal and surety—Mortgage—Collateral security.

A surety has rights with regard to collateral security, even before he pays or is called upon to pay the debt.

Summons.

This was a summons by a married woman seeking to redeem leasehold property which she had mortgaged to secure a debt of her husband, which was also secured by mortgage on a leasehold house of the husband.

By a mortgage dated the 12th of January, 1894, John Dixon mortgaged certain property (a) to Thomas Steel to secure £225 and interest.

By a mortgage dated the 20th of March, 1896, Mrs. Dixon mortgaged certain other property (b) to Thomas Steel to secure £275 and interest.

By a mortgage dated the 5th of August, 1896, and made between John Dixon, Mrs. Dixon, and Thomas Steel, in consideration of £500 advanced by Thomas Steel to John Dixon, John Dixon and his wife jointly and severally covenanted to pay the £500 with interest and John Dixon as to property (a) and Mrs. Dixon as to property (b) charged the properties with the £500 and interest, and Mrs. Dixon mortgaged certain other properties (c) to Thomas Steel to secure the £500 and also the two sums of £225 and £275 secured by the prior mortgages.

The £500 advanced on this security had been paid off, but the deed was used again as security for a sum of £500 advanced by Thomas Steel on the 20th of April, 1898; it had never ceased to be a further security for the £225 and £275.

On the 13th of June, 1899, Messrs. Steel, Maitland, & Steel, who were judgment creditors of John Dixon, obtained equitable execution against him. Before this date they had been informed that Mrs Dixon was a surety for her husband.

On the 14th of August, 1899, Thomas Steel transferred all his mortgages to Messrs. Steel, Maitland, & Steel.

By an order made by North, J., on the 2nd of December, 1899, on the application of Messrs. Steel, Maitland, & Steel, certain inquiries were directed to ascertain what was due under the judgment, what interests in land of the said John Dixon had been delivered in execution, and what liens, charges, and incumbrances there were.

The master made his certificate dated the 3rd of April, 1900, and found that the property delivered in execution was an equity of redemption in property (a), and that the incumbrances were the mortgages of the 12th of January, 1894, and the 5th of August, 1896, but that Mrs. Dixon claimed to be party to the mortgage of the 5th of August, 1896, as surety for John Dixon.

Pursuant to subsequent orders the property was sold for £375 to one Thomas Stockdale, who was authorized to pay to Messrs. Steel, Maitland, & Steel, as transferees of the first mortgage, the amount due on that mortgage. Messrs. Steel, Maitland, & Steel had since received the balance of the purchase-money, £130 4s. 1d., and claimed to apply it towards satisfaction of their judgment debt.

This action was commenced by Mrs. Dixon as plaintiff against Messrs. Steel, Maitland, & Steel and John Dixon as defendants, to redeem property (c), and the only question was whether Messrs. Steel, Maitland, & Steel were justified in applying that sum towards satisfaction of their judgment debt or whether it ought not to go in relief of Mrs. Dixon's mortgage.

Micklem, K.C., and *Douglas*, for the plaintiff.—The plaintiff was merely a surety, and is entitled to redeem, and the benefits of collateral security will be given to the creditor, who cannot tack a subsequent incumbrance to his mortgage debt to the detriment of the surety: *Pearl v. Deacon*, 5 W. R. 793, 1 De G & J. 461; *Forbes v. Jackson*, 30 W. R. 652, 19 Ch. D. 615; *Arden v. Arden*, 33 W. R. 593, 29 Ch D. 702; and *Rouse v. Bradford Banking Co.*, 43 W. R 78, [1894] A. C. 586. Whether the creditor had notice that the plaintiff was only a surety is immaterial: *Overend Gurney, & Co. v. Oriental Financial Corporation*, 20 W. R. 253, 7 Ch. App. 142, L. R. 7 H. L 348.

E. W. Martelli, for the defendants.—(1) Mrs. Dixon was not, in fact, a surety; (2) if she were a surety, a surety is entitled to the security held by the principal creditor, but only if and when he pays the debt: *South v. Bloxam*, 2 Hem. & M. 457, at p. 463; *In re Toogood's Legacy Trusts*, 61 L. T. Rep. 19, 38 W. R. Dig. 133; *Ferguson v. Gibson*, L. R. 14 Eq. 379, 21 W. R. Dig. 6; and *Hudson v. Carmichael*, 2 W. R. 503, Kay 613, at p. 620.

Micklem, K.C., in reply.

COZENS-HARDY, J., after stating the above facts, read the following judgment: The sum of £130 4s. 1d. represents the equity of redemption in (a). That equity of redemption was charged together with (c) with the £500. As between (a) and (c) (a) was primarily liable. This primary liability cannot be affected by the subsequent incumbrances created by the delivery of (a) in execution. The money must be applied in partial satisfaction of the £500 secured on (c) the surety's property.

The case thus put does not seem to present much difficulty. But it was urged by Mr. Martelli in his very able argument that as the surety has paid nothing her right has not arisen, and he relied upon some observations by Wood, V.C., in *South v. Bloxam*, in support of his contention. It is necessary to consider what was decided in that case.

Arnold mortgaged (a) and (b) to Marcon for £2,800, his mother Susannah Arnold joining as surety in the covenant for payment. After the surety's death Arnold gave a further charge to Marcon on (a) and (b) for £600. Subsequently Arnold mortgaged (a) to the plaintiffs to secure £2,000.

In March, 1853, Marcon commenced an action against the defendant Bloxam, the surety's executor, upon his covenant in the mortgage deed. Before the defendant pleaded, Marcon had sold (a) for a sum less than was due on the first mortgage. He sought to pay off his further charge of £600 out of this sum. The defendant succeeded as to the £600 but failed on other points. The court ordered the defendant to pay the balance of the debt and interest and costs, and

(a.) Reported by W. MORRIS CARTER, Esq., Barrister-at-Law.

thereupon Marcon was to assign (*b*) to the defendant, and this was done: see *Marcon* v. *Bloxam*, 11 Ex. 586. The defendant's own costs of action were £658. In 1859 the defendant received £2,800 in respect of (*b*), being the amount of two policies on the mortgagor Arnold's life. The plaintiffs in 1863 filed a bill claiming to have the balance of the policy-moneys after payment of the first mortgage marshalled, so as to make good *pro tanto* what had been taken from (*a*) towards payment of the first mortgage. Wood, V.C., held the plaintiffs entitled. His judgment so far as material was as follows: [Here his lordship read the judgment of Wood, V.C., practically *in extenso*.] This only decided that the surety was not entitled to tack to his security as against a second mortgagee costs incurred in resisting the creditor's claim, except so far as they were properly incurred for the benefit of the estate. It does not seem to me to have any bearing on the present case. The observations of Wood, V.C., must be read with reference to the particular point with which he was dealing. It certainly is not the law that a surety has no rights until he pays the debt due from his principal.

I must therefore declare that the £130 4s. 1d. is to be taken in reduction of the £500 mortgage debt.

I understand that the figures are agreed except as to this sum, and that a proper tender was made by the plaintiff.

The defendants other than John Dixon must pay the costs of the action.

Solicitors, *Douglas, Ward, Bowie, & Co.*, for *C. T. Stockdale*, Sunderland; *Maples, Teesdale, & Co*, for *Steel, Maitland, & Steel*, Sunderland.

Chan. Div.
Farwell, J. } Oct. 30.

In re SHUCKBURGH.
ROBERTSON *v.* SHUCKBURGH. (*a*.)

Will—Appointment—Marriage settlement—Limitation over on remarriage of wife—Power of appointment in husband—Appointment referring only to death of wife—Accumulated income.

Where a fund was settled on marriage to pay the income to wife for life reducible to one-half on remarriage, and subject thereto to children on attaining twenty-one as husband should appoint, the husband by his will purported to exercise the power of appointment, but referred only to the death of his wife. The widow having remarried, the elder son, on attaining twenty-one, claimed the distribution of the moiety in the proportion appointed.

Held that, on the principle referred to by Wood, V.C., *in* Maddison *v.* Chapman, 4 *K. & J.* 709, *at p.* 719, 7 *W. R. Ch. Dig.* 102, *the words which in form imported contingency were to be read as equivalent to "subject to the interests previously limited," and that the elder son was entitled to the appointed share of the moiety and of accumulated income.*

Adjourned summons.

Under the settlement dated the 21st of June, 1879, made on the marriage of the late Sir George Shuckburgh, a sum of £20,000 Three per cent. Bank Annuities was brought into settlement by him, the trusts being to pay the income to the husband for life, and after his decease, if his wife should survive him, to her during her life unless and in such case until she should re-marry, and if she should re-marry then to pay the income of one moiety to her during her life for her separate use, and upon further trust from and after the failure or determination of and in the meantime subject to the trusts aforesaid to stand possessed of the capital trust premises in trust for the child or children of the marriage as he (Sir George Shuckburgh) should by any deed appoint, and in default of appointment to the children who should attain twenty-one years in equal shares; and in the event of the minority of a child the trustees were authorized to apply the whole or a part of the income of the fund to which such child was contingently entitled towards his or her maintenance and education, and any surplus income was to be invested as therein mentioned.

The husband died in 1884, leaving two children only—viz., the defendants Sir Stewkley Shuckburgh and Gerald Shuckburgh, the latter being now still an infant.

By his will dated the 5th of June, 1882, the husband purported to exercise the said power of appointment in the following words: "In pursuance of the power given to me by the said settlement I do hereby appoint that after the death of my said wife the said sum of £20,000 or the investments for the time being representing the same shall as to £12,000 thereof be held upon trust for my son Stewkley and as to the sum of £8,000 thereof upon trust for my son Gerald."

Lady Shuckburgh remarried in 1886, whereupon her interest in one moiety of the funds ceased.

The trustees had since accumulated the income of this moiety, and it was now represented by a sum of £3,696 India Stock.

The elder son having attained twenty-one years, and the trustees desiring to distribute the sons' moiety of the capital, the questions arose whether the appointment affected the fund of accumulated income and whether the fund appointed to Sir Stewkley must (under a clause in the settlement) be brought into hotchpot, so as to make the shares of the appointees equal.

Wurtzburg, for the trustees.

T. Methold, for the defendant Sir Stewkley Shuckburgh.—Where there is a set of limitations with a gift over referring to one contingency only, and that fails, the gift over takes effect as if on the failure of all the prior limitations: *Jones* v. *Westcomb*, 1 Eq. Cas. Abr. 245, pl. 10; *Stanford* v. *Stanford*, 35 W. R. 191, 34 Ch. D. 362; *In re Jobson*, *Jobson* v. *Richardson*, 44 Ch. D. 157, 38 W. R. Dig. 220; *In re Akeroyd*, *Roberts* v. *Akeroyd*, [1893] 3 Ch. 363. The elder son is now entitled, on a distribution of the £10,000, to have a share of three-fifths of the capital and of the accumulated income.

Sargant, for the defendant Gerald Stewkley.—Here the limitations are only determined as to one-half of the trust fund, and there is no ground for presupposing that the testator meant to negative what all the deeds express. The court is not at liberty to guess at what the testator intended.

In re Tredwell, [1891] 2 Ch. 640, 40 W. R. Dig. 280, referred to.

FARWELL, J.—The court in construing wills of this kind has to avoid the Scylla of saying on the one hand what the testator must have meant and the Charybdis of adhering too closely to the letter on the other hand. On the whole, I have come to the conclusion that this is an appointment of the whole fund subject to the life interest of the wife or such part as existed. Assuming (but without deciding it) that Mr. Sargant is right in saying that there is no such presumption against intestacy in the case of a power as in the case of a will disposing of property, I do find on the will an absolute in-

(*a*.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

tention to appoint the whole of the trust property. It is quite true that the testator recites the power to appoint after the death of his wife. This is accurate in the sense that he had that much, but he had more. But what is important is not the point of time but the existence of the interest. The wife had a life interest reducible to one moiety on re-marriage. Obviously the testator refers to the death of the wife, and thus shows that he does not intend to displace her interest. I think that this is a fair way of applying principles familiar to the court. The general principle is well expressed by Wood, V.C., in *Maddison* v. *Chapman*, 4 K. & J. 709, where at p. 719, speaking of cases where there is a limitation over which, though expressed in the form of a contingent limitation, is, in fact, dependent upon a condition essential to the determination of the interests previously limited, he says: "I apprehend the true way of testing limitations of that nature is this: Can the words which in form import contingency be read as equivalent to 'subject to the interests previously limited.' Take the simplest case: A limitation to A. for life, remainder to B. for life, and, upon the decease of B., 'if A. be dead,' then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, subject to A.'s life interest (if any), to C. in fee." I apply this to the present case *mutatis mutandis*. I think that the point of time is not the material matter, but the reference to the prior interest. In the present will I think that the true meaning of the words "after the death of my said wife" is "subject to the wife's interest," and that I am here justified in acting on what I have no doubt the testator really meant. The eldest son is entitled to three-fifths of the moiety and of the accumulations.

Solicitors, *Kays & Jones*, for all parties.

Chan. Div. } Oct. 25; Nov. 28.
Buckley, J. }

In re TIMMINS & SONS (LIMITED). (*a*.)

Company—Shares subscribed for in memorandum of association—Shares allotted as fully paid up under contract of sale—Application to register memorandum of contract—Liability of subscriber to memorandum of association—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

Shares subscribed for in a memorandum of association of a limited company formed in 1893 *cannot subsequently be contracted to be paid for in some way other than in cash, or be superseded and replaced by others issued under a contract subsequently executed and registered, even if the shares so subscribed for were intended to be paid for in this way, and those subsequently issued were intended to be the ones subscribed for. And where the shares in question do not exhaust the whole of the shares of the company, an application under section* 1 *of the Companies Act*, 1898, *to file a memorandum stating that the shares were issued as part of the consideration of the contract will be refused.*

In re Jarvis & Co., 47 *W. R.* 186, [1899] 1 *Ch.* 193, *and* In re Archibald D. Dawnay (Limited), 48 *W. R.* 600, [1900] *W. N.* 152, *followed.*

In re Whitehead & Brothers (Limited), 48 *W. R.* 58, [1900] 1 *Ch.* 804, *distinguished.*

Motion.

This was a motion by certain shareholders in the above company for an order enabling the applicants to file a memorandum under section 1 of the Companies Act, 1898, protecting certain shares as fully paid.

One Ebenezer Timmins, being entitled to a certain business, made his will on the 19th of April, 1888, and thereby devised and bequeathed the business premises and business to two of his sons, upon trust that they should transfer the property to a joint stock company to be formed of the testator's seven children, and the testator provided that there should be allotted to each of his children a certain specified number of shares amounting in the aggregate to 515, and that there should be allotted to the trustees of his will 235 further shares, upon trust for his wife for life, and after her death upon trust in specified numbers for his said seven children, and he provided that all the above shares should be fully-paid shares.

His wife predeceased him.

At his death, therefore, under the provisions of his will, each child was under the above scheme entitled absolutely to a certain specified number of shares, making 750 in all.

After his death the company was formed, and on the 3rd of March, 1893, was incorporated. Each of the seven children signed the memorandum of association for exactly the number of shares to which, as above, he or she was entitled, making the aggregate of 750 shares. The total capital consisted of 1,000 shares. Further shares to the number of 118 had been issued and paid for in cash, making 868 in all, leaving a balance of 132 shares.

On the 4th of March, 1893, an agreement was executed to which the seven children and the company were parties. It was an agreement for the sale of the property to the company. That agreement recited the will and provided for the allotment of the above-mentioned numbers of shares to the seven children respectively (making 750 shares in all), and that they should be fully-paid shares, and that they should be allotted in execution of the trusts of the will.

On the same 4th of March, 1893, as appeared by the minute-book, the company's seal was affixed to the agreement of that date.

On the 22nd of March that agreement was duly filed under the Companies Acts.

On the 15th of April it was resolved that shares be allotted to the seven children to the above numbers, and that share certificates be sealed and signed and issued to them; and that was done.

The object of the present application was to file a memorandum stating that 750 fully-paid shares were issued to the signatories to the memorandum in part satisfaction of the consideration for the assignment of the business mentioned in the agreement of the 4th of March, 1893.

Stewart Smith, for the applicants, in addition to the cases mentioned in the judgment, referred to in *In re Brutton & Burney* (*Limited*), 49 W. R. 360, [1901] 1 Ch. 637.

Nov. 28.—BUCKLEY, J.—To the extent to which the company had on the 15th of April, 1893, shares available for allotment, the allotment as fully paid-up shares pursuant to the agreement was properly protected by a registered contract. Upon the facts I am satisfied that the shares referred to in the agreement and allotted on the 15th of April are identified

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

with, in the sense that they were meant to be the same as, those for which the memorandum of association was subscribed. But this does not, in my judgment, enable me to make the order which is asked. To say that the parties intended that they should be the same shares is one thing, and to say that they legally contracted that they should be the same is another. They could not so contract. When the memorandum of association was signed, and the company was registered, there was at once a contract to take and pay. The sale agreement was not yet in existence, and there could not legally be a contract to satisfy the one contract arising upon registration of the company, by rights to arise under another contract intended to be entered into with the company after it was registered. Since the decision of the Court of Appeal in *Dalton Time Lock Co.* v. *Dalton*, 66 L. T. Rep. 704, 40 W. R. Dig. 40, it must be taken as settled that the shares for which the children subscribed the memorandum of association were, for all purposes material to the present application, issued on the day on which that memorandum was registered, and that the subscribers then came under liability to pay for those shares in cash. It was not in 1893 competent to them subsequently to contract that these shares should be paid for in some other way, or should be superseded and replaced by other shares to be issued under an agreement subsequently executed and registered. It is, in my judgment, made out by this memorandum of association, and article 3 of the articles, and the draft agreement thereby identified, that the parties did intend that the shares for which they subscribed the memorandum should be paid for in manner provided by the agreement; but inasmuch as they could not, as the law then stood, enter into such a contract, the matter is not thereby advanced. The case, in my opinion, is governed by the decision of Romer, J., in *In re Jarvis & Co.*, 47 W. R. 186, [1899] 1 Ch. 193, which was followed in *In re Archibald D. Dawnay (Limited)*, 48 W. R. 600 [1900] W. N. 152. As regards the decision of Cozens-Hardy, J., in *In re Whitehead & Brothers (Limited)*, 48 W. R. 585, [1900] 1 Ch. 804, I need only say that in my judgment that decision does not govern the present case. For here the total number of shares is not (as it was there) exhausted by the 750 shares in question and the 118 shares otherwise issued. To the extent of the balance of 132 shares at least there remained and remain in the present case shares capable of being allotted under the memorandum of association. This application cannot be used for the purpose of evoking a decision as to what, if any, liability there is in respect of the subscription of the memorandum of association. I refuse the motion, and I do so with the less reluctance by reason of the fact that section 33 of the Companies Act, 1900, has now repealed section 25 of the Companies Act, 1867, and has provided that no proceedings under section 25 shall be commenced after the commencement of that Act. This section might become of importance in case it were sought to enforce liability under the subscription of the memorandum of association.

Motion refused.

Solicitors, *W. W. Wynne & Sons*, for *Joseph Burton*, Runcorn.

K. B. Div. (Ridley and Phillimore, JJ.) May 22, 1901.

In re AN ARBITRATION BETWEEN THE BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1890) (LIMITED) AND THE PONTYPRIDD WATERWORKS CO. (*a*.)

Lands Clauses Acts—Compulsory taking of land—Coal mine—Notice to treat—Subsequent rise in price of coal—Compensation—Arbitration—Basis of assessment.

Where a notice to treat for the compulsory taking of a certain part of a coal mine has been given, and arbitration subsequently takes place under the Lands Clauses Acts to determine the compensation to be paid to the owner of the mine in respect of the seams of coal in that part of the said mine, the arbitrator is entitled to take into consideration, in assessing the compensation, a rise in the value of the coal which has taken place subsequently to the date of the notice to treat.

Award stated in the form of a special case by an umpire.

By an instrument in writing under the hand of the secretary of the Bwllfa and Merthyr Dare Steam Collieries (1891) (Limited), dated the 2nd of September, 1898, and addressed to the Pontypridd Waterworks Co., the coal company, after reciting that they were the lessees of certain mines, veins, beds, and seams of coal lying under certain farms and under a portion of a certain reservoir which is situate partly in the parish of Aberdare and partly in the parish of Ystradyfodwg, in the county of Glamorgan, authorized to be made under the Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), and also within the distance of forty yards from the reservoir on the eastern side, and were desirous of and intended working such of the same mines, veins, beds, and seams of coal under the reservoir and area within the distance of forty yards from the reservoir as was commonly known by the name of the Six Feet Vein or seam of coal, in pursuance of such intention gave notice that they would, after the expiration of thirty days from the notice, begin to work such seam of coal unless in the meantime the waterworks company should signify their willingness to make compensation therefor.

By an instrument in writing dated the 15th of October, 1898, and addressed by the waterworks company to the coal company, the waterworks company, in pursuance of the provisions of the Pontypridd Waterworks Act, 1892, and of the Lands Clauses Acts and the Acts respectively incorporated therewith, gave notice to the coal company that they were willing to make compensation to the coal company for their estate or interest in that part of the mines, veins, beds, and seams of coal as they required, the coal company to leave unworked in the 6 ft. vein or seam of coal so situate under portion of the reservoir, and more particularly delineated on a plan attached thereto, and the waterworks company thereby demanded from the coal company the particulars of their estate and interest in the mines and minerals so required, and of the claims made by them in respect thereof, and further gave notice that if for twenty-one days after the service of that notice they failed to state the particulars of their claim or to treat with the waterworks company in respect of the seam of coal the amount of compensation payable to them would by virtue of section 22 of the Lands Clauses Consolidation Act, 1845, be settled in the manner that Act provided for settling cases of disputed compensation.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

On the 2nd of March, 1899, the coal company sent to the waterworks company the said particulars, and gave them notice that, unless they were willing to agree to pay to the coal company the sum of £6,084, the coal company desired to have the amount of purchase-money or compensation to be paid by them for the coal company's interest in that part of the mines, veins, beds, and seams of coal so required to be left unworked, and the amount of compensation for damage to be sustained by the coal company in the working of the adjoining mines, veins, beds, and seams of coal by reason of such part of the beds and seams of coal being left so unworked, settled by arbitration in the manner prescribed by the Lands Clauses Consolidation Act, 1845.

The waterworks company refused to pay the coal company this sum of £6,084.

Two arbitrators and an umpire were appointed for the two companies, and the time for making the award was ultimately extended until the 15th of April, 1901. The arbitrators and the umpire then sat on several days, after which it was agreed between the parties, with the consent of the arbitrators, that the latter should retire, and that the umpire should sit during the remainder of the reference and give his award alone, which he accordingly did.

Coal rose in value subsequently to the date of the notice of the 15th of October, 1898.

During the reference the coal company claimed that in consequence of such rise the compensation to be paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the part of the mines, veins, beds, and seams of coal which was possessed at the date of the notice of the 15th of October, 1898 (which basis is hereinafter called "the first alternative"), but on the basis of the knowledge of such value which was subsequently acquired (which lastly-mentioned basis is hereinafter called "the second alternative").

During the reference the coal company claimed according to the second alternative, that they were entitled to receive from the waterworks company by way of compensation the sum of £9,961 0s. 10d., and in this claim were specifically included sums claimed for (*a*) wastage, (*b*) loss by working two acres to the dip, and (*c*) a sum of 10 per cent. to be paid for compulsory purchase.

At the request and with the consent of the parties it was arranged that the umpire should state in the form of a special case for the opinion of the court the question whether the coal company were entitled to have compensation assessed according to the first alternative or according to the second alternative, and that he should determine what sums the coal company were respectively entitled to receive from the waterworks company by way of compensation according to the first alternative and the second alternative respectively.

In determining the sums hereinafter mentioned the umpire made allowances for wastage, and also for loss by working to the dip, but he did not allow any sum for compulsory purchase, and he accordingly stated this special case, and made this his award.

The question for the opinion of the court was whether the coal company was entitled to have the compensation assessed according to the first alternative, or according to the second alternative.

If the coal company were entitled to have the compensation assessed according to the first alternative, then the umpire awarded and determined that they were entitled to receive from the waterworks company the sum of £2,950.

If the coal company were entitled to have the compensation assessed according to the second alternative, then he awarded and determined that they were entitled to receive from the waterworks company the sum of £5,650.

Abel Thomas, K.C. (*W. D. Benson* with him), for the coal company.—The second alternative stated by the umpire is the basis on which compensation should be made. The coal company is entitled to the value of the coal on the rise of the price thereof, and the umpire should take into consideration such probable rise. In *Brown* v. *Commissioner for Railways*, 15 App. Cas. 240, it was laid down that it does not follow that because a seam of coal is not presently workable at a profit that no compensation is to be given for it if it is likely to prove profitable in the future. The notice to treat by itself does not constitute a contract by the landowner; the contract is not completed until after the award is made: *Haynes* v. *Haynes*, 9 W. R. 497, 30 L. J. Ch. 578. A notice to treat creates the relation between the parties of vendor and purchaser, but until the price is ascertained the land remains the property of the vendor: see *Tiverton and North Devon Railway Co.* v. *Loosemore*, 32 W. R. 929, 9 App. Cas. 480, at p. 493. The umpire has to arrive at the true value of the coal at the date of the notice to treat, and in doing so he is bound to take into account the knowledge obtained subsequently to such date of the rise in the price of coal—this being a very important element in enabling him to fix the value as on the date of the notice. The award ought therefore to be entered for the larger sum of £5,650.

B. F. Williams, K.C. (*Trevor Lewis*, with him) for the waterworks company.—The first alternative is the correct one on which the compensation ought to be assessed. The whole question is what was the market price of the coal at the time the notice to treat was given. On that notice being given a contract arose between the parties and the relation of vendor and purchaser was created between them, and the property was transferred. In *Penny* v. *Penny*, 16 W. R. 671, L. R. 5 Eq. 227, Wood, V.C., at p. 236, in speaking of the Lands Clauses Consolidation Act, says: "The scheme of the Act I take to be this: that every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given." Therefore the time at which the notice to treat is given is the time at which the value is to be ascertained, and the umpire is restricted to the knowledge of the value of the coal at that time, and must not take into consideration any evidence of any knowledge of the rise in value of the coal that is obtained subsequent to that time: *Rhys* v. *Dare Valley Railway Co.*, 23 W. R. 23, L. R. 19 Eq. 93. The umpire's award, ought, therefore, to be for the smaller sum. [PHILLIMORE, J., referred to *Great Northern Railway Co.* v. *Commissioners of Inland Revenue*, 49 W. R. 261, [1901] 1 Q. B. 416.]

Abel Thomas, K.C., was not called on to reply.

RIDLEY, J.—I do not wish to say more in this case than is necessary to decide the question which of these alternatives stated by the umpire for our opinion is the right one. The first alternative is that the umpire is to assess the compensation to be paid to the coal company by the waterworks company, without reference to what has taken place since the date of the notice to treat, and that he is to deal with the matter as though he possessed no more knowledge than a vendor or a purchaser of the right to work this coal would have had on that date, and not on the basis of the knowledge of such value which was subsequently acquired.

The second alternative is that the arbitrator is to assess the compensation on the basis of the knowledge of the value which was subsequently acquired—that

is to say, that he is to take into account what he has learnt since and what can be proved since that date, in order to ascertain the proper price to be given for the right to work that coal. Counsel for the waterworks company has argued that the price or the value is to be ascertained and taken at the date of the notice to treat—namely, on the 15th of October, 1898. I think that is the proper way to put it. That is the date on which the price or value is to be ascertained, and that value so fixed is what has to be given. But when we come to that position we do not at all get as far as the first alternative would require us to go. That alternative says that the arbitrator is not only to fix that as the price, but that he is to shut his eyes and to know nothing about the facts which bear upon that price, or which would have borne upon that price at that date had they been known to those who were treating for the purchase. That is a position I cannot agree with; and I think the first alternative is wrong for that reason. It seems to be based on the argument that because the price is to be ascertained as of the 15th of October, 1898, therefore at the date when the arbitrator fixes it he is to know nothing which persons would not have known who were purchasing at that date. I do not think that is the right view. I think that although that is the date at which the price is to be ascertained, the arbitrator may, and ought to, ascertain it with all the proper evidence bearing upon the subject which is put before him. He ought in such a position to say that the price to be ascertained is to be fixed as of the 15th of October, 1898, but since that date many things have happened governing the price of coal, and therefore the value of the working of these five acres, which would have influenced any person dealing for the purchase thereof if they had known them. It seems to me that the arbitrator ought to take that into account. He wants to get at what was the accurate value as near as he can, not at what would be the comparative guesswork value arrived at by persons who could not know that which the arbitrator now does know—namely, the rise and fall in the price of coal which have occurred since the notice to treat. The present case is rather a singular instance, where the rise of prices has largely fluctuated during the particular period in which the right to work the coal has to be valued, and therefore the point has more significance and attracts more notice. I believe it is in accordance with the practice of arbitrations conducted on this subject—namely, the ascertainment of the value of premises or land to be taken by railway or other companies, to give evidence of that which has taken place since the date of the notice to treat, so long as it has any bearing upon the actual value of the property at that date. It is for the arbitrator to get at the fair price, and I do not mean to say, and I wish to be understood as not saying that the arbitrator is to assume absolutely that all this coal would have been worked out at the high prices. What he is to assume is that there was such a high price (bearing, of course, upon the value of the working of that coal), and that there would have been a fall thereafter. It is with that knowledge that he ought to assess what was the price or value of the coal upon the 15th of October, 1898, the date of the notice to treat. I do not think the second alternative means more than I have endeavoured to express. It says: "On the basis of the knowledge of such value which was subsequently acquired." He is to assess upon the basis of that knowledge, not only upon the high prices which have accrued since, but upon the basis of the whole of the knowledge which he has, both of the rise and fall in prices, and using the sense and the judgment which an arbitrator is required to use in considering that those prices would not last for ever. If the second alternative means no more than that, I am of opinion that the arbitrator would correctly arrive at the value of £5,650. Therefore I think we ought to answer the question by saying that the second alternative is the correct one.

PHILLIMORE, J.—I am of the same opinion, and I so entirely agree with the judgment delivered that I have little to add. I agree with the view of my learned brother, and the contention of counsel for the respondents, that the price or value to be ascertained is the price or value at the date of the notice to treat. That being the case, I think the arbitrator has put the right question before us. The question is merely this: In ascertaining that value is the arbitrator to discard all subsequent evidence, and put himself in the position of a man scientifically inferring from the past to the future at the beginning of the term; or, is he entitled to take into consideration the actual historical facts which have happened during a portion of the term, both as facts established for the past, and as facts from which, as well as from other sources, further inference can be made for the future? Arbitrations follow too soon upon notices to treat, and the prices generally do not vary so rapidly as to make it often of importance to consider this question, and it may be we are giving the first decision upon the subject. But I think the principle is quite easy to ascertain. If there were a market value it would be otherwise, as in that case there would be no necessity to do anything else than ascertain the value of the market; but *ex hypothesi* there cannot be a market value of things to be taken compulsorily, because, if there were, you would not take them compulsorily but you would get them in the market. There is never any market value of any specific piece of real property. There is a market, and you may occasionally get near to ascertaining the value, but there never can be any market value. It is not the intrinsic value of the number of acres of land which is considered, but it is the value of the acres of land there situate, and that has its own special and particular value. Once establish that there is no market value, then you have to get at the real value of the property as best you can. It may be that it cannot be less than what a purchaser would give, but it certainly may be more. It does not follow that, because there is no particular demand for a particular piece of land, the owner is to sell it for a small sum. He is entitled to make the best profit he can out of it. Therefore, it seems to me that an arbitrator, when he comes to fix the value as of the date of the notice to treat, must take into consideration evidence which shows what has been the profit made out of the property since the notice to treat has been given. If that be true—and I propose to hold that it is true—with regard to all purchases of land under the Lands Clauses Acts and similar Acts, it is *à fortiori* true in this case. This is not a case of the purchase of land, as the Court of Appeal have thoroughly established in the case of *Great Northern Railway Co.* v. *Commissioners of Inland Revenue*. The waterworks company have not bought the coalfield; they have not even bought the coal. They have only bought a right to prohibit the coal owners from raising this coal. Consequently, the true inquiry here is, not what the value of the coalfield is, or what the value of the coal is, but what the colliery company, if they had not been prohibited from taking the coal, would have made out of the coal during the time it would have taken them to have got it. Assuming that it would have taken four years as one

side contended, or five years as the waterworks company contended, the real loss to the colliery company is what they would have made by getting out that amount of coal which they would naturally have got out in the first year, with interest from that date onwards to the time of the award; what they would have made out of the coal in the second year, and so forth. If you start that estimate before the working of the coal has begun, it must be purely inference. If you start it after the working has begun inference is no longer wanted. You do not want to infer what would have been got in the first year, as you know it, nor the profit, as you know it. The same applies as to the second year, and partially as to the third year. With regard to the remainder of the third year and the fourth and fifth years, it must be estimated; but, instead of being an estimate made five years off with a great deal of uncertainty, it is an estimate made at the outside two and a-half years off, with other elements for the purposes of the calculation. It seems to me to be wrong to say that the arbitrator ought to exclude that. On the contrary he is bound to include all those elements in his calculation. In other words, he is right to proceed, as he expresses it, upon the knowledge of such value which has been subsequently acquired. Therefore I think we ought to say that the second alternative is right, and that there should be judgment accordingly with costs.

Judgment for the claimants that the award should be entered on the second alternative for £5,650, with costs.

Solicitors for the claimants, the colliery company, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Solicitors for the respondents, the waterworks company, *Wrentmore & Son*, for *Frank James & Sons*, Cardiff.

Prob. Div. & Adm. Div. Divorce. } Nov. 11, 18.

BLOOD v. BLOOD. (a.)

Divorce—Variation of settlements—Section 5 of Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61).

The court has power under section 5 of the Matrimonial Causes Act to make orders dealing with the property settled for the benefit of the petitioner, even though it may affect the property which, under the settlement, has vested in the children of the marriage.

Motion for variation of settlements under section 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61).

Constance Blood had petitioned for, and obtained, a decree of dissolution of her marriage with Neptune William Blood on the ground of his desertion and adultery.

Priestley and *F. Russell*, for the petitioner, moved the court to extinguish the respondent's interest in the wife's trust fund under the ante-nuptial settlement dated the 25th of July, 1877. Under that instrument the wife brought into settlement certain property in trust for herself for life, and on her death for the respondent for life, if he should survive her, with remainder to the children of the marriage, with a proviso that if the petitioner should survive the respondent, and marry again after his death, and there should be only one child of the marriage, she should be at liberty to appoint a moiety of her income of her trust funds to such husband, in the event of survivorship, for his life, and a moiety of the trust funds for the children of such second marriage. Counsel contended that although there had been one child of the marriage who having attained the age of twenty-one and died a bachelor and intestate, and having thus obtained a vested interest to which the respondent as the son's next-of-kin had succeeded, yet the court should extinguish the respondent's interest therein.

Inderwick, K.C., and *Barnard* contended that the property was not settled property within the meaning of section 5 of the Matrimonial Causes Act, 1859, but was property which had come to the respondent by intestacy, the trust having come to an end when the child of the marriage had become absolutely entitled.

Wright, for the trustees of the settlement.

The following cases were cited: *Crisp* v. *Crisp*, 21 W. R. 79, L. R. 2 P. & D. 426; *Pocock* v. *Pocock*, 16 W. R. 712, 18 L. T. Rep. 338; *Pollard* v. *Pollard*, [1894] P. 172; *Meredyth* v. *Meredyth and Leigh*, 43 W. R. 304, [1895] P. 92; *Wigney* v. *Wigney*, 31 W. R. 140, 7 P. D. 232.

BARNES, J., in delivering judgment, said that the only question now remaining to be decided was whether the settlement could be varied by extinguishing all the interests of the respondent in the capital and income of the petitioner's trust funds. On the 12th of June, 1900, the petitioner obtained a decree *nisi* on the ground of the respondent's adultery and desertion, and on the 14th of January, 1901, the decree was made absolute.

On the 25th of July, 1877, an ante-nuptial settlement was executed, the wife bringing into settlement certain property in trust for herself for life, and, on her death, to the respondent for life, if he should survive her, with remainder to the children of the marriage, with a proviso that if the petitioner should survive the respondent and marry again after his death, and there should be only one child of the marriage, she should be at liberty to appoint a moiety of her income of her trust funds to such husband, in the event of survivorship, for his life, and a moiety of the trust funds for the children of such second marriage. There had been only one child of the marriage, who attained his majority on the 13th of July, 1899, and who on the 16th of July, 1900, died a bachelor and intestate. The child had therefore obtained a vested interest in the wife's fund, and therefore his father, the respondent, was entitled to succeed to his son's property. The respondent had married again, and on the 22nd of May 1901, he had executed a settlement dealing with the property that came to him through his son under the settlement. Application had now been made under section 5 of the Matrimonial Causes Act, 1859 (without entering into the question of the powers of the court under section 32 of the Matrimonial Causes Act, 1857), that the property should be reconveyed to the wife freed from the husband's interest in it; and, following the case of *Meredyth* v. *Meredyth and Leigh*, to accelerate the wife's powers under the settlement. To this it was objected that the court had no power under section 5 of the Act of 1859 to do what was asked. That section enacts that "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or their respective parents as to the court

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

shall seem fit." The words of that section were extremely wide, and the court was very desirous that they should not be narrowed down, for many and various, and so diverse in their circumstances, were the cases that had to be decided thereunder. In the case of *Hartopp* v. *Hartopp and Akhurst*, [1899] P. 65, 47 W. R. Dig. 52, it was objected that the court had no power to make the order there asked for as it would affect the interest of the children under the settlement; but he (the learned judge) had himself there held that the court had power under the 5th section, although it was not for the benefit of the children. Again, in a case just recently decided by the President, it was held that the court had power to vary a marriage settlement so as to deprive infant childrenof the marriage of part of their interests secured to them by such settlement.

He was therefore of opinion that the words of the section were wide enough to give the court power to act, although it was clear that the interests of the children might be affected. He therefore thought that all interests of the husband in the wife's trust funds should be extinguished and that the trustees should reconvey the wife's trust fund freed from the husband's interests, subject to any prior life interest under the settlement and subject to any charges made by the child of the marriage. The respondent must pay the costs of the petitioner and of the trustees.

Solicitors, *C. Russell; Valpy, Peckham, & Chaplin.*

House of Lords.

From C. A. (Ireland). Aug. 5, 1901.

QUINN *v.* LEATHEM. (*a.*)

Trades union—Inducing others to break or not to enter into contract—Coercion—Competition—Trade Union Acts, 1871-76—Lawful disposal of his time and labour—Injury to another without justification.

It is an actionable wrong to induce without justification others to break or refrain from entering into contracts, when this is done for the purpose of injuring another, and damage is thereby caused to him. Legitimate trade competition, the lawful exercise of one's calling, and the lawful use of combination for the advancement of one's trade or labour are not an interference with the rights of others. Outside such opposition, any coercion of another to prevent his disposing of his labour or goods is illegal, and purposely to cause damage to a third person in this manner is likewise an injury for which an action will lie.

Allen *v.* Flood (46 *W. R.* 259, [1898] *A. C.* 1) *explained and distinguished.*

Decision in Temperton *v.* Russell (41 *W. R.* 565, [1893] 1 *Q. B.* 715) *approved, but not* dicta *of* Lord Esher *therein.*

Decision of Court of Appeal ([1899] 2 *I. R.* 667) *affirmed.*

Appeal from the Irish Court of Appeal, *Leathem* v. *Craig*, [1899] 2 Ir. R. 667.

The respondent brought an action against various defendants, including the appellant, for a wrongful interference with the respondent's business of a butcher at Lisburn, near Belfast.

The facts are set out at length in Lord Brampton's judgment.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

W. Martin McGrath, and *Vesey Knox*, for appellant.

Haldane K.C., and *F. Watt*, for respondent.

The authorities and arguments are given in their lordships' judgments.

THE HOUSE took time to consider their judgment.

Aug. 5.—Earl of HALSBURY, L.C.—In this case the plaintiff has, by a properly-framed statement of claim, complained of the defendants and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy formed among them; and that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment; and that all this was done with malice in order to injure the plaintiff; and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community. Nor, indeed, do I understand that anyone has doubted, before the decision in *Allen* v. *Flood*, 46 W. R. 258, [1898] A. C. 1, in this House, that such facts would have established a cause of action against the defendants. Now, before discussing the case of *Allen* v. *Flood* and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. I think that the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in the case of *Allen* v. *Flood*. Now, the hypothesis of fact upon which *Allen* v. *Flood* was decided by a majority in this House was that the defendants neither uttered nor carried into effect any threat at all. They simply warned the plaintiff's employer of what the men themselves without their persuasion or influence had themselves determined to do, and it was certainly proved that no resolution of the trade union had been arrived at, and that the trade union official had no authority himself to call out the men, which, it was argued in that case, was the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even of combination. What was alleged to have been done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that it was the true view of the facts, but as I have said we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision. In my view what has been said already is enough to decide this case without going further into the facts of *Allen* v. *Flood*, but I cannot forbear accepting with cordiality the statement of the case prepared by two of your

lordships—Lord Brampton and Lord Lindley—with great care and precision. Now, in this case it cannot be denied that, if the verdict stands, there was a conspiracy and threats carried into execution so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand that the very learned judge who dissented doubted any one of the propositions; but his view was grounded on the belief that *Allen* v. *Flood* had altered the law in these respects and made that lawful which would have clearly been actionable before the decision of that case. For the reasons which I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case have to be pushed to their logical conclusion it would be very difficult to resist Palles, C.B.'s, inflexible logic; but, with all the respect which any view held by that learned judge is entitled to command, I cannot concur. This case is distinguished in its last form from the essentially important facts in *Allen* v. *Flood*. Rightly or wrongly the theory upon which judgment was pronounced in that case is one whereby the present is shown to be one which the majority of your lordships would have held to be a case of actionable injury inflicted without any excuse whatever. There was a subordinate question raised which I must not pass over. It is suggested that FitzGibbon, L.J., did not put all the questions which were necessary to raise all the points which the learned counsel desired to argue. Now I think the charge of the Lord Justice absolutely accurate, and when, in deference to the wishes of the counsel for the defendant, he consented to put such questions as were then desired, it would be intolerable that it should be made afterwards the subject of complaint that he did not at the same time put other questions which he was not asked to put at all. I move that this appeal be dismissed with costs.

Lord MACNAGHTEN (read by Lord Brampton).—Notwithstanding the strong language of O'Brien, J., and the weighty argument of Palles, C.B., I cannot help thinking that the case of *Allen* v. *Flood* has very little to do with the question now under consideration. In my opinion the decision in *Allen* v. *Flood* laid down no new law. It simply brushed aside certain *dicta* which were, in the opinion of the majority, contrary to principle, and unsupported by authority. Those *dicta* are first to be found in the judgment delivered by Lord Esher (then Brett L.J.) on behalf of himself and Lord Selborne, L.C., in *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333. They were repeated by Lord Esher, M.R., and Lopes, L.J., in *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715; but they were not, I think, necessary for the decision in either case. They did form the ground of the decision in *Allen* v. *Flood* in its earlier stages. But the only result of the final decision in that case was that the law was restored to the condition in which it was before Lord Esher's views in *Bowen* v. *Hall* and *Temperton* v. *Russell* were accepted by the Court of Appeal. In fact I think that the head-note to *Allen* v. *Flood* might well have run in these words, which were used by Parke, B., in giving the judgment of an exceptionally strong court nearly half a century ago in *Stevenson* v. *Newnham*, 13 C. B. 285: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen* v. *Flood*, if you eliminate all matters of merely passing interest, the charge of the learned judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two aspects in which it was presented for the consideration of this House, and for the consideration of the judges by whom the House was assisted. The case which is really brought under review on this appeal is *Temperton* v. *Russell*. I cannot distinguish that case from the present case. The facts are identical in substance, and the grounds of decision must be the same. Now, the decision in *Temperton* v. *Russell* was not overruled in *Allen* v. *Flood*, nor is the authority of *Temperton* v. *Russell*, in my opinion, shaken in the least by the decision in *Allen* v. *Flood*. Disembarrassed by the expressions which Lord Esher, M.R., unfortunately used in giving judgment, the decision in *Temperton* v. *Russell* seems to me to stand on sure ground. So far from being impugned in *Allen* v. *Flood*, it had, I think, the approval of Lord Watson, whose judgment seems to me to represent the joint views of the majority far better than any other judgment delivered in the case. Lord Watson says that he did not think it necessary to notice at length *Temperton* v. *Russell* because it was to his mind "very doubtful whether in that case there was any question before the court with regard to the effect of the *animus* of the actor in making that unlawful which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the court had to consider were: (1) That the defendants had maliciously induced certain persons to break their contracts with the defendants; and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which was disposed of in *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216. According to the second finding, the person induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy, a clear ground of liability according to *Lumley* v. *Gye* if, as the court held, there was evidence to prove it." It must be admitted, I think, that the second reference to *Lumley* v. *Gye* in the passage which I have just quoted is a slip, a rare, if not an unexampled, occurrence in a judgment of Lord Watson's. I cannot see that *Lumley* v. *Gye* has any bearing on the question of conspiracy. But I do not think that the slip (if it be a slip) impairs the effect of what Lord Watson said. Obviously he thought that there was authority for the proposition that a conspiracy to injure may give rise to civil liability. There is authority for that proposition; but even if there were none to be found, Lord Watson's view that the proposition was supported by authority is, I think, of considerable weight. Precisely the same questions arise in this case as arose in *Temperton* v. *Russell*. The answers, I think, must depend upon precisely the same considerations. Was *Lumley* v. *Gye* rightly decided? I think that it was. *Lumley* v. *Gye* was much considered in in *Allen* v. *Flood*. But as it was not directly in question, some of your lordships thought it better to suspend your judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of right to interfere with contractual relations recognized by law, if there be no justification for the interference. The only other question is this: Does a conspiracy

to injure, if there be damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory* v. *Brunswick*, 6 Man. & G. 205, is one authority, and there are others. There are valuable observations on the subject in Erle, J.'s, charges to the jury in *Reg.* v. *Duffield*, 5 Cox C. C. 404, and *Reg.* v. *Rowlands*, 5 Cox C. C. 436. Those were cases of trade union outrages, but the observations to which I refer were not confined to exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Fitzgerald, J., in *Reg.* v. *Parnell*, 14 Cox C. C. 508. That a conspiracy to injure, an oppressive combination, differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree with the remarks of Bowen, L.J., and Lord Bramwell and Lord Hannen in *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 37 W. R. 756, 23 Q. B. D. 598; 40 W. R. 337, [1892] A. C. 25. A man may resist without much difficulty the wrongful act of an individual. In repelling it he would probably have at least the moral support of his friends and neighbours; but it is a very different thing, as Fitzgerald, J., observes, when one man has to defend himself against many combined to do him wrong. I have only to add that I agree generally with the judgments delivered in the courts below, and particularly with the judgment of Andrews, J., in the Queen's Bench, and the judgment of Holmes, L.J., in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see there was no trade dispute at all. Leathem had no dispute with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay all their fines and entrance money. What he did object to was a cruel punishment which it was proposed to inflict on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance upon Leathem's servants who were not members of the union. I also think that the provision in the Conspiracy and Protection of Protection Act, 1875, which says that in certain cases an agreement or combination is not be "indictable as a conspiracy," has nothing to do with civil remedies.

Lord SHAND (read by Lord Davey).—After the able and full opinions of the learned judges of the Court of Appeal in Ireland, holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that this judgment ought to be affirmed, and the appeal dismissed, may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their lordships, and they have been already dealt with in my judgment in the case of *Allen* v. *Flood*. In that case I expressed my opinion that while a combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that a combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed. The learned Lord Justice before whom the case was tried told the jury with reference to the words "wrongfully and maliciously" in the first question that the questions to be answered by them were only matters of fact to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests. The verdict affirms that this was the fact, for after the direction of the learned judge no other interpretation can be given to the finding that the acts were done by the defendants "wrongfully and maliciously." This being clearly so, the question now raised is whether in consequence of the decision of this House in *Allen* v. *Flood*, and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie; or, to put the question in a popular form, whether the decision in *Allen* v. *Flood* has made boycotting lawful? Apart from the decision in that case the judgment of the learned judges in Ireland would have been unanimous in affirming the principle to which FitzGibbon, L.J., gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of Bowen, L.J., in the *Mogul case*, 61 L. T. Rep. 820, which was quoted by Lord Halsbury, L.C., with an expression of his strong approval, in *Allen* v. *Flood*. The Lord Chancellor there said: "I can desire no more apt exposition of the law than that which is contained in Bowen, L.J.'s, admirably reasoned judgment in the *Mogul case* in the Court of Appeal," which he then quotes, as follows: "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of the violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton* v. *M'Gawley*, 1 Peake N. P. 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford* v. *Brandon*, 2 Camp. 358; *Gregory* v. *Brunswick* the disturbance of wildfowl in decoys by the firing of guns (*Carrington* v. *Taylor*, 11 East, 571, and *Keeble* v. *Hickeringall*, 11 East, 573, *n*; 11 Mod. 74, 131); the impeding or threatening servants or workmen (*Garret* v. *Taylor*, Cro. Jac. 567); the inducing persons under personal contracts to break their contracts (*Bowen* v. *Hall* and *Lumley* v. *Gye*), are all instances of such forbidden acts." The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by Erle, J., in his work on trade unions. It may be that in certain cases the object of inflicting injury and success in that object require combination or conspiracy with others in order to be effectual. That was not so in all the cases enumerated by Bowen, L.J., but no question on that point arises in the circumstances of this particular case, for, according to the verdict of the jury, the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although in my opinion it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts unless the judgment in the case of *Allen* v. *Flood* has introduced a change which has rendered such acts lawful. As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which he was held entitled to do, although it was injurious to his competitors; whereas in the present case, while it is

clear that there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." It is unnecessary to quote from the judgments of the majority of the learned judges in *Allen* v. *Flood* to show their opinions on the importance of this essential point. Lord Herschell, for example, said: "The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end"; and the other Lords in the majority expressed themselves to a similar effect. For myself, what I said was this: "If anything is clear on the evidence it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those whom he represented in all that he did, that this was his motive of action, and not a desire, to use the words of the learned judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which in my opinion is in all respects analagous to competition in trade, and the same principles must apply to it." The ground of judgment of the majority of the House, however varied in expression by their lordships, was, as it appears to me, that Allen, in what he said and did, was only exercising the right of himself and his fellow-workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong. It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him; and that the case of *Allen* v. *Flood* as a case of legitimate competition in the labour market is essentially different, and gives no ground for the defendants' argument. I concur in holding that there is not sufficient ground for disturbing the verdict on the question of damages, and in holding that the special provision of section 3 of the Conspiracy and Protection of Property Act, 1875, has no application to the circumstances of this case.

LORD BRAMPTON. — This case now awaiting final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern, but it involves nevertheless questions of widespread importance to every trade, and to every employer and servant engaged in the trade. The action was originally brought in the High Court in Ireland by Henry Leathem, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons—John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants—to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years, before July, 1895, Leathem had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly £20 or £30 worth of the best meat; and he had in his employment as assistants several men at weekly wages. In February, 1893, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of "The Belfast Journeyman Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leathem's men and the union. Early in that month, however, Leathem, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. Leathem had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years; he was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked them out, and they said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes." The chairman spoke truly; for, on the 6th of September the secretary of the society wrote to Leathem asking "whether he had made up his mind to continue to employ non-union labour," adding, "If you continue as at present our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on the 13th of September stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leathem & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on the 14th of September, a very sensible reply: "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leathem that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on the 17th of September he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th of September brought a definite announcement from the secretary to Mr. Munce, that having failed to make a satisfactory arrangement with Mr. Leathem,

they had no other alternative but to instruct his (Munce's) employees "to cease work immediately Leathem's beef arrives." Thereupon Mr. Munce was constrained to send to Leathem on the 20th of September a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and from that day Munce took no more meat from Leathem, to his substantial loss. Another mode adopted by several of the defendants with a view to prevent persons from dealing with Leathem was the publication throughout the district of Lisburn of "black lists," containing and holding up to odium not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leathem, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to induce two other men named Davis and Hastings. With the object of further inconveniencing Leathem in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leathem; it is true that they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But after they had left their service they were paid by the society during the time that they were out of work weekly sums of money as compensation for the wages which they would have earned with Leathem. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so broke his contract with his employers, and there was evidence that he was induced to do so through the influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leathem's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leathem because the rest were out, and promised to pay him what he had from Leathem; that he left and was paid by Rice for the society and was then in Dornan's service. The case came on for trial at the Belfast Assizes in July, 1896, before FitzGibbon, L.J., and a special jury. The pleadings charged in the first four counts as separate causes of action—(1) the procuring Munce to break contracts he had made with Leathem; (2) the publication by the defendants of "black lists"; (3) the intimidation of Munce and other persons to break their contracts; and (4) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to occasion him and have occasioned him actual loss, injury, and damage." The fifth and last count charged also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed. At the conclusion of the evidence, Mr. O'Shaughnessy, Q.C., for the defendants, submitted that they were entitled to a nonsuit upon the grounds that there was no evidence of a contract between Munce and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and the acts of the defendants were legitimate. The learned Lord Justice refused to nonsuit. He left, in compliance with the wishes of the defendants' counsel, the three following questions to the jury: (1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages against all the defendants at £200, and with regard to the third question they found against the defendants Dornan, Davey, and Shaw, with an additional £50 as damages against them only. Judgment was given in accordance with that verdict. The defendants appealed, but the appeal was dismissed except that the damages were disallowed in respect of the third question. FitzGibbon, L.J., rightly I think, refused to nonsuit. For there was clearly evidence for the consideration of the jury upon one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House. No evidence was called for the defendants. From a careful perusal of the learned Lord Justice's own notes and memoranda, I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism. After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, the judge told the jury that they had to consider whether the conduct and actions of the defendants went beyond the limits which would not be actionable—namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination, and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful and were not actionable, so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention, which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question which they had to try upon the evidence, whether the acts of the defendants were or were not in that sense actionable? I have thought it right to follow as nearly as possible the language of the Lord Justice, for that charge was delivered before *Allen* v. *Flood* was decided in

this House, and in substance I think that it was correct, having regard to the particular case. In some respects it seems to me a little too favourable to the defendants. The defendants' counsel made four objections to the summing up. The first two—viz., that the judge had given no definition of damage, and that he had told the jury that the liability of the defendants depended on a question of law—were conclusively answered in the summing up. The third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this, I take it, he meant not as an independent cause of action, there being, in fact, no evidence of their personal participation in the publication of these lists. But that left them still affected by them as overt acts of conspiracy, for each of which every one of the conspirators was liable, and the evidence touching the black lists is beyond question admissible under the conspiracy count. The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants, but the judge then declined to withdraw the question of contract from the jury, and I think rightly. And, at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. The single general question first proposed by the judge was finally divided into three separate questions—(1) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff to refuse to deal with him? (2) Did the defendants or any two or more of them maliciously conspire to induce the customers or servants named in the evidence, or any of them, not to deal with the plaintiff, or not to continue in his employment; and were such persons so induced not to do so? (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and if so, did the publication injure him? The jury answered each of these questions in the affirmative.

Rightly understood, I think that the judgment in *Allen* v. *Flood* is inapplicable. But in order to properly appreciate it, it is essential to ascertain what were the material facts assumed to exist by their lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realized that unanimity of opinion as to the facts certainly did not prevail, and that the judges who were called on to render assistance to the House were given one simple question only—viz., "Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The evidence of the plaintiff's witnesses handed to the judges most certainly did not altogether coincide with some very material facts assumed by their lordships. This would account for the variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion. I will therefore not make the attempt. Some of this confusion arose, no doubt, from the course taken, rightly or wrongly, at the trial. Then all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Co. to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered £20 damages. It was assumed by their lordships that the Glengall Co. were under no contractual obligation to retain the plaintiffs, Flood and Taylor, in their service for any duration of time, but might dismiss them from their employment at any moment, and that the boilermakers were working under the same conditions; that Allen, in making the communication which induced the company to dismiss the plaintiff, was only doing that which he had a legal right to do, and their lordships held, therefore, that the plaintiffs had no legal cause of action against either the company or the defendant, and that the mere fact, as found by the jury, that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act. This proposition that the exercise of an absolute legal right cannot be treated as wrongful and actionable merely because a malicious motive prompted such exercise was established as clear law in the *Bradford Corporation* v. *Pickles*, 44 W. R. 190 [1895] A. C. 587, and it is now too late to dispute it even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege, to do or to say that which, without such privilege, would be wrongful and actionable. Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believed that he had reasonable and probable cause, though he had it not in fact, to put the criminal law in motion against another; but if a malicious motive operating on the mind of such prosecutor be added, that which would have been a justifiable act, if done without malice, becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. In the present case the alleged cause of action is very different from that in *Allen* v. *Flood*. The real and substantial cause of action was an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right—in the words of Alderson, B., in *Hilton* v. *Eckersley*, 6 E. & B. 47, 3 W. R. C. L. Dig. 176—"in all matters not contrary to law to regulate his own mode of carrying on his business according to his own discretion and choice." To this I would add the emphatic expression of Lord Halsbury, L.C., in the *Mogul case*: "All are free to trade upon what terms they will," and of Bramwell, B., in *Reg.* v. *Druitt*, 10 Cox C. C. 592, who, in a passage referred to by Lord Halsbury, L.C., in the same case, said: "The liberty of a man's mind and will to say how he should bestow himself and his means, his talents, and his industry, is as much a subject of the law's protection as is that of his body." Again, Sir William Erle thus expresses himself: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour, or his own capital, according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." I am not aware that the rights thus stated have ever been seriously questioned. I rest my judgment on the principle expressed in the extracts which I have read. I seek for no more. The remedy for the invasion of a legal right was thus stated by Lord Watson in *Allen* v. *Flood*: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed." I cannot

suppose that any intelligent person reading the evidence adduced on the trial of the present case would fail to come to the conclusion that the acts complained of amounted to a serious invasion of the plaintiff's trade rights, and I am at a loss to comprehend on what ground the defendants seek to justify or excuse their action towards him. As members of a trade union they had no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they were attached had never come into existence. They had no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differed from them and belonged to other trade associations would have a right to coerce them. The Legislature in conferring on trade unions such privileges as were contained in the Acts of 1871 and 1876 most certainly has not conferred on any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way which he thinks fit, provided only that it is lawful; and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy, merely because the objects of that combination are in restraint of trade, no protection is given to any combination or conspiracy which before the Act of 1871 would have been criminal for other reasons. One cannot read the 7th section of the Conspiracy Act of 1875 without seeing that it had no intention to tolerate such proceedings as in this case were complained of, but rather to protect those upon whom coercive measures might be practised. But I will not linger upon a consideration of what might be done in competition, for competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression, the outcome of a malicious but successful conspiracy, to harm the plaintiff in his trade. It cannot be—it has not even been suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirements, nor in support of any lawful right of the association, or any member of it, nor to obtain or maintain fair hours of labour or fair wages, nor to promote a fair understanding between employers and employed or workman and workman. It would indeed be a strange mode of promoting such a good understanding to coerce a tradesman's customers to leave him because he would not at the bidding of the association dismiss workmen who desired to continue in his service, and whom he wished to retain, to make way for others whom he did not want; nor for the settlement of any dispute, for none had existence.

I will next deal with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, of embarking upon a history relating to the subject. That would be useless for the present purpose, and I will endeavour briefly to state how I view the matter practically as far as it concerns the present case. A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful or harmful towards some other person. It may be punished criminally by indictment, or civilly by an action if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy are in my opinion the same, though to sustain an action special damage must be proved. I will quote, as a very instructive definition, the words of a great lawyer, Willes, J., in *Mulcahy* v. *The Queen*, L. R. 3 H. L. 306, 17 W. R. H. L. Dig. 4-13, in delivering the unanimous opinion of himself and others, which was adopted by this House—"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful; and punishable if for a criminal object, or for the use of criminal means. The number and compact give weight and cause danger." It is true that these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present. I have occupied more of your lordships' time than I had intended, but the case is of great importance and I feel that such unlawful conduct as has been pursued towards Mr. Leathem demands serious attention. I think that the law is with him, and that the damages awarded were in the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of anyone who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous conspirators acting under an illegal compact together and separately, as often as opportunity occurs, regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organized and ruinous oppression. I think that the judgment in the courts below ought to be affirmed and this appeal dismissed with costs.

Lord ROBERTSON concurred.

Lord LINDLEY.—The case of *Allen* v. *Flood* has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. The only question which the House of Lords had to decide in that case was whether what Allen had done entitled the plaintiffs to maintain their act against him. What the jury found that he had done was that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble lords who heard the appeal, but the opinion of the majority was that Allen had no power himself to call the workmen out, and all that he did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. There being no question of conspiracy, intimidation, coercion, or breach of contract for the consideration of the House, and the House having come to the conclusion that Allen had done no more than I have stated, the majority of the noble lords held that the action against Allen would not lie, that he had infringed no right of the plaintiffs, that he had done nothing which he had not a legal right to do, and that the fact that he had acted maliciously, and with intent to injure the plaintiffs, did not entitle the plaintiffs to maintain the action. The decision, as I understand it, establishes two

propositions, one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first. The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new nor laid down for the first time in *Allen* v. *Flood*; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition, however, care must be taken to bear in mind, first, that in *Allen* v. *Flood* criminal responsibility had not to be considered. It would revolutionize criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful"—*i.e.*, to acts involving no breach of duty, or, in other words, no wrong to anyone. I shall refer to this matter later on. The second proposition is that what Allen did infringed no right of the plaintiffs, even though he acted maliciously and with a view to injure them. I have already stated what he did and all that he did in the opinion of the majority of the noble lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiff is perfectly intelligible and, indeed, unavoidable. Truly, to inform a person that others, not under the control of the informant, will annoy or injure him unless he acts in a particular way cannot of itself be actionable whatever the motive or intention of the informant may have been.

I will pass now to the facts of this case and consider (1) what the plaintiff's rights were; (2) what the defendants' conduct was; (3) whether that conduct infringed the plaintiff's right. For the sake of clearness it will be convenient to consider these questions, in the first place, apart from the statute which legalizes strikes, and in the next place, with reference to that statute. (1) As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided that he did not violate some special law prohibiting him from so doing, and provided that he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty without justification. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would obviously be practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified, the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by Bowen, L.J., in his admirable judgment in the *Mogul Steamship Co.'s case* may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen* v. *Flood* to be opposed to it. If the above reasoning is correct, *Lumley* v. *Gye* was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service; nor, indeed, to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton* v. *Russell* ought to have been decided and may be upheld on this principle. That case was much criticized in *Allen* v. *Flood*, and not without reason; for, according to the judgment of Lord Esher, M.R., the defendant's liability depended on motive or intention alone whether anything wrong was done or not. This went too far, as was pointed out in *Allen* v. *Flood*. But in *Temperton* v. *Russell* there was conspiracy and a wrongful act—viz., unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right. (2) I pass on to consider what the defendants did. They were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men the defendants threatened to put the plaintiff and his customers, and persons lawfully working for him, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union, but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen* v. *Flood*. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers; nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse their conduct. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case. (3) The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion it plainly did. The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty

to the plaintiff and his customers and servants, which was to leave them in the undisturbed liberty of acting as they had a perfect right to do. What is the legal justification or excuse for such conduct? None is alleged and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff; not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*. Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in *Mogul Steamship Co.* v. *McGregor* and *Allen* v. *Flood*, and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen* v. *Flood* in favour of the appellants. Their sheet-anchor is *Allen* v. *Flood*, which is far from covering this case, and can only be made to cover it by greatly extending its operation. It was contended at the bar that, if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. One man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and if he had done so I conceive that he would have committed a wrong towards the plaintiff, for which the plaintiff could have maintained an action. I am aware that in *Allen* v. *Flood* Lord Herschell expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike or threatening to make them strike by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen* v. *Flood* there was nothing more, but here there was very much more. What may begin as peaceable persuasion may easily become, and in trade disputes generally does become, peremptory ordering with threats, open or covert, of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working is a very different thing, and is *primâ facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him, very difficult to resist, and, to say the least, requiring justification. None was offered in this case. It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so when many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy, both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to *Vegelahn* v. *Guntner*, 167 Mass. 92, where coercion by other means than violence or threats of it was held unlawful. In this country it is now settled by the decision of this House in the case of the Mogul Steamship Co. that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but at the same time merely exercise their own rights and infringe no rights of other people. *Allen* v. *Flood* emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society* v. *Glasgow Fleshers' Association*, 35 Sc. L. Rep. 645, which was referred to in the course of the argument. In that case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert. The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed; no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as of his, and was wrongful both to them and also to him, as I have already endeavoured to show. Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible provided that nobody's rights are infringed. The law is the same for all persons, whatever their callings; it implies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock out as well as the rights of those who strike. But coercion by threats open or disguised not only of bodily harm, but of serious annoyance and damage, is, *primâ facie*, at all events, a wrong inflicted on the persons coerced, and in considering whether coercion has been applied or not numbers cannot be disregarded. I conclude this part of the case by saying that in my opinion the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service and coercion to break contracts of other kinds, and coercion not to enter into contracts.

I pass now to consider the effect of the statute 38 & 39 Vict. c. 86. This Act clearly recognizes the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to

work except on their own terms. On the other hand, it is clearly illegal for them or anyone else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts of degrees; picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law; but if confined merely to obtaining or communicating information it is rendered lawful by the Act (section 7). Is a combination to annoy a person's customers so as to compel them to leave him unless he obeys the combination permitted by the Act or not? It is not forbidden by section 7; is it permitted by section 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *Lyons* v. *Wilkins*, 45 W. R. 19, [1896] 1 Ch. 811, in the case of Schoenthal, which arose there, and is referred to in the judgment of Walker, L.J., in this case. This particular point had not to be reconsidered when *Lyons* v. *Wilkins* came before the Court of Appeal after the decision in *Allen* v. *Flood*. But Byrne, J., modified the injunction granted on the first occasion by confining it to watching and besetting. He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention. It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of section 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section even on an indictment for a conspiracy. But assuming that there was a trade dispute within the meaning of section 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked, and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert and not the criminal conspiracy is the important element in the action for damages: see the notes to 1 Wms. Saund. 229*b* and 230. In my opinion it is quite clear that section 3 has no application to civil actions; it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with Andrews, J., and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shows that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these. I will detain your lordships no longer. *Allen* v. *Flood* is in many respects a very valuable decision, but it may be easily misunderstood and carried too far. Your lordships are asked to extend it, and to destroy that individual liberty which our laws so anxiously guard. The appellants seek by means of *Allen* v. *Flood*, and by logical reasoning based upon some passages in the judgments given by the noble lords who decided it, to drive your lordships to hold that boycotting by trade unions in one of its most objectionable forms is lawful and gives no cause of action to its victims, although they may be pecuniarily ruined thereby. So to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do that which is not yet authorized by any statute or legal decision. In my opinion this appeal ought to be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Eyre, Dowling, & Co.*, for *Joseph Donnelly*, Belfast.

Solicitor for the respondent, *Francis H. White*, for *G. B. Wilkins*, Lisburn, Ireland.

Court of Appeal.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 9.

WILMOTT *v.* PATON. (*a.*)

Master and servant—Employer's liability—Accident—Compensation—Factory—Mechanical power—Warehouse—Factory and Workshop Act, 1878 (41 *Vict. c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The use of machinery moved by hand power is not the use of "mechanical power" within the meaning of those words in the definition of "non-textile factory" contained in section 93 *of the Factory and Workshop Act*, 1878.

The word "warehouse," in section 7 *of the Workmen's Compensation Act*, 1897, *is not confined to premises contiguous to water.*

Appeal from an award of the judge of the Pontypool County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a dependant of a workman who had been accidentally killed in the course of his employment.

The employer's premises on which the deceased man was employed at the time of the accident were used for the purpose of breaking up old iron and storing iron for sale.

A very large quantity of iron, consisting of many thousand tons, was stored there, partly in an open yard, and partly in sheds.

The iron was broken by means of a heavy weight which was raised by a mechanical appliance moved by hand power.

The premises were not connected with any dock, wharf, or quay, and were not contiguous to water.

The deceased man was run over by a truck on a tramway running through the premises which he was trying to stop by putting a crowbar between the spokes of one of the wheels.

The county court judge held that the premises were a factory within the meaning of section 7 of the Workmen's Compensation Act, as coming within the definition of a "non-textile factory" given in section 93 of the Factory and Workshop Act, 1878. That section says that "non-textile factory" in that Act means—"(3) any premises wherein any manual labour is exercised by way of trade or for purposes of gain in or incidental to the adapting for sale of any article, and wherein steam, water, or other mechanical

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

power is used in aid of the manufacturing process carried on there."

The county court judge was of opinion that, though the machinery in the present case was moved by hand power, it came within the words "or other mechanical power" in the above section. He also held that the premises were a factory within the meaning of section 7 of the Workmen's Compensation Act, as being a "warehouse" to which certain provisions of the Factory Acts are applied by the Factory and Workshop Act, 1895. He accordingly made an award in favour of the applicant.

The employer appealed.

Ruegg, K.C., and *A. Parsons*, for the employer.—These premises were not a factory within section 93 of the Factory and Workshop Act, 1878. Neither steam, water, nor other mechanical power was used there. The use of machinery moved by hand power is not the use of "mechanical power": see *Wrigley* v. *Bagley & Wright*, 49 W. R. 472, [1901] 1 Q. B. 780. Neither were they a "warehouse" within the meaning of section 7 of the Workmen's Compensation Act. The words of the section are "any dock, wharf, quay, warehouse, machinery, or plant." The word "warehouse" must be read as *ejusdem generis* with dock, wharf and quay, and can only apply to premises which are contiguous to water: see *Haddock* v. *Humphreys*, 48 W. R. 292, [1900] 1 Q. B. 609.

Clavell Salter and *Minton-Senhouse*, for the applicant.

COLLINS, M.R.—This case comes before us in an unsatisfactory sort of way. No evidence was given at the trial, and the case was argued on an agreed state of facts. Two points were raised—first, whether the premises of the employer were a factory within section 93 of the Factory and Workshop Act, 1878; secondly, whether they were a warehouse. The county court judge decided in favour of the applicant on both points. With regard to the first question, the matter seems to have been already decided by this court in the case of *Wrigley* v. *Bagley & Wright*. There an operation of lifting a driving wheel had been performed by means of a hand-winch and pulleys. The point was taken that this was an operation by mechanical power within the meaning of those words in the definition of "engineering work" in section 7 of the Workmen's Compensation Act, but it was overruled by the court in the course of the argument. I therefore think the decision of the county court judge was wrong on that point.

With regard to the second question, whether the premises were a warehouse, I have come to the conclusion, though the facts are not put before the court in a satisfactory way, that the evidence shows a clear *primâ facie* presumption that the premises might be a warehouse, and on that ground I think the decision of the county court judge can be supported. The only point argued on this part of the case was that no place could be a warehouse within the meaning of the Act unless it was contiguous to water, because the word "warehouse" ought to be construed as *ejusdem generis* with the words preceding it in the section—"dock, wharf, quay." In my opinion there is nothing to debar us from holding that a place which is not contiguous to water may be a warehouse.

STIRLING and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the employer, *W. Hurd & Son*, for *L. E. Webb*, Pontypool.

Solicitors for the applicant, *Le Brasseur & Oakley*, for *Le Brasseur & Bowen*, Pontypool.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 8.

BARTLETT v. SUTTON & SONS. (*a*.)

Master and servant—Accident—"Average weekly earnings"—Stevedore employed for one day—Workmen's Compensation Act, 1897, *Schedule I., cl.* 1 (b).

A casual stevedore's labourer was employed for one day to assist in discharging cargo from a vessel in a dock. During the day he met with an accident. He had then earned 3s. 3d.

Held, that as there was no presumption that the stevedore would have been employed by the same employer beyond the day, the amount of compensation he was entitled to was a weekly payment of one-half of 3s. 3d., the sum he had actually earned in that employment.

Appeal by the employers from an award of the learned judge of the Bristol County Court in an arbitration under the Workmen's Compensation Act, 1897.

The workman was a casual stevedore's labourer, and was engaged for one day to assist in discharging a vessel, being employed and paid by the hour, and he met with an accident on that day in the course of his employment. The amount of wages he had actually earned was 3s. 3d.

The masters admitted liability, and the only question was on what basis the award was to be calculated.

It the county court it was argued for the applicant that his average earnings were six times 3s. 3d., for the employers that the man's average weekly earnings were but 3s. 3d.

The county court judge adopted neither of these views, but heard evidence as to what was the average weekly earnings of an ordinary casual dock labourer at the port of Bristol, which, on the evidence given, he found to be 18s. He accordingly awarded the applicant 9s. a week.

The employers appealed.

Ruegg, K.C., and *H. H. Gregory*, for the appellants.

Foote, K.C., *Clavell Salter*, and *Minton-Senhouse*, for the workman.

THE COURT allowed the appeal.

COLLINS, M.R.—I think the award made by the county court judge in this case cannot be supported, although his judgment is a logical judgment, and in fact he has only pushed home to its logical conclusion a theory based on what was laid down by the House of Lords in *Lysons* v. *Andrew Knowles & Sons*, 49 W. R. 636, [1901] A. C. 79. I do not, however, think, when the real facts of this case are considered, that it comes within the extreme position which is spoken of by some of the learned judges in that case—namely, the position where it could be said that no provision could be found in the Act for calculating in the particular case the compensation which the Legislature clearly intended should be given. In this case there is no presumption that the employment of the injured workman would last beyond the time occupied by his employers in discharging the cargo from this particular ship. The man was a casual stevedore's labourer and was paid by whatever master he worked for at so much an hour. The applicant was paid 3s. 3d. for the work which he did. The county court judge thought that the contention of neither party was correct, and for the purpose of ascertaining the applicant's average weekly earnings he adopted what he understood to be the ordinary standard of a dock labourer's wages at the port of

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Bristol throughout the year. It was not disputed, if he had jurisdiction to assess the compensation on that ground, that the figure he arrived at was one that could be reasonably challenged. But it was said he had no power to receive evidence on that point at all. I think that was so. Such a way of dealing with the matter would seem to involve this proposition—that the applicant for compensation would be entitled to have taken into consideration loss of wages other than those which he could have earned from the same employer. It is difficult to see why the workman should not be compensated for the full loss which the accident caused him, but for some reason or other the Legislature very carefully and expressly limited what he was to receive to the loss of wages earned from the master alone in whose service he was at the time of the accident. To adopt the method followed by the county court judge in this case would be to strike out of the Act the words to be found in Schedule I. (1) (*b*) "for any less period during which he has been in the employment of the same employer." As I have said, the Legislature did not intend to give full compensation, but only compensation in respect of the loss of not being able to be employed by the same employer. Of that there can be no doubt. In this case there is no presumption that the man would continue to be employed by the same employers for any longer period than one day or at any rate of wages, but yet the question we have to ask ourselves is this: "What has the man lost by his inability to be employed by the same employers?" In my opinion it cannot be said that the Act has provided no means for estimating the compensation in this case. I think the provision made is this—half of what he had earned from the same employer, which was 3s. 3d. It was said that to make an award of 1s. 8d. a week was to make an illusory award, and under the circumstances one that never could have been contemplated by the Legislature. No doubt it is startling, but I do not think it is illusory, although it is a very small amount. To decide otherwise would be to ignore the connection which the Act all through establishes between the workman and the master in whose service he was at the time of the accident. It seems to me therefore that this appeal must be allowed, and as the parties are willing that the case should be dealt with by us the award will be varied and the weekly payment reduced to 1s. 8d.

STIRLING and MATHEW, L.JJ., delivered judgment to the same effect.

Solicitors for the employers, *W. Hurd & Son.*

Solicitors for the applicant, *Ford & Ford.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Aug. 9; Nov. 2.

In re HOTHAM.
HOTHAM *v.* DOUGHTY. (*a.*)

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-section* 2—*Investment of capital moneys—Tenant for life—Duty of trustees.*

On a sale of settled estate a tenant for life entered into a conditional contract for the investment of a part of the proceeds of the sale on mortgage of real estate. The trustees of the settled estate objected to some of the provisions of the mortgage. The tenant for life then asked for a declaration that the trustees, having received from him a direction to invest on a particular mortgage under section 22, *sub-section* 2, *of the Settled Land Act*, 1882, *were bound to invest accordingly, without making any inquiry as to the title, value, or form of the mortgage.*

Held, that trustees for the purposes of the Settled Land Act must satisfy themselves both as to title and value and as to the form of the mortgage, just as any ordinary trustee would.

The plaintiff in this summons, Frederick William Hotham, was tenant for life of an estate called Worlingham Hall. This estate had been purchased out of capital money settled upon plaintiff by the will of Augustus Thomas Hotham.

On the 7th of February, 1901, the plaintiff entered into a contract with the Hon. A. J. Mulholland for the sale of the estate, and it was agreed that two-thirds of the purchase-money should remain as a mortgage on the estate.

The preliminaries were all arranged, and a draft mortgage conveying the estate to the trustees of the settlement under A. T. Hotham's will had been prepared and accepted by the purchaser.

The trustees of the settlement then raised objections to the draft deed, declaring that they were entitled to check the tenant for life in the exercise of his powers under sub-section 2 of section 22 of the Settled Land Act, 1882.

They were also bound to satisfy themselves that proper security was offered, and were entitled to the costs and charges incurred by them in procuring such satisfaction.

The plaintiff by his summons asked "that it might be declared that upon a direction under sub-section 2 of section 22 of the Settled Land Act, 1882, given by the applicant as tenant for life under the above-mentioned settlement to the respondents as trustees of the said settlement for the purposes of the Settled Land Act, 1882, to invest capital moneys in their hands as such trustees as aforesaid upon the security of a mortgage referred to in such direction, the respondents, as such trustees as aforesaid, are bound to invest the same accordingly, if such mortgage purports upon its face to be such a mortgage as is by the settlement or by law authorized as an investment of such capital moneys, and that they are not under obligation or entitled to satisfy themselves as to, or examine, or make any inquiry as to the title to, or value of, the security included in such mortgage, and that they are not entitled to make any alteration in the form of such mortgage.

Hon. E. C. Macnaghten, K.C., and *A. à Beckett Terrell*, for the plaintiff, said that the tenant for life could use his own discretion as to the investment, and was not in any way bound by his trustees: *In re Lord Coleridge's Settlement*, 44 W. R. 59, [1895] 2 Ch. 704. The tenant for life was a trustee for all parties under section 53 of the Settled Land Act, 1882.

H. T. Eve, K.C., and *H. Fellows*, for the trustees, cited the case of *In re Broadwater Estate*, 33 W. R. 738.

Davenport, for the mortgagor.

COZENS-HARDY, J., said that the various ways in which capital money might be invested were prescribed in section 21 of the Settled Land Act, 1882. Sub-section 2 of section 22 of the Act declared that the investment was to be according to the direction of the tenant for life. The plaintiff in this case relied upon the decision in *In re Lord Coleridge's Settlement*, but that did not enable him to order the trustees to invest the capital moneys on mortgage of any estate he might choose, or to declare that the trustees had nothing to do with title or value. The trustees, on

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

the other hand, said that before they could act upon the direction of the tenant for life they must be satisfied that the mortgage was such as the court considered a proper investment of trust funds, or, in other words, that they must satisfy themselves both as to title and value and as to the form of mortgage just as any ordinary trustee would.

He thought the latter the correct view. Under section 42 the trustees were at liberty to adopt certain contracts made by the tenant for life without inquiry, but that did not extend to a mortgage. The trustees were bound to see that the money was applied in the manner directed by the Act, and there was no reason why they should be satisfied with the mere statement of the tenant for life that the particular investment was an authorized one. Once they were satisfied that the mortgage was a proper one they were bound to follow the directions of the tenant for life. When the trustees and the tenant for life were represented by different solicitors, it rested with the solicitors for the trustees to do what was necessary with reference to the mortgage.

The same principle applied to investments other than a mortgage under sub-section 1, section 21.

Declaration that the trustees were not bound to invest upon a particular mortgage unless and until they were satisfied as to the title and value of the proposed security.

Solicitors for plaintiff, *Rowcliffes, Rawle, & Co.*, for *Hamilton Fulton*, Salisbury.

Solicitors for defendants, *Collyer-Bristow, Hill, Curtis, & Dods*, for *Stone, Simpson, & Mason*, Tunbridge Wells.

Solicitors for mortgagor, *Bompas, Bischoff, & Co.*

K. B. Div. (Wills, J.) — Aug. 5, 10, 1901.

CORPORATION OF TRURO *v.* ROWE. (*a.*)

Fishery—Oyster fishery—Depositing oysters on foreshore as incident to right of fishery—Municipal corporation—Short lease of foreshore taken by corporation—Powers of corporation to take lease—Sea Fisheries Act, 1868 (31 *&* 32 *Vict. c.* 45), *s.* 41—*Mortmain and Charitable Uses Act,* 1888 (51 *&* 52 *Vict. c.* 42), *s.* 1—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 107.

A right to deposit freshly dredged oysters which are unfit for the market by reason of their being contaminated with certain impurities in the water in which the oyster beds were situate, on a particular part of the foreshore of the fishery for the purpose of purifying them, which right had been exercised from time immemorial by fishermen, is a right which may be legally incident to the right of oyster fishery, and may be justified against the owner of the foreshore either by an immemorial custom or as part of the common law rights of oyster fishing.

A municipal corporation who have obtained from the Board of Trade an order for the regulation of the oyster fishery in their harbour, which order has been confirmed by Act of Parliament, may, under section 41 *of the Sea Fisheries Act,* 1868, *take a short lease of the foreshore for the purpose of carrying out the objects of their Act, and such lease is not rendered invalid either by the Mortmain Act,* 1888, *or by section* 107 *of the Municipal Corporations Act,* 1882.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Further consideration by Wills, J., in an action tried before him with a jury at Truro.

The plaintiffs were the mayor, aldermen, and burgesses of the city of Truro, and the action was brought by them against the defendant for damages for alleged acts of trespass on a part of the foreshore at Truro of which the plaintiffs were the lessees, and for an injunction to restrain the defendant from committing the acts of trespass alleged.

The plaintiffs are an ancient corporation incorporated by royal charter, and by a charter of 31 Eliz. it was provided that the corporation "May and shall be for ever at all future times persons fit and capable in law to hold, purchase, receive, and possess lands, tenements, liberties, privileges, jurisdictions, franchises, and hereditaments of what kind or nature soever they be, to them and their successors in fee and perpetuity, and also goods and chattels and other things whatsoever of what nature or kind soever they may be, and to give, grant, demise, and assign lands, tenements, and hereditaments, and all and singular other acts and deeds to do and execute by the same name."

By on order of the Board of Trade made under the Sea Fisheries Act, 1868, and confirmed by the Oyster and Mussel Fisheries Order Confirmation Act, 1876, the power of regulating the oyster and mussel fishery in a part of the estuary of the Truro river was conferred upon the plaintiff corporation.

By an indenture, dated the 4th of June, 1897, the plaintiffs, in order to enable them more efficiently to carry out their powers under the said order, obtained a lease of certain parts of the foreshore of the said estuary for a term of fourteen years from the 29th of September, 1896, at a yearly rent of £15.

The oysters when freshly dredged from the oyster beds in the fishery were unfit for the market owing to the water being contaminated with copper from the washings of the copper mines in the vicinity, and the fishermen had from time immemorial been in the habit of depositing the oysters, when dredged from the fishery, for a considerable time upon a portion of the foreshore leased to the plaintiffs as aforesaid in order to get rid of the copper.

The defendant and other fishermen exercised this right, each having a particular space for depositing his oysters, which space was allocated by an arrangement amongst the fishermen themselves and was staked out by withies stuck in the bed of the river.

The defendant, in accordance with this custom, was in the habit of depositing the oysters dredged by him upon a particular space on the plaintiffs' foreshore.

The plaintiffs, claiming as lessees of the foreshore under the lease of the 4th of June, 1897, brought the present action against the defendant, alleging that the acts of the defendant in depositing the oysters on the foreshore as above described were acts of trespass committed on the foreshore.

The jury at the trial found, in answer to the learned judge, (1) that the acts done by the defendant did not constitute an occupation of the soil; (2) that such acts were merely incidental to the fishing for oysters, and (3) that the oyster fishery could not be practically carried on without a storage.

Upon these findings the case was reserved for further consideration.

The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), provides as follows: "Section 1.—(1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a licence from her Majesty the Queen or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be

forfeited to her Majesty from the date of the assurance, and her Majesty may enter on and hold the land accordingly."

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), provides as follows: "Section 105.—A municipal corporation may contract for the purchase of and hold any land not exceeding in the whole five acres, either in or out of the borough, and thereon, or on any land belonging to or hold in trust for the corporation, may build a town hall . . . or any other building necessary or proper for any purpose of the borough."

"Section 107.—(1) When any municipal corporation has not power to purchase or acquire land, or to hold land in mortmain, the council may, with the approval of the Treasury, purchase or acquire any land in such manner and on such terms and conditions as the Treasury approve, and the same may be conveyed to and held by the corporation accordingly.

"(2) The provisions of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, relating to the purchase of land by agreement and to agreements for sale . . . shall extend to all purchases of land under this section."

Duke, K.C. (*J. A. Hawke* with him), for the plaintiffs.—The plaintiffs are entitled to damages and an injunction. Section 1 of the Mortmain and Charitable Uses Act, 1888, operates as a forfeiture to the Crown of land acquired by a corporation in mortmain, but the title of the corporation to such land is good if those who have power to enter do not do so: Brice on *Ultra Vires* (3rd ed.), pp. 63-4; *Great Eastern Railway Co.* v. *Turner*, 21 W. R. 163, L. R. 8 Ch. App. 149; *Ayres* v. *South Australian Banking Co.*, 19 W. R. 860, L. R. 3 P. C. 548, per Mellish, L.J., at pp. 558-9. Further, the Mortmain Act does not apply here, for by section 12 of that Act a corporation authorized to hold land is exempted from the operation of the Act. The corporation have power by their charter to acquire and hold lands, and that charter is wide enough to include leaseholds. By section 12 of the local Act of 1876 they are given power to make bye-laws for the regulation of these fisheries, and the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), establishes a code for their management. Section 41 of that Act provides that "where an order of the Board of Trade . . . confers a right of regulating an oyster and mussel fishery . . . the persons obtaining the order . . . shall . . . have power (*c*) to provide for depositing and propagating oysters and mussels within the limits of the fishery, and for improving and cultivating the fishery." The Board of Trade have in this case made an order which has been confirmed by Parliament (39 & 40 Vict. c. xci.). The defendant has got a right of fishery, but that right does not entitle him to appropriate a particular part of the foreshore and deposit oysters there. The right is confined to the taking of fish and carrying them away. The defendant may not occupy the foreshore; that would be a dispossession of the owner and would amount to a user enabling him in course of time to acquire a statutory title to the portion of the foreshore used by him: *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770, 28 W. R. Dig. 95. The acts of the defendant amounted to a trespass: *Blundell* v. *Catterall*, 5 B. & Ald. 268. The right of fishery does not give the defendant a right to deposit and store oysters on the foreshore: *Earl of Ilchester* v. *Raishley*, 38 W. R. 104; *Ward* v. *Creswell*, Willes, 265; *Gray* v. *Bond*, 2 Brod. & B. 667; *Aiton* v. *Stephen*, 1 App. Cas. 456, 24 W. R. Dig. 249.

Foote, K.C. (*Bodilly* with him), for the defendant.—The claim of the defendant to deposit oysters was in no sense a claim to the occupation of the soil. The depositing is incidental to the right of fishery. The oysters were not stored there by the defendant, but merely deposited until they were purified. The right to do so had existed from time immemorial. There had been no trespass on the part of the defendant. The power given to the corporation by charter is to hold lands in fee simple only. The term "chattels" in the charter does not include leaseholds, nor has the corporation power to hold this lease under the Municipal Corporations Act, 1882. This is not a question of mortmain. The question depends upon the power given the corporation by the charter—namely, a power to hold lands in fee. The plaintiffs had no power to take this lease.

Duke, K.C., replied.

Cur. adv. vult.

Aug. 10.—WILLS, J., read the following judgment: The plaintiffs complain of various acts done by the defendant which they allege are acts of trespass committed on parts of the foreshore of the Port of Truro, of which the plaintiffs claim to be the lessees by virtue of a lease for fourteen years granted in the year 1897. The acts complained of are the depositing of oysters which have been dredged up from the oyster beds in other parts of the harbour, and which are placed by the defendant in a particular spot and kept there until they are ready and wanted for sale in the market. The defendant is in the habit of keeping to a particular spot, which is very roughly indicated by withies stuck in the soil or bed under the sea. It is not quite clear whether they are placed on the foreshore or below the line of foreshore; but I have the strongest impression that it was mentioned in the course of the case that they are below low-water mark. Other fishermen do the like, and the practice has been the same as far back as living memory goes. It is not contended that the defendant has any legal right to the spot in question, only that he has the right to use some part or other of the foreshore in this way, to this extent and for this purpose, as an incident to the right of fishing for oysters. The right is claimed both as a common law right and as existing by immemorial custom. The allocation of particular spaces to particular individuals is an act of comity among the fishermen themselves, and up to the present time it does not appear that any difficulty has arisen out of it. It is alleged by the plaintiffs that the time is at hand when by the improvement of the fishery and the increase in the number of the fishermen difficulties will arise which will render the possession of the foreshore by them very desirable, if not necessary, for the regulation of the fishery. The plaintiffs also complain of these acts as amounting to an occupation of the soil which will in time give a title to the occupant. The ground may be cleared at once to a certain extent. The jury have found that the acts in question were not acts of occupation but were incident to and practically necessary for the oyster fishing. The circumstances are peculiar. The oysters as gathered from some of the beds are contaminated with copper from the washings of the copper mines, and they require a prolonged stay in the particular locality in question to get rid of the copper. Oysters gathered from other beds are sometimes fit for immediate use and sometimes require to be laid down; and it is needless to say that the oysters are not kept unsold longer than is necessary. The only importance of the facts relating to the use of the fishery is as explaining the necessity for a place of deposit, without which the fishery would be of little value, and I think the jury for that and other reasons were justified in finding that the Truro oyster fishing requires such a

place of deposit. The finding that the acts were not acts of occupation gets rid of the contention that the defendant is acquiring a title under the Statute of Limitations, and reduces the questions for my consideration to two—namely, Have the plaintiffs made out such a title as will enable them to maintain an action of trespass; and, secondly, can a right of deposit on the foreshore legally exist as an incident to the right of fishing for oysters? The plaintiffs do not appear, upon the evidence, to have done any single act of possession or ownership since the lease was granted. There is no evidence, for instance, that they have taken money for ballast or exercised any other act of ownership. They have therefore to rely upon the right of possession which flows from ownership and upon the presumption of actual possession which follows upon such legal right. It becomes necessary, therefore, to consider the objections which have been taken to their title. They are two; first, under the Statutes of Mortmain; and, secondly, under the Municipal Corporations Act, 1882. The Statutes of Mortmain appear to me to have nothing to do with a short lease for fourteen years. It does not seem to be open to the class of objections which gave rise to the Statutes of Mortmain, and I find that both Shelford's Statutes of Mortmain (1836), p. 9, and Tudor's Charitable Trusts, (3rd ed, 1889), p. 382, treat this as clear law, and they give a number of authorities for the proposition. These objections, therefore, may be shortly dealt with and put on one side, and I may add that as the Statutes of Mortmain do not apply, the licence to hold lands in fee which it is plain from the charter of Elizabeth existed in the old charters, and which had no application to leaseholds, is equally beside the question. The licence to hold goods and chattels, which term is used, where it is used, in contradistinction to lands, cannot, I think, have any application to leases of land. As to the objection under the Municipal Corporations Act, section 105 of the Act of 1882 confers powers on corporations to purchase or hold a limited quantity of land for certain purposes without consent of any authority, and section 107 provides that with the consent of the Treasury (for which the Local Government Board is now substituted by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72), where the corporation has not power to purchase or acquire land or to hold land in mortmain, they may purchase or acquire any land on such terms as the Treasury may approve; but I think it is clear from the reference to mortmain that the Act is speaking of the acquisition of lands in fee or for such long terms as the Statutes of Mortmain do attach to, and I do not think that the implied prohibition to go outside those sections has ever been applied in practice to prohibit the taking of land by a municipal corporation on short leases, or been supposed to extend to such leases. I can see, therefore, no objection to the lease on that ground. But a municipal corporation as such has nothing to do with foreshore or foreshore rights, and the limits of expenditure are prescribed by section 140, and Schedule V., and I think they do ferbid the payment by a municipal corporation as such out of the borough fund of such a rent as this, and that, therefore, if the lease is *intra vires* it must be supported under some other powers. This brings me to the question of whether, under the Sea Fisheries Act, 1868, and the order made in pursuance of that Act by the Board of Trade and confirmed by the local Act of 1876 (39 & 40 Vict. c. xci.), any such power is conferred. There is neither in the Act of 1868 nor in the local Act any express power conferred on the grantees, who in the present case are the plaintiffs, to take and hold foreshore. On the other hand, I start with the proposition that there is no statutory or other disability which prevents a corporation, merely because it is a corporation, from acquiring a short leasehold. It seems to me, therefore, that if the acquisition of the leasehold affords a reasonable facility to the corporation for the carrying out the purposes of their Act of 1876, they may do so. This view is much strengthened by section 47 of the Sea Fisheries Act of 1868. By section 46 no fishery order can be obtained where the Crown or the Duchy of Cornwall owns the foreshore, without the consent of such owner, so that the Crown or the duchy can make its own terms. By section 47, if the foreshore belongs to a private owner no consent is necessary, but for the protection of the owner it is enacted that the order shall incorporate the Lands Clauses Act, 1845. This would of course give no power to buy any existing interest, freehold or leasehold, in the foreshore unless the special Act—that is, the order confirmed by Parliament, should confer it, and even then it would be a power to buy an existing interest, not to create a new leasehold. But it is the clearest possible intimation that it may be a useful thing for the grantees to have the foreshore, and the section applies to both classes of orders—those which create several fisheries, and those like the present order, which only give power to regulate the fishery. I have come to the conclusion, therefore, that the acceptance of the lease is not *ultra vires*, and that, therefore, the right to possession draws the possession with it, and that so far as this objection is concerned the plaintiffs are not out of court. For one reason I am not sorry to come to this conclusion, inasmuch as it avoids a purely technical difficulty available in another action, and leaves open only the one real question important to the parties—namely, Is there any legal objection to the finding of the jury that the acts complained of are incidental to the right of enjoyment of oyster fishing? I think the question is very nearly answered when I say that it appears to me to be a perfectly right conclusion in fact. A great part of this oyster fishery would be useless without it. I believe the same is true in varying degrees of advantage or necessity in most oyster fisheries. In this case oyster laying is absolutely necessary to sweeten some of the oysters, and the source of pollution certainly existed long before legal memory if one is at liberty to resort to history and tradition. I do not think, however, that it would make any difference were that not so. The practice is traced back as far as living memory can go, and that is evidence of immemorial usage. Oyster laying often has to be resorted to for the purpose of feeding and fattening before the oysters are ready for consumption, and although oysters may be and I believe often are sold as dredged, yet they quite as often have to be deposited and left for a time before being fit for the market. In an interesting article on oysters in the 9th edition of the Encyclopædia Britannica, the temporary laying of oysters for such purposes as I have mentioned is treated as a regular "concomitant"—to use the writer's phrase—of an oyster fishery, and I cannot see how any valid objection can be raised to a practice so widespread and so ancient. The chief objection that has been made is that it amounts to an occupation of the soil. I think this is disposed of by the finding of the jury. It was clearly a question of fact for them, and in my opinion their finding is right. The mere sticking in of a stake to indicate a spot is too trivial to talk about, even if it be on the foreshore, which I think is not the case. It is quite true that the oyster laying may interfere with the uninterrupted user of the foreshore by the owner, but a like interference with territorial rights takes place in many instances which

present no legal difficulty. The rights of inhabitants to recreate themselves on a village green have been repeatedly established by evidence and upheld by the courts, and yet they may absolutely destroy all chance on the part of the owner of making any, or any but the slightest, beneficial use of land which is undoubtedly his. The custom here alleged is not open to the objection that it is in substance a claim to a profit *à prendre*, nor in my judgment to any other legal objection to its validity. Apart from custom the owner of the foreshore owns and enjoys the foreshore subject to the common rights of all members of the public which are such as to reduce the value of the foreshore in nine cases out of ten to something of very small pecuniary value. The owner cannot build on it because the public have rights of passage over it everywhere *per mare et per terram*. In all but some exceptional cases he cannot graze it, because no herbage will grow upon it. Where herbage will grow upon it, as in the fens, I do not think oysters will be found to be composite factors. At all events the enjoyment of foreshore is subject to the common rights of fishing, and if oysters constitute a part of the fish to be taken, the right of fishing must include the necessary and practical incidentals, and if they involve the consequences that in some places he cannot dig ballast or sand for sale, as he can generally, he suffers no inconvenience or loss which is not common to him and the owner, say, for example, of the village green, who cannot dig pits or do other acts of ownership which would interfere with the rights of recreation of the inhabitants. I am of opinion, therefore, that whether the rights claimed be regarded as parts of the common law rights of oyster fishing, or as claimable by immemorial custom, they can stand in law, and as they have been established in fact, the acts complained of by the plaintiff are justified. Suggestions were made that the rights in question, if upheld, might lead to trouble between the fishermen, whose numbers, it is said, are increasing, so that the old comities observed between themselves will no longer meet the necessities of the case. I do not think that such considerations affect the existence or non-existence of the rights. Inconvenience of this kind must be always liable to arise when the class of persons enjoying concurrent rights over a limited area comes to include more than can conveniently enjoy the rights simultaneously. The remedy lies usually in some form of legislation. In the present case it seems to be amply met by the powers of regulation given to the plaintiffs by the order of the Board of Trade confirmed by the Act of 1876. My judgment must therefore be for the defendant, with costs.

Judgment for defendant.

Solicitor for the plaintiffs, *John A. Bartrum*, for *Robert Dobell*, Truro.

Solicitor for the defendant, *Sydney James*, for *J. Messer Bennetts*, Truro.

K. B. Div. (Wills, J.) — Aug. 7, 1901.

MICHAEL v. HART & CO. (a.)

Damages—Measure of—Principal and agent—Stockbroker and customer—Wrongful sale of shares—Breach of contract.

The plaintiff opened an account with the defendants, stockbrokers on the London Stock Exchange, and employed them to buy and sell stocks and shares for him, in pursuance of which contract the defendants bought certain stocks and shares on behalf of the plaintiff, and the defendants entered into an agreement with the plaintiff that they would carry over such stocks and shares to a certain settling day, holding them in the meantime at plaintiff's disposal. In breach of such agreement the defendants, before such settling day and without the plaintiff's consent, sold such stocks and shares to the plaintiff's detriment.

Held, that, in assessing the amount of damages sustained by the plaintiff, he was entitled to be credited with the amount which would have resulted from a sale at the highest price the said stocks and shares could have realized between the date the account was wrongfully closed and the settling date to which the defendants had agreed to carry it over.

Further consideration by Wills, J., in an action brought for damages for breach of contract and tried before him with a jury on the 29th of July, 1901.

In April, 1901, the plaintiff employed the defendants, who are stockbrokers, members of the London Stock Exchange, to buy and sell stocks and shares for him, and he deposited with them certificates of certain shares held by him to secure any balance that might from time to time become due from him to the defendants in respect of the transactions, and this security the plaintiff afterwards increased by a further deposit of shares.

In pursuance of this employment various transactions for purchase and sale of shares were conducted by the defendants for the plaintiff for the end of April, 1901, and the mid-May, 1901, settlements on the Stock Exchange.

On the 11th and 13th of May, 1901, it was orally agreed between the plaintiff and the defendants that certain contracts for the purchase of stocks and shares which had been made by the defendants on the plaintiff's account for the Stock Exchange settlement in the middle of May should be carried over for the settlement at the end of May.

Such stocks and shares were respectively carried over by the defendants at the mid-May settlement for the end of May settlement, and the usual contracts for such carrying over were sent by the defendants to the plaintiff, who then became entitled to all the advantages of the carrying over during the currency of the account to be concluded at the end of May settlement.

The defendants wrongfully, and in breach of their contract with the plaintiff, on the 16th of May realized all the plaintiff's holding by buying in against the plaintiff 200 shares in Rand Mines and selling out against him the other shares and stocks open, at prices greatly to the detriment of the plaintiff, and they then claimed to realize the deposited share certificates in order to satisfy the amount which upon the balance of the account they alleged to be due to them from the plaintiff.

The plaintiff sued the defendants for breach of contract, and claimed a declaration that he was

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

entitled to have an account taken on the footing of his being credited with the highest prices which the stocks and shares would have realized at any time during the currency of the account terminating on the 28th and 29th of May, and he also claimed the delivery up of the shares which had been deposited with the defendants as security.

The jury found a verdict for the plaintiff, and the question as to the measure of damages the plaintiff was entitled to was reserved for further consideration.

Rufus Isaacs, K.C. (*A. J. David* with him), for the plaintiff.—The true measure of damages to which the plaintiff is entitled is the profit which would have been gained by a sale of the stocks and shares at the best price obtainable at any time between the date of the breach of the contract and the settlement at the end of May: *Murray* v. *Hewitt*, 2 Times L. R. 872. In *Shepherd* v. *Johnson*, 2 East 211, Grose, J., says: "The true measure of damages in" an action for breach of an engagement to replace stock on a given day "is that which will completely indemnify the plaintiff for the breach of the engagement." In *Harrison* v. *Harrison*, 1 C. & P. 412, Best, C.J., says: "Justice is not done, if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there."

Counsel also referred to *Shaw* v. *Holland*, 15 L. J. Ex. 87, and *Brown* v. *Muller*, 21 W. R. 18, L. R. 7 Ex. 319.

Lawson Walton, K.C. (*Herbert Reed, K.C.*, and *Kisch* with him), for the defendants.—The measure of damages to which the plaintiff is entitled must be assessed at the price of the stocks and shares either at the date of the breach of the contract—namely, the 16th of May, or at the date to which they would in ordinary course have been carried over—namely, the 31st of May. Plaintiff cannot claim damages assessed on the prices obtainable on any of the intermediate dates that were most favourable to him and most unfavourable to the defendants on the mere assumption that he would have realized on such dates.

Counsel referred to *Ellis* v. *Pond*, [1898] 1 Q. B. 426, 46 W. R. Dig. 138.

Isaacs, K.C., replied.

WILLS, J.—The only question I have to deal with here is one as to damages.

The plaintiff had entered into contracts with the defendant, as his agent, and the defendant had made contracts on his behalf, which entitled him to have shares delivered to him on the carrying-over day, on payment of a certain sum of money, at certain prices. That is part of what the defendant undertook. Another part of what the defendant undertook was that in the meantime he would sell the same shares for the plaintiff when directed to do so by him, and for any possible loss on this transaction he seemed to have held ample cover as security.

He did not do so, but repudiated the contract.

It seems to me that the plaintiff is plainly entitled to all the advantages which would have been his, or which might have been his had the contract been carried out. That is a perfectly sound principle. Amongst these advantages, it is contended, there was the right to sell the shares whenever he chose during the period over which the transactions were to run, and at different times, with respect to different stocks, different prices might have been realized.

Now it is perfectly certain that, as a matter of fact, with regard to these prices, the best prices that ruled during that time never would have been realized. It is equally certain that in some cases in which people are held liable for breach of contract or for withholding property, to the possession of which the plaintiff is entitled, he has been held to be entitled to the best price that has ruled during the period over which the transactions have run; and it is equally certain, with regard to a great number of those cases, that nobody supposes that one can ever get, as a matter of course, the best prices. The great probability is that he would have speculated and exercised his judgment in some cases rightly and in some cases wrongly. But I think I am right in saying that that element has never been allowed to enter into consideration for the purpose of reducing damages, and it seems to me that this is one of those cases in which the wrongdoer suffers because he is a wrongdoer, and that the plaintiff really is entitled to the best prices which ruled during the period during which it was at his option to sell or not to sell.

In questions of damage it is very difficult to lay down any rule which shall really do actual justice between the parties; the rules are obliged to be more or less arbitrary, and this case is, I think, an illustration of it.

I think upon that view, and also upon the view that the wrongdoer must suffer, the burden must be upon the wrongdoer and not upon the other party.

I think, therefore, that the measure of damages which Mr. Isaacs has contended for is the right one to apply in this case.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Martin & Co.*

Solicitors for the defendants, *Beyfus & Beyfus.*

K. B. Div.
(Lord Alverstone, L.C.J.) } June 14, 24, 1901.

MERCER v. LIVERPOOL, ST. HELEN'S, AND SOUTH LANCASHIRE RAILWAY CO. (*a.*)

Lands clauses—Compulsory taking of land—Notice to treat—Interest created by owner in adjoining land subsequently to date of notice—Injurious affection of such land—Right to compensation—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 68.

The defendants, under their statutory powers, served a notice to treat on the owner of certain land. After the date of this notice the owner leased certain adjoining land, not included in the notice to treat, to the predecessor in title of the plaintiff for a long term of years. Subsequent to such lease an agreement was made between the owner and the defendants in respect of the land included in the notice to treat, and compensation paid to the owner for all damage sustained by him by reason of the severing of the property purchased from him, from his other property, or otherwise injuriously affecting such other property. Owing to the execution of certain works by the defendants the plaintiff's property was injuriously affected.

Held, that the plaintiff, although his predecessor's title was created after the date of the notice to treat, was entitled to claim compensation for the injurious affection of his interest in the property.

The service of a notice to treat does not prevent the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

owner of the property to which the notice to treat relates dealing with property other than that included in the notice, and persons who bonâ fide *acquire interest in such other property are not deprived of their claim to compensation for injurious affection by works subsequently executed simply because, after the date of the creation of their interest, an agreement has been made between the purchaser and the owner whereby the owner has been paid compensation for the land taken and for the injurious affection of his other property.*

Trial before Lord Alverstone, L.C.J., without a jury.

The following are the facts of the case as set out in the written judgment of the Chief Justice:

The action was brought by a Mrs. Mercer to recover the sum of £371 10s., the amount of an award made under the Lands Clauses Act, and the costs subject to taxation of the arbitration.

The award was made on the 5th of March, 1897, in respect of the injurious affection of certain leasehold land and houses adjoining Birchley-street, St. Helen's, belonging to the plaintiff.

The land in question forms part of the estate of Lord Gerard, and previously to the granting of the lease hereinafter referred to was in his possession as owner.

Before the year 1886 certain streets had been laid out and partially constructed, and at the time of the application to Parliament in 1886, hereinafter mentioned, a certain street known as Standish-street was already in existence. Certain other streets communicating with Standish-street, and among others Birchley-street, had already been laid out though not constructed.

In the years 1885 and 1886 applications were made to Parliament by the predecessors of the defendant company for powers to construct a railway from St. Helen's to Wigan, and by the St. Helen's and Wigan Junction Act, 1886, s. 4, powers were granted to construct, among others, Railway No. 4, in the township of Windle, commencing by a junction with a certain other line of railway, and terminating at or near the intersection of College-street and Corporation-street, which is a short distance to the south of Standish-street.

In the passage of that Bill through Parliament an agreement was come to by Lord Gerard and the promoters which was embodied in section 13 of the Act of 1886. By that section the company became bound within twelve months from the passing of the Act to purchase certain land, indicated upon a certain plan, and the section contained provisions whereby the company were to take the land, and make, sewer, and flag half of Birchley-street, construct a bridge to carry the railway over Standish-street, and lower the other streets and adjoining building land to correspond with the streets which had to be lowered to be passed under the railway.

The Act incorporated the Lands Clauses Act, and section 21 contained the usual limits of time for exercising the compulsory powers.

By an Act of 1889 the twelve months mentioned in section 13 of the Act of 1886 was extended for one year from the 26th of July, 1889, to the 26th of July, 1890; and by an Act of 1891, the powers of compulsory purchase under the Acts of 1885 and 1886, which had become vested in the defendants, were extended until the 20th of July, 1893. But there was no further extension of the twelve months ementioned in the said section 13.

Prior to the year 1891 nothing had been done by the railway company to carry out the agreement mbodied in section 13 of the Act of 1886.

On the 23rd of October, 1891, the defendants served upon Lord Gerard a notice to treat to take the land necessary for the railway.

The plan annexed to the notice to treat was for the purpose of this case identical with the plan referred to in section 13 of the Act of 1886. The notice did not refer to section 13, nor was it in any way given under that section: it was an ordinary notice to treat given by the defendants under their compulsory powers to acquire compulsorily the land shown upon the plan.

On the 12th of January, 1892, Lord Gerard sent in his claim under the notice to treat. This claim was made subject to and upon the basis of the company carrying out the provisions of section 13 of the Act of 1886.

In the month of February, 1892, Lord Gerard's agent agreed with one John Gleave, the predecessor in title of the plaintiff, to let him certain land on the east side of Birchley-street opposite the land in respect of which notice had been given by the railway company for a term of 999 years. The land was let for the purpose of building.

On the 14th of June, 1892, a lease was granted pursuant to that agreement, the term reserved being from the 1st of January, 1892, and the lease contained provisions that the lessees should within twelve calendar months build a certain number of houses upon the land demised. Some of the houses were in fact built during the summer of 1892, and some of those houses were occupied by tenants of Gleave prior to October, 1892.

On the 14th of October, 1892, an agreement was made between Lord Gerard and the defendants in respect of the land included in the notice to treat, and under that agreement Lord Gerard agreed to sell the land shown upon the plan annexed to the notice to treat, a copy of which was also annexed to the agreement, for the sum of £23,000, such sum to include all satisfaction and compensation for all damages sustained by the vendor by reason of the severing of the property purchased from the vendor from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers.

By clause 4 of the agreement the purchase was to be completed on the 30th of November, 1892. The agreement provided by clause 6 that the company should make, sewer, flag, and channel the western half of Birchley-street. The purchase was not completed on the date contemplated.

In 1893 Lord Gerard commenced proceedings to obtain specific performance of the agreement of the 14th of October, 1892, and subsequently, upon the 27th of November, 1894, a deed of conveyance was executed by Lord Gerard whereby, after reciting that the defendants had agreed with him, the vendor, for the purchase of the land thereinafter conveyed, and among others of the rights conferred by section 13, sub-section 3, of the Act of 1886, for the sum of £24,209, which sum it had been agreed should include all satisfaction and compensation for all damages sustained by the vendor, or by reason of the severance of the property purchased from the vendor's other property, or otherwise injuriously affecting such other property by the exercise of the statutory powers, Lord Gerard conveyed the land the subject of the notice to treat to the defendants.

Subsequently to October, 1894, the defendants constructed the railway, lowered the level of Standish-street and of the northern end of Birchley-street so as to bring it to the same level at the junction of Standish-street with an upward incline towards the south, and put up a retaining wall to support the plaintiff's houses. The result of these operations by the defendants was that the access to the plaintiff's houses was permanently interfered with.

On the 12th of November, 1895, the plaintiff gave a notice claiming compensation for injurious affection under the 68th section of the Lands Clauses Act, and appointed an arbitrator, and, the usual formalities having been observed, the umpire in due course made his award, awarding to the plaintiff the sum of £371 10s. in respect of the damage and injury sustained by the plaintiff in or to her lands, messuages, and hereditaments by reason of the execution of the works of the company, and by reason of such lands, messuages, and hereditaments being injuriously affected.

Jelf, K.C. (*MacConkey* with him), for the plaintiff.

McCall, K.C., T. G. Horridge, K.C., and *Lorraine*, for the defendants.

The arguments of counsel sufficiently appear in the following judgment.

Cur. adv. vult.

June 24.—Lord ALVERSTONE, L.C.J., having stated the facts as set out above, read as follows: It was not disputed that the lowering of the road and the interference with the access to the plaintiff's houses did cause an injurious affection which would, under ordinary circumstances, entitle the plaintiff to compensation. This has been for a long time settled; but it was said that either the provisions of section 13 of the Act of 1886, or the giving of the notice to treat on the 23rd of October, 1891, coupled with the payment to Lord Gerard of the compensation in pursuance of the agreement, prevented the plaintiff from being entitled to recover compensation in respect of the injurious affection of the land demised to Gleave under the lease of the 14th of June, 1892. In my opinion no argument can properly be founded by the defendants upon the statutory bargain contained in section 13 of the Act of 1886.

That bargain was never carried out. The lands were not purchased under the agreement therein contained. The powers of the company for carrying out that bargain expired on the 26th of July, 1890. The land was in fact purchased under the compulsory powers contained in the Act of 1886, the time for the exercise of those powers having been extended by section 3 of the Act of 1891.

The question, therefore, to be determined is, did the transaction between the company and Lord Gerard, founded upon the notice to treat of October, 1891, disentitle the plaintiff to the right of compensation which would have otherwise existed? It is well established that no compensation can be claimed in respect of an interest in land the subject of a notice to treat created subsequently to the date of the notice: *Ex parte Edwards*, 19 W. R. 1047, L. R. 12 Eq. 389; *Wilkins* v. *Mayor of Birmingham*, 32 W. R. 118, 25 Ch. D. 78; *Todd* v. *Metropolitan District Railway Co.*, 19 W. R. 720, 24 L. T. Rep. 435, and other cases. The argument of the defendants in this case, however, goes further. It is contended by them that after the service of the notice to treat, either taken alone or in conjunction with section 13 of the Act of 1886, no owner of any interest in property created by Lord Gerard after the date of the notice could make any claim for compensation for any injurious affection sustained by any such property in consequence of the construction of the works authorized by their parliamentary powers. In my opinion this contention is not well founded.

There are many reasons why the principle that an interest cannot be created in the land the subject of the notice to treat should not be extended in the way suggested. The notice to treat does not determine the amount of compensation for the land taken, or the amount to be paid for injurious affection. It does fix and stereotype the interest which the company desire to acquire; but the amount to be paid is the subject of subsequent agreement, or, it may be, of assessment by a jury or arbitrators. Between the time when the notice to treat is given and the damages are actually assessed a landowner may, as far as I know, deal with his adjoining lands. There is no statute or principle to restrain him from so doing, and when the amount to be paid is ascertained, whether by agreement or judicial proceedings, the real nature of the injury by severance or injurious affection has to be considered. The vendor may, since the notice to treat, have ceased to own other parts of his property. No doubt, if it could be shown that the vendor, with the consent of the person claiming the subsequent interests under him in lands other than those taken, had claimed and received compensation in respect of those interests, it might raise the case which has sometimes been made that the vendor received less for his interests in the other land from the persons acquiring them because he intended to claim and receive compensation to recoup him for accepting a lower price from the persons acquiring the interests. In my opinion, however, any such case would have to be established by evidence, and does not flow as a legal deduction from the mere fact that a notice to treat has been given for land other than that out of which the interests have been created. I may observe that by their defence the defendants properly raised an issue on this point. In this case the defendants have not adduced any evidence that in fixing the purchase-money ultimately paid to Lord Gerard anything was included for the damage to the property leased to the predecessors of the plaintiff by the lease of June, 1892.

It is true that the agreement of the 14th of October, 1892, speaks of compensation for injurious affection of the other property of the vendors. At the time that agreement was made the lease was in existence. The houses were already built fronting upon Birchley-street, and, in my opinion, it was for the defendants to prove that some claim was made or item included in respect of the then existing land and houses which now belong to the plaintiff. There is no evidence that Gleave had any notice or knowledge of the fact that the notice to treat was served on Lord Gerard in October, 1891. He must be deemed to have known of the provisions of section 13 of the Act of 1886, but, as I have already said, the land was not taken under that section, but under the ordinary compulsory powers. Evidence was given that the solicitors for the railway company did not know of the lease of June, 1892, when they made the agreement of October; but, in my opinion, that is immaterial in the absence of any evidence that a claim was being made or included in respect of the injurious affection of the land and houses in question which formed no part of the property taken. Moreover, I am by no means satisfied that the extent to which Birchley-street would have to be lowered was then known, or that the nature of the works which the defendants would have to execute to secure the plaintiff's property was known.

Section 13 of the Act of 1886 contemplated the possible lowering of Standish-street and Birchley-street to some extent, but I do not know that the actual degree of lowering could be ascertained until the railway was constructed, still less what works would be required to be carried out in connection therewith. The main ground on which I have decided in favour of the plaintiff is that, in my opinion, the service of the notice to treat does not prevent the owner of the property to which the notice to treat relates dealing with property other than that included in the notice, and

that persons who *bonâ fide* acquire interest in such other property are not deprived of their claim to compensation for injurious affection by works subsequently executed simply because the defendants have made a settlement with the vendor in respect of the land taken and injurious affection of his other property. As I have indicated, a great deal more requires to be shown before the right of compensation, otherwise admitted, can be taken away. I have assumed in favour of the defendants that the amount of £24,209 paid under the conveyance of 1894 included the £23,000 the subject of the agreement of October, 1892. It was contended on behalf of the plaintiff that I ought not to take this view; but, having regard to the recital in the deed of 1894 to which I have referred, I think that is established.

Judgment for the plaintiff.

Solicitors for the plaintiff. *Bell, Brodrick, & Gray*, for *J. Haslam Fox*, St. Helen's.

Solicitors for the defendants, *Maples, Teesdale, & Co.*, for *Oppenheim & Malkin*, St. Helen's.

K. B. Div.
(Ridley and Bigham, JJ.) June 17, 1901.

THRELKELD (*Appellant*) *v.* SMITH (*Respondent*). (*a.*)

Criminal law—Larceny—Deer—Unlawful possession of —Deer "kept or being in" a forest—Deer killed outside forest—Larceny Act, 1861 (24 *&* 25 *Vict. c.* 96), *ss.* 12, 14.

A person who kills and carries away a deer when it has strayed outside the boundaries of a forest, chase, or purlieu, in which it is usually kept, on to the land of a third person has not "unlawfully" killed the deer within the meaning of section 12 *of the Larceny Act,* 1861, *and cannot therefore be convicted under section* 14 *of being in unlawful possession thereof.*

Case stated by justices of Westmoreland.

On the 4th of March, 1901, an information under section 14 of the Larceny Act, 1861, preferred against Threlkeld, the appellant, by Smith, superintendent of police, the respondent, was heard and determined by the justices, who convicted the appellant and fined him £5.

J. E. Hasell was the owner of the uninclosed common and forest of Martindale, in which he kept a herd of wild red deer.

Lord Lonsdale was lord of the manor of Bampton, which adjoined Hasell's property, and comprised a large uninclosed common.

On the 18th of February, 1901, the appellant shot a deer which had strayed from Hasell's herd in the forest of Martindale on to the common belonging to Lord Lonsdale, and carried it away and concealed it within the buildings of his farm.

On the 25th of February the police, acting under a search warrant, found the body of the deer in the place in which the appellant had concealed it.

It was contended on behalf of the appellant that he ought not to be convicted for the following reasons:

1. That the deer, being wild and unreclaimed, belonged to the class of animals *feræ naturæ*; that any man might seize and keep for his own use animals *feræ naturæ* which have escaped from captivity; that the possessory property in such animals is gone when off the owner's land, even though driven off by a trespasser; and that therefore there could be no larceny of a deer.

2. That therefore the prosecution had to bring themselves strictly within sections 12 and 13 of the Larceny Act, 1861, and that these sections did not apply to the case, the words "kept or being" used in those sections not applying, inasmuch as the deer, when killed, was neither in the inclosed nor in the uninclosed part of the forest, chase, or purlieu.

3. That the deer not being the subject of larceny at common law, and sections 12 and 13 not applying, and Mr. Hasell not having any property in the deer at the place where it was killed, the appellant had committed no offence against either the common or statute law.

For the respondent it was contended that deer are not necessarily animals *feræ naturæ*, but that even if they are not the subject of larceny at common law, yet section 14 of the Larceny Act, 1861, applied.

The justices were of opinion that the appellant had not satisfied them that he had come lawfully by the deer for the following reasons: First, he had not shown that he had the right of shooting on the commons in the manor of Bampton; and secondly, he had unlawfully killed a deer kept in the uninclosed part of a forest, chase, or purlieu within the meaning of section 12 of the Larceny Act, 1861, there being a difference between the word "kept" and the word "being."

The question for the opinion of the court was whether the justices were right in point of law in finding that the appellant had not satisfied them that he came lawfully by the deer.

The Larceny Act, 1861 (24 & 25 Vict. c. 96), provides as follows:

"Section 12.—Whosoever shall unlawfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet. . . .

"Section 13.—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years. . . .

"Section 14.—If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof . . . he shall on conviction by the justice forfeit and pay any sum, not exceeding twenty pounds. . . ."

T. Shepherd Little, for the appellant.—The conviction was wrong. It was clear he had come lawfully by the deer. It was not a deer "kept or being in the uninclosed part of any forest" within the meaning of section 12, therefore no offence had been committed by the appellant within that section. The deer when killed was entirely outside the forest. The fact that the appellant had killed the deer outside the forest on the land of Lord Lonsdale did not

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

constitute an offence under the Larceny Act, 1861, and therefore he could not be said to be unlawfully in possession of it within the meaning of section 14. If a deer get out of a forest it cannot be said to be "kept in." The Act does not make it an offence to shoot a deer on uninclosed land which is not a forest: *Reg.* v. *Roe*, 11 Cox C. C. 554, 18 W. R. C. L. Dig. 31; *Reg.* v. *King*, 13 L. J. M. C. 43.

Danckwerts, K.C., for the respondent.—The conviction was right. The appellant "unlawfully and wilfully" killed the deer within the meaning of section 12. The deer when killed was a deer "kept or being" in an uninclosed forest within the meaning of section 12. The word "kept" does not mean that the deer must be actually within the forest, but refers to deer which are as a rule kept within the forest, and although they may occasionally stray from a particular forest, they are nevertheless "kept" there within the meaning of the section. The appellant had killed the deer unlawfully, and therefore he could not, under section 14, show that he had "come lawfully by such deer." Even if there had been no offence under section 12, nevertheless the appellant could not show he was in lawful possession within section 14 because he had killed the deer on Lord Lonsdale's property, which act was unlawful: *Davies* v. *Powell*, Willes, 46; *Blades* v. *Higgs*, 13 W. R. 927, 11 H. L. Cas. 621.

T. S. Little replied.

RIDLEY, J.—In this case the appellant was convicted of an offence under section 14 of the Larceny Act, 1861, the justices being of opinion that he had not satisfied them that "he came lawfully by" the body of a deer found in his possession. The deer in question was one of a herd of deer kept within the forest of Martindale belonging to a Mr. Hasell. This deer had escaped from the forest and was killed by the appellant upon land belonging to Lord Lonsdale, which was outside the boundaries of the forest. The appellant was the occupier but not the owner of the land upon which the deer was killed, and therefore he cannot set up the right that the deer belonged to him. The question therefore is whether the justices ought to have found that "he came lawfully by such deer," and this question depends upon the construction of certain sections of the Larceny Act, 1861. However, I will first state what I believe to be the law with regard to forests. Offences committed within the forests were, under the Norman kings, treated as capital offences, or were very severely punished, but by a series of statutes, passed from time to time, the severity of the forest laws was mitigated. That being so with regard to offences in respect of animals *feræ naturæ* committed within a forest, those offences were confined to crimes committed within the forest. There were, however, certain boundaries which were wider than the forest—namely, the outskirts of the forest, and in these outskirts there were certain wider rights belonging to those persons who held the land. In Coke's Institutes, bk. 4, ch. 73, it is said that: "When the king's game of the forest do range out of the forest (and purlieu if any be) they belong not to the king but are at their natural liberty, *et occupanti conceduntur*." That means that the person who found them was entitled to take possession of them. Assuming, however, that it only means that the occupier of the land may kill and take them, it seems to show that the rights of the forest ceased at the limits of the purlieu. A person who killed one of those animals outside the forest did not break the forest laws, and he was not subject to criminal proceedings, though, by taking an animal not belonging to him, he may have broken the civil law. Within the purlieus the owner possessed certain other rights which are stated in Manwood's Forest Laws and in Comyn's Digest, tit. Chase I. Within the forest the owner's right was absolute, within the purlieu he had a right to kill them if he caught them, but outside the purlieu he had no right. That law has been altered from time to time by various statutes, the latest of which is the Larceny Act of 1861. Section 10 makes the stealing of domestic animals an offence punishable with penal servitude. Section 11 enacts that "whosoever shall wilfully kill any animal with intent to steal the carcase . . . shall be guilty of felony," and be liable to the same penalty as under section 10, if the offence of stealing the animal would have amounted to a felony. That has no application to section 12, although it might have to section section 13, but it is unnecessary to decide that point, for the proceedings in this case are not taken under either of those sections. Then the statute goes on to deal with deer, and we have to consider whether sections 12 to 16 are to be read together as a code to be construed with regard to the previous law upon the subject, or whether they are new provisions which are to be construed without regard to the previous law, and to be given a wider meaning than they would otherwise receive. According to the one interpretation it would be unlawful for the appellant to kill outside the forest a deer which was usually kept within the forest. According to the other interpretation it would not be unlawful because he did not kill the deer within the limits of the forest. Which of these interpretations is correct? Are we to suppose that the Act intended to give a criminal complexion to an act which previously would not have been so regarded? I should hesitate long before holding that it so intended. It seems to me improbable that it was intended to treat persons who had killed deer which had escaped from a forest in the same way as if they had killed them within the forest. Some light seems to be thrown upon the meaning of the word "unlawfully" as used in the Act by the difference between the sections which make it an offence universally to kill domestic animals, and section 12, which does not make it an offence universally to wilfully kill deer. The very word "unlawfully" itself seems to indicate that there may be circumstances under which it might be lawful to kill deer within a forest. If so, may not the word "unlawfully" be sufficiently explained in that way? The word refers to the killing of a deer in a place where it is not lawful to kill it. Then we have to interpret the words "any deer kept or being in the uninclosed part of any forest, chase, or purlieu."

It has been argued that, as the word "being" is used, a wider meaning must be given to the word "kept" so as to include deer which are usually kept within the forest but which have escaped. We may, however, read these words in the sense that the statute is protecting the boundaries of a forest and not the rights of any particular person; that it protects not only the animals which are usually kept there, but also those which happen to stray there. If that be so it seems to me that this section is capable of a narrower construction than that for which the respondent contends.

Having regard to the previous law on the subject, I am of opinion that that is the proper interpretation of section 14, and that the narrower construction is the better one.

Section 13 we need not consider. Then we come to section 14, which provides that if any deer shall be found in the possession of any person, or on his premises with his knowledge, and he does not "satisfy the justices that he came lawfully by such deer," he may be convicted and fined. It was argued

on behalf of the respondent that the appellant was not in lawful possession of the deer, and that the justices could not find that he was, because the deer belonged to Lord Lonsdale under the rule of law that the owner of the land has the right to animals *feræ naturæ* which are on his land; and that no one has a right to kill them and take possession of them without the consent of the owner of the land. I do not think "lawfully" is used in that sense in this section. I think it is used in the same sense as "unlawfully" is used in section 12. Therefore if a person proves that he killed the deer outside the limits of a forest protected by section 12, I think he shows that he came by it "lawfully" within the meaning of section 14. Sections 15 and 16 are supplemental. They deal with attempts to kill deer and with persons who set snares or enter into a forest with intent to hunt deer. Under section 16 no person can be convicted unless he has done something within the forest, chase, or purlieu, whether inclosed or not. I think that furnishes an argument in favour of our view, and shows that all these sections are intended to protect animals at that particular place which is limited by the boundaries of the forest, chase, or purlieu. For these reasons I am of opinion that the justices were wrong, and that they ought to have found that the appellant was lawfully in possession of the deer.

BIGHAM, J.—I am of the same opinion. The respondent contends that section 14 is of general application, and is not to be read with exclusive reference to the offences created by sections 12 and 13. In my opinion that contention is not sound. Section 14 comes after the two sections which make it an offence to kill deer and before the two sections which do not relate to the offence of killing, and, therefore, I have no doubt that section 14 intends that the person charged shall not be convicted if he satisfies the justices that an offence has not been committed under section 12 or section 13, in which case he could, in my opinion, say that he came lawfully by the deer. Any other construction would lead to an absurdity, for it would make any person who happened to be in possession of any part of a deer liable to an information laid against him under section 14. In my opinion section 14 is only meant to apply to a person who is in possession of any part of a deer and is unable to show that an offence has not been committed in respect of it under section 12 or section 13.

Then it is contended that, even if section 14 is to be construed as having that narrow application, the appellant was guilty of an offence under section 12, because the deer which he killed was "kept" in the forest. This deer was one which, in a sense, was at one time "kept" or was in the uninclosed part of a forest, and would, therefore, appear to be a deer which, while it was there, came within section 12, which provides that "whosoever shall unlawfully and wilfully . . . kill any deer kept or being in the uninclosed part of any forest" may be convicted. Did the appellant "unlawfully" kill this deer? For the respondent it is contended that "unlawfully" in that section means in such a way as to violate the private rights of another individual, and that the appellant in killing this deer did violate the private rights of Lord Lonsdale. Assuming that is so, still, in my opinion, that does not make the appellant's act unlawful within the meaning of section 12. Probably it has always been contrary to the criminal law to "course, hunt, snare, or carry away, or kill or wound" any deer in a forest. From time to time statutes have defined the punishment for that offence, and they have from time to time been repealed and replaced by other statutes, the latest of which is the Larceny Act of 1861. Section 12 does not create the offence, but refers to it as an existing offence at common law, and means that if any man violates the criminal law by doing this act, he shall be liable to the prescribed punishment. In my opinion, the word "unlawfully," as used in this section, means, not in contravention of the rights of a private individual, but of the criminal law of the land. I do not think the appellant committed any unlawful act in that sense. He was possibly violating the rights of Lord Lonsdale, but he was not, in my opinion, therefore acting "unlawfully" within the meaning of section 12.

The next question is whether this deer was, at the time it was killed, "kept" in the forest, within the meaning of section 12. The deer was certainly not in any part of the forest, for it had escaped, and was in the manor of Bampton. It is contented, however, that although it was not in the forest it was "kept" in the forest. In my opinion section 12 refers only to acts done in the forest and not to anything done outside the limits of the forest, chase, or purlieu. I think the section means that the act must be done in the forest and that it is a criminal act if done there in respect of an animal which is either kept there by the owner of the forest or happens to be there.

I am therefore of opinion—firstly, that the act of the appellant was not, under the circumstances, done "unlawfully" within the meaning of section 12; and, secondly, that it was not an offence within the statute, because it was not done in a forest, chase, or purlieu; and, lastly, that it was not an offence because the deer was not at the time "kept or being" in a forest. The conviction was therefore wrong.

I would add that in my opinion the decision in *Reg.* v. *King* involves the conclusion that this offence cannot be committed except within the limits of a forest, because it was there held that the conviction was bad for omitting to state that the deer was in the inclosed part of some forest, chase, or purlieu.

Appeal allowed. Conviction quashed.

Solicitors for the appellant, *Edwards & Sons*, for *Scott & Allan*, Penrith.

Solicitors for the respondent, *Bleaymire & Shepherd*, Penrith.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) } Nov. 28.

ATTORNEY-GENERAL v. MAYOR, &c., OF EASTBOURNE. (a.)

Revenue—Stamp duty—Conveyance on sale—Person authorized by statute to purchase property—Purchase of realty and chattels—Stamp duty on consideration for sale of chattels—Finance Act, 1895 (58 & 59 *Vict.* c. 16), *s.* 12.

By section 12 *of the Finance Act,* 1895, *where by virtue of any Act, either* (a) *any property is vested by way of sale in any person, or* (b) *any person is authorized to purchase any property, such person shall produce to the Commissioners of Inland Revenue a copy of the Act or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the* ad valorem *duty payable upon a conveyance on sale of the property.*

Held, that the word "property" means specific property, whether real or personal, which is either vested in the purchaser by some Act or which the purchaser is authorized by some Act to purchase, and stamp duty is payable upon the whole consideraton for the purchase.

Judgment of the Divisional Court (ante, *p.* 59, [1901] 2 *K. B.* 773) *affirmed.*

Appeal from the judgment of a Divisional Court (reported *ante*, p. 59, [1901] 2 K. B. 773) on a special case stated by consent pursuant to ord. 34, r. 1, and ord. 68, r. 2, in an information by the Crown to recover £443 15s. and interest for duty under section 12 of the Finance Act, 1895, in respect of the purchase by the defendants of the undertaking of the Eastbourne Electric Lighting Co. (Limited) under statutory powers.

The consideration for the sale was the sum of £88,749 2s. 9d., and of this sum £37,929 was in respect of goods, wares, and merchandize, and the rest in respect of real estate.

The Crown claimed *ad valorem* duty upon the whole of the consideration. The defendants admitted that they were liable to pay duty in respect of so much of the consideration as related to the purchase of the real estate, but contended that no duty was payable in respect of the sum of £37,929. No appeal was brought in respect of the duty upon the sum of £2,000 mentioned in paragraph 5 of the case.

The facts are fully stated in the report of the case in the court below.

The Divisional Court (Kennedy and Phillimore, JJ.) gave judgment for the Crown. The defendants appealed.

By section 12 of the Finance Act, 1895: "Where, after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either—(*a*) any property is vested by way of sale in any person; or (*b*) any person is authorized to purchase any property; such person shall within three months after the passing of the Act or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property; and in default of such production, the duty with interest thereon at the rate of 5 per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to her Majesty from such person."

Danckwerts, K.C., and *Macoun*, for the defendants.—Some limitation must be placed on the word "property" in section 12; otherwise, whenever a highway board purchased materials for the repair of a highway, which they are authorized to purchase under section 52 of the Highway Act, 1864, or whenever a local authority purchased a water-cart or a lamp-post, which they can only do under statutory powers, a duly stamped conveyance would have to be produced to the Commissioners of Inland Revenue. This absurd result cannot have been intended by the Legislature. The test is whether a conveyance is required by law to pass the property. Personal chattels pass by delivery, and no conveyance is necessary. The section was not intended to impose new taxation, but merely to facilitate the collection of an old duty. Therefore the word "property" should be read as meaning personal chattels. No doubt, if a person chooses to take a conveyance of personal chattels, the conveyance must be stamped, but a conveyance is not necessary. Where property which requires a conveyance to pass it and property which does not require a conveyance are joined in one conveyance, the practice has been to apportion the consideration payable in respect of each for the purpose of stamp duty. The Divisional Court were therefore wrong.

They referred to *Great Western Railway Co.* v. *Inland Revenue Commissioners*, 42 W. R. 211, [1894] 1 Q. B. 507.

Sir Edward Carson, S.G., and *S. A. T. Rowlatt*, for the Crown.—The language of section 12 is clear. The section points to specific property which is either vested by some Act by way of sale in any person, or which some Act authorizes a person to purchase. The word "property" therefore includes all property, whether real or personal, which is specifically vested by some Act in any person or which some person is specifically authorized by some Act to purchase. This construction of the section avoids the difficulties suggested by the defendants. The contention on the other side would compel the court to read words into the section which are not there now. In the present case the defendants were authorized by statute to purchase the undertaking, including the real and personal property, of the Electric Lighting Co., and stamp duty is payable on the whole of the consideration in respect thereof.

Danckwerts, K.C., in reply.—A statute must impose a tax in clear terms: per Lord Halsbury in *Tennant* v. *Smith*, [1892] A. C. 150, at p. 154, 40 W. R. Dig. 216. Here the section does not purport to impose new taxation.

COLLINS, M.R.—In my opinion this appeal must be dismissed. The corporation were empowered by statute to purchase the undertaking of the electric company, which embraced freehold property and chattel property to a large amount. The Crown claim that it is the duty of the corporation, having acquired statutory power to purchase the whole of the undertaking, to produce to the Commissioners of Inland Revenue an instrument of conveyance stamped with the *ad valorem* duty payable in respect of the whole consideration for the purchase. The corporation are willing to produce a conveyance stamped in respect of the consideration payable for the realty, but deny their liability to produce a conveyance

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

stamped in respect of the consideration for the chattels. The question in dispute turns upon section 12 of the Finance Act, 1895. The Divisional Court held that the contention of the Crown was right—namely, that the corporation must produce a conveyance stamped in respect of the whole of the consideration. The contention of the corporation is that that is a wrong view of the section. It is said that the word "property" is so wide that it would embrace, if read in its wide meaning, all sorts of transactions which the Legislature cannot possibly have intended it to embrace in this section; for instance, materials for the repair of highways which the highway authority is authorized by statute to purchase, and lamp-posts which a local authority is similarly authorized to purchase. It is therefore said that some limitation must be placed upon the meaning of the word "property." It is said that the section is one intended, not to impose fresh taxation, but merely to facilitate the collection of taxation previously imposed; and it is said that before the Act if a person purchased both real property and personal chattels, he was not bound by law to take a conveyance of the chattels, as they would pass by delivery without a conveyance, and therefore, though they might both be included in the conveyance, he only paid *ad valorem* stamp duty on the consideration for the purchase of the realty. The Act, it is contended, did not intend to place the purchaser in a worse position than he was in before. I agree that we must place some limitation upon the meaning of the word "property" in the section. It seems to me, upon reading the whole section together, that we get a limitation arising fairly on the language used in the section, and if the result of that construction is to impose new taxation, it is imposed according to the fair reading of the section as a whole. It is not by a process of importing into the section words which are not there that the new duty is imposed. The words here are clearly capable, when read in their ordinary and natural meaning, of imposing the duty, and we are merely placing a limitation upon the wide meaning of the words. The governing factor in this legislation is that there is a purchase of particular property, which is either vested by some Act in the purchaser, or which the purchaser is empowered by some Act to purchase. If the property is specifically vested by the Act—section 12 (*a*)—in the purchaser, clearly *ad valorem* stamp duty is payable on the whole consideration. If, on the other hand, power is conferred by the Act to purchase the property—section 12 (*b*)—why should the purchaser in that case be relieved from paying the duty which he would have to pay in the first case? I agree that this reading of the section imposes additional taxation, but there is no reason to suppose, so far as I can see, why the Legislature, in cases of the purchase of ascertained property under statutory authority, did not intend to impose stamp duty upon the whole consideration for the purchase. The Legislature in the two cases is dealing with the same subject-matter, which has been treated differently in the two clauses of the section as a mere matter of machinery for effecting its transfer from the vendor to the purchaser. In so deciding we are not in any way straining the language of the section. The appeal must therefore be dismissed.

STIRLING, L.J.—I am of the same opinion. I have come to the conclusion that the limitation contended for by the Crown is the true one, because I think that the word "property" ought to be read in the same sense throughout the section. It is clear that the word, when used in clause (*a*), means all property specifically vested in the purchaser by the Act. In that clause property is obviously not limited to real property. The word must have the same meaning in clause (*b*).

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Sharpe, Parker, Pritchards, Barham, & Lawford,* for *H. W. Fovargue,* Eastbourne.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 8.

MCGARTH v. ROBERT NEILL & SONS. (*a*.)

Master and servant—Compensation for injuries by accident—"Building which exceeds thirty feet in height"—What level such measurement should be calculated from—Foundation footings—Height of building may include brickwork below street level—Workmen's Compensation Act, 1897, *s.* 7, *sub-section* 1.

In ascertaining the height of a building in course of erection for the purpose of deciding whether it is a building thirty feet high within the meaning of section 7 (1) *of the Workmen's Compensation Act,* 1897, *that part of the wall which is below the street level measured from the top of the concrete foundations may properly be included, even,* semble, *where that part of the wall is intended subsequently to be covered up with soil.*

Appeal by the employers, Robert Neill & Sons, from the decision of the Manchester County Court Judge in an arbitration under the Workmen's Compensation Act, 1897.

The accident to the applicant happened on a building in the course of erection the measurements of which if taken from the bottom of the footings or from the top of the footings came within the Act as being a building thirty feet high, but if measured from the street level or the basement level would in either case fall short of the statutory height.

The walls of the warehouse were at the time of the accident if measured from the bottom of the footing exactly 33ft. 2½in.; from the top of the footing, 31ft. 2½in.; from the basement floor, 29ft. 10in.; and from the level of the street, 23ft. 5¾in.

The county court judge held that the proper measurement was from the bottom of the footings to the top of the wall and as this measurement gave a height of 33ft. 2½in., he awarded compensation to the applicant.

The respondents appealed.

Clavell Salter, for the employers.—The mean level of the street is the proper place to measure from, where the foundations, &c., are covered in. A distinction has always been drawn between height and depth. They are relative terms no doubt. Suppose a man had a well dug 100 feet deep and lined with brick-work from top to bottom. If he stood at the bottom of the well he might properly say the brick walls were 100 feet high, but standing in the street it would be wrong to speak of the walls of the well except as 100 feet deep. [MATHEW, J.—Suppose you dug a trench twenty feet deep to get a good foundation for a wall, and from the foundation you build a wall forty feet in height. A workman employed in laying the last row of bricks was killed, would he come within the benefit of the Act?—No; because the wall would only be twenty feet above the

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

street level.] In *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, [1901] A. C. 49, the converse proposition to the present case was considered—namely, up to what point could a building be measured to. And this court held that the ridge of the roof was part of the building for the purpose ascertaining its statutory height. Assuming the court holds against me and decides that the street level is not the lowest point in a building from which the measurement of the height of the walls can be ascertained, then I submit the floor of the basement is certainly the lowest point for ascertaining the height of the building, and this building so measured is then less than thirty feet. In *Halstead* v. *Thompson & Sons*, 3 Ct. Sess. Cas., 5th series, 668. the question was whether a washhouse came within the Act. It was 30ft. 5½in. in height above its foundation; immediately above the foundation was a basement floor six feet below the level of the surrounding ground. The floor of the washhouse was 6ft. 4in. above the basement floor. The court there held that the question whether or not a building exceeded thirty feet was one of fact, and that this building had rightly been decided as coming within section 7 (1) of the Act, but they did not decide the question whether in estimating the statutory height of a building the foundations were to be taken into account.

McCleary, for the applicant, was not heard.

THE COURT dismissed the appeal.

COLLINS, M.R.—In the case of *Billings* v. *Holloway*, 47 W. R. 105, [1899] 1 Q. B. 70, this court decided that the Act does not apply to employment on a building in course of erection which at the time of the accident does not exceed thirty feet in height, but which when completed will exceed that height; and therefore the question we have here to answer is whether this building at the time of the accident exceeded thirty feet in height. Mr. Clavell Salter contended that the street level must be the base line from which the height must be measured, and he said that it would be inconvenient and in some cases impossible to excavate and ascertain the depth below that level at which the foundations were. I agree with the decision in *Halstead* v. *Thompson & Sons* that what is really the height of a building must be a question of fact in each case, and provided there is evidence to support the finding on this point of the arbitrator, one which this court must accept. I can quite conceive a building which, when measured from its base before the footings are filled, it, to a particular point, may properly in some conditions of fact be considered as exceeding thirty feet in height, but less in other conditions of facts. I agree with Lord Macnaghten that the provision as to the height of the building is inserted to differentiate different classes of buildings and builders. In *Hoddinott* v. *Newton, Chambers, & Co.*, [1901] A. C., at p. 56, he said the provisions as to the height of a building and as to scaffolding "were intended to exempt a certain class of builders of the humbler sort from the operation of the Act." A building might be an important building although the greater part was below the level of the ground or street, and all the mischief contemplated by the Act when it gave a remedy to workmen employed on that class of building might arise. In this case probably the footings were covered in, but I can see no evidence that there was more than a flooring at the top of the footings. In my judgment there is evidence upon which the judge's finding can be supported. The building measured from the top of the footings gives a measurement of 31ft. 2½in., and on that basis the building comes within the Act. It is therefore immaterial to consider whether the learned judge was justified in taking the measurement from the bottom of the footing for the purpose of deciding this case. I think the presumption from the evidence is that the flooring at the time of the accident had not got beyond that stage, and as this court can only interfere with a finding of fact, where there is no evidence to support the finding of the court below, or the judge has misdirected himself, we must accept the learned judge's finding that this building exceeded thirty feet. For these reasons the appeal fails.

STIRLING and MATHEW, L.JJ., concurred.

Solicitors for the appellants, *Mackrell, Maton, & Co.*

Solicitors for the applicant, *Chester & Co.*, for *Crofton, Craven, & Worthington*, Manchester.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 8.

HOWELLS *v.* VIVIAN & SONS. (*a.*)

Master and servant—Compensation for injury by accident—"Dependants"—Dependency on son's earnings—Standard of living—Workmen's Compensation Act, 1897, *Schedule I., cl.* 1.

An applicant sought compensation for the loss of his son, and evidence was given that the applicant could maintain himself and his family without assistance from the earnings of the deceased.

Held, reversing the decision of the county court judge, that this fact did not debar the applicant from compensation as being partially "dependent" upon the earnings of the deceased at the time of his death.

Appeal from an award of the judge of the Neath County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was the father of a workman who was killed by an accident arising out of and in the course of his employment by the respondents in a coal mine.

He claimed compensation as being partially "dependent" upon the earnings of the deceased at the time of his death.

At the hearing of the matter before the county court judge evidence was given that the deceased was unmarried, was twenty-seven years of age, and lived with his father, mother, and a married sister; that his average wages were 28s. a week, the whole of which he was in the habit of paying into a common family fund kept by his mother.

His cost of living was from 10s. to 12s. a week, and his mother allowed him a small amount of pocket money weekly, spending the difference on the upkeep of the home. The father's earnings were 33s. 9d. a week.

The county court judge in deciding the application for an award said: "The facts I find were that the applicant is an able-bodied workman, earning the usual full wages of a person in his position of life . . . and had no one except himself and his wife to maintain. I take it that a 'dependant' or 'part dependant' is a person who from some cause is unable to support himself and his family without assistance from some other source and on which he may be said then to be dependent. Now can I say in this case that this able-bodied workman earning about 33s. 9d. a week, with only himself and wife to maintain, is unable to support himself without assist-

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

ance? I cannot find that the applicant was a dependant, so I must find in fact that he was not dependent on his son."

He refused, therefore, to award any compensation to the applicant, who thereupon appealed.

S. T. Evans, K.C., Ivor Bowen, and *W. H. Kelly,* for the applicant.

Ruegg, K.C., and *Bertram,* for the respondents.

THE COURT allowed the appeal.

COLLINS, M.R.—I think the county court judge was wrong in holding that the applicant in this case was not a "dependant" upon the earnings of his son within the meaning of section 7 (2) (*a*) of the Act and Schedule I., clause 1 (*a*) (ii.), because he was able to maintain himself and his family without the assistance of his son's earnings. The learned judge seems to have acted under a misconception as to the law laid down by the House of Lords in *Main Colliery Co.* v. *Davies,* [1900] A. C. 358, 48 W. R. Dig. 113. He has adopted as the standard or test of dependency the question whether the applicant alleging to be dependent could support life without the assistance of the deceased, and he thought that a claim based on dependency under such circumstances as the present was negatived if that person could subsist without assistance. The judgment of the House of Lords seems, as I read it, to preclude us from laying down any definite standard by which to test dependency, and certainly the decision of the learned county court judge is clearly contrary to what the noble and learned lords expressed to be their view of the question.

The case must therefore go back to the county court judge to be reconsidered by him and to ascertain the amount of the award the applicant is entitled to.

STIRLING and MATHEW, L.JJ., concurred.

Order accordingly.

Solicitors, *Sharpe, Parker, & Co.,* for *Cuthbertson & Powell,* Neath; *H. P. Becher,* for *Vaizey Simons,* Pontypridd.

High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 5, 6.

In re TIMMIS.
NIXON *v.* SMITH. (*a.*)

Trustee—Executor—Merging of executorship in trusteeship—Statutes of Limitations—Real Property Limitation Act, 1874 (37 & 38 *Vict c.* 57)—*Trustee Act,* 1888, *s.* 8 (1) (b)—*Property retained by the trustee.*

Where the executors of the will of a testator who died in 1857, *under which part of the property became divisible in* 1873 *and the remainder in* 1892, *were also appointed trustees of the will; in an action by a beneficiary for an account,*

Held, that the office of executor had merged in that of trustee, and that, therefore, the Trustee Act, 1888, *s.* 8, *applied, and not the Real Property Limitation Act,* 1874, *s.* 8.

Held, also, that the exception to section 8 *of the Trustee Act,* 1888, *excluding from the benefit thereof cases in which the proceeds of the trust property are still retained by the trustee, does not apply to cases in which no moral liability attaches to the trustee.*

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

Trial of action.

Peter Timmis by his will dated the 6th of December, 1856, delivered all his lands and hereditaments unto his nephews William Smith and Peter Smith as tenants in common charged with the payment of £400 which he directed should be settled on his niece Ann, the wife of William Pointon, and her children in like manner as his residuary personal estate. And the testator gave all his personal estate and effects unto the said William Smith and Peter Smith upon trust that they should sell and convert into money such part thereof as should not consist of money and should stand possessed thereof and of all moneys produced therefrom upon trust to invest a sufficient portion thereof to produce an annuity of £120 which he directed should be paid to his wife Mary during her life, and as to the remainder of such moneys upon trust as to one equal fourth part thereof to invest the same and stand possessed thereof upon trust during the life of the said Ann Pointon to pay the annual produce thereof to her and after her decease in trust for all and every the children and child of the said Ann Pointon who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry to be divided between them if more than one in equal shares. And the testator directed that after the decease of his said wife his said trustees should divide the moneys and securities set apart to produce her said annuity equally between the said William Smith, Ann Pointon, Peter Smith, and Mary Smith, the share of the said Ann Pointon to be held in trust in like manner as thereinbefore directed with respect to her other share and portion under that his will. And he appointed the said William Smith and Peter Smith to be executors of that his will.

By a codicil to his will the testator appointed the said Mary Smith to be a trustee and executrix of his said will in conjunction with the said William Smith and Peter Smith and bequeathed the trust estates to them accordingly.

The testator died on the 9th of September, 1857.

The said Mary Timmis (the widow of the testator) died on the 18th of February, 1873, and the said Ann Pointon died on the 18th of November, 1892, leaving eight children who attained the age of twenty-one years or being daughters married, of whom one was the plaintiff in this action.

The defendant William Smith paid to each of the eight children or their representatives the sum of £50, being one-eighth of the sum of £400 charged upon the real estate.

No account of the share of the residuary personal estate of the testator settled upon Ann Pointon and her children had been delivered to the plaintiff, and no payment had been made to her on account thereof. It appeared, however, that the trustees, whose representatives were the defendants in the action, had paid over that share to the said Ann Pointon absolutely.

It also appeared that the said William Smith, Peter Smith, and Mary Smith each received one-fourth part of the residuary personal estate of the testator.

The plaintiff claimed an account of the personal estate of the testator not specifically bequeathed, and of the one-fourth part thereof bequeathed in trust for the said Ann Pointon and her children which came into the hands of the said William Smith, Peter Smith, and Mary Smith, and payment to her of what should appear to be due to her on taking such account.

Warrington, K.C., and *W. W. Leuchars,* for the defendants.—The real breach of trust was in not having the money ready for distribution at the proper

time. If we are right in saying that the defendants are trustees, which we submit they are, then this is an action against trustees to recover money, and the Trustee Act, 1888, applies. The money is due from them as trustees and not as executors; it is not an action for a legacy, but an action for a breach of trust: *In re Swain*. [1891] 3 Ch. 233, 40 W. R. Dig. 269; *In re Jane Davis*, 39 W. R. 627, [1891] 3 Ch. 119; *In re Page*, 41 W. R. 357, [1893] 1 Ch. 304. And if they are trustees it follows that, this being an action to which prior to the year 1888 "no existing Statute of Limitations applied," this action is barred by the Trustee Act, 1888, s. 8.

Renshaw, K.C., and *Crossfield*, for the plaintiff.—The executorship never merged in the trusteeship and is still subsisting. But even if there was such a merger we submit that we come within the exception to section 8 of the Trustee Act, 1888, at any rate as to three-quarters of the sum claimed. Each trustee on the division of the residuary estate received more than he ought. One-fourth of what each of the defendants took ought to have been paid to the children of Ann Pointon. A trustee is only discharged by a proper payment of the trust funds. This they have not done, but each trustee has retained a portion payable to other *cestuis que trustent*, and they are therefore excepted from the benefit of the statute. If they remain executors the Real Property Limitation Act, 1874, applies, and twelve years not having elapsed the defendants remain liable.

Warrington, in reply.—The trustees have only received the property to which they were beneficially entitled. The money which the plaintiff seeks to recover they paid away. The only claim is for the plaintiff's share, and it cannot, under the circumstances, be said to amount to a claim to property still retained by the trustees. The retainer mentioned in the Trustee Act, 1888, is not the notional retainer used in connection with the taking of a trustee's accounts.

KEKEWICH, J.—There are few things more difficult than to determine when executors cease to have duties as such and become trustees. Occasionally testators are advised to appoint different persons as executors and trustees, and these cases, though they do not present the same difficulties, illustrate and sometimes accentuate them. The duties of an executor are to pay debts, funeral and testamentary expenses, and legacies. Supposing one of the debts to be disputed and an action to arise in consequence, the executor retains the property, but does he hold it as executor or as trustee? This will is of the ordinary type. It contains a direction to set apart a sum to provide an annuity for his wife, subject to that to divide the residue amongst certain persons, and on the falling in of the annuity to divide the capital so set apart to provide it. The duty to do that is given to the same persons as are appointed executors. It is obviously, therefore, the ordinary case of executors ceasing at some time or other to be executors and becoming trustees; though in one sense, of course, they never cease to be executors, for they can still be sued as such, but they cease to have any duties to perform *virtute officii*.

The testator died on the 9th of September, 1857, and the widow entitled to the annuity died on the 18th of February, 1873, and Ann Pointon, who was entitled to an interest for life, died on the 18th of November, 1892. Meanwhile, on the death of the widow the executors had distributed a large part of the estate—there is no evidence to show that they did not distribute the whole estate—and it appears that there was nothing more to distribute.

Were these gentlemen trustees or not? Seeing that the testator died in 1857, and that there was no apparent obstacle to winding up his estate, I think I ought to assume that long before 1892, and, I think, even before the death of the widow, they ceased to be executors and became trustees, and held the funds then in their hands as such, upon the express trusts of the will.

That being so, can I say that they are liable for the share which ought to have gone to Ann Pointon and her children, the whole of which they made over to Ann Pointon absolutely. For this purpose I need only state that the money is not forthcoming, but there is no suggestion of fraud by the trustees or of appropriation to their own use. The action is brought by one of Ann Pointon's children, and is clearly an action within section 8 (1) (*b*) of the Trustee Act, 1888. The defendants, the representatives of the trustees, claim the benefit of the Statute of Limitations, inasmuch as the right of action accrued in 1892, and the writ in the action was not issued until 1900.

The answer raised to that plea is that the Trustee Act of 1888 is merely remedial, and applies only to cases to which no Statute of Limitations applied before the Act of 1888. They claim that the Act of 1874 applies. If the defendants are sued as executors the case falls within the statute of 1874, and, the statutory period being twelve years, the plaintiff's claim is not barred.

Several cases have been cited to me, but they all proceed on the lines I have pointed out. On the facts proved I think the defendants are sued as trustees, and as such they are therefore entitled to the benefit of the Trustee Act, 1888.

But the plaintiff argues that the case comes within the exception in section 8, which provides that that section is not to apply where "the claim is . . . to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use . . ."

It seems to me that the Legislature intended, not money for which the trustee has got no proper discharge, but money which he has put into his own pocket or invested in the name of some other person as trustee for himself—money, that is, upon which you can lay your finger. The plaintiff's point is that the defendant has converted this money to his own use. There is nothing to show that all the money that came into the trustees' hands was not distributed. They divided it into four parts and paid one of the four parts to Ann Pointon; and of course that was wrong, and the money is not forthcoming. The three remaining fourth parts were paid to Peter Smith, William Smith, and Mary Smith, the three trustees. Mary Smith was only entitled for life, but after her death it was to go to her children, but, having none, it passed under an appointment in her will, and so I may treat her representative as on the same footing as Peter Smith and William Smith. The plaintiff's argument is that this amounts to an appropriation by trustees for their own use, and is therefore taken out of the statute of 1888.

The answer to that argument is, that it is not a case of a trustee putting into his pocket trust money, so as to defeat the trust, for each of the trustees was entitled to the share paid to him. I think that answer is complete. The object of the statute was to prevent a trustee from reaping any benefit by its provisions if there was anything morally wrong on the part of the trustee. The statute was intended to apply to their relief if they had committed merely a legal wrong. I think that Peter Smith, William Smith, and Mary Smith only received that to which they were entitled. They ought, no doubt, to have paid one-fourth share into a separate account, but

they have done nothing morally wrong. I therefore think the Trustee Act, 1888, is applicable to this case, and the plaintiff consequently fails.

Solicitors, *Stephens & Stephens*, for *Sheldon, Plant, & Barclay*, Congleton; *Hudson, Mathews, & Co.*, for *H. L. Reade*, Congleton.

Chan. Div. Joyce, J. } Nov. 22, 29.

WHITE *v.* HARROW.

HARROW *v.* MARYLEBONE DISTRICT PROPERTY CO. (LIMITED). (*a.*)

Practice — Injunction — Restraining defendant from prosecuting another action—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24 (5).

In circumstances under which the court before the Judicature Act, 1873, *would have granted an injunction to restrain an action, the court may by section* 24 (5), *upon a motion, order the proceedings to be stayed.*

This was a motion entitled, by order of the judge, in both the above-named actions, for an order to restrain the defendant Harrow until trial or further order from objecting to certain buildings then being erected by the Marylebone District Property Co. on premises adjoining No. 24, High-street, Marylebone, and from claiming any easement of light over the said premises, or alternatively or in addition that all proceedings in the secondly above-mentioned action might be stayed, or that the applicant might be added as a defendant to that action.

By an indenture of lease dated the 20th of September, 1894, certain premises known as No. 24, High-street, Marylebone, were let by the trustees of the Portland Estate to the plaintiff White. The lease contained (*inter alia*) a covenant in the following words: "The lessee, his executors, administrators, and assigns, will not object to any works to adjoining premises that may be sanctioned by or on behalf of the said trustee or trustees, or other the person or persons for the time being entitled in reversion to the said estates, and will not claim any easement against the said person or persons entitled in reversion as aforesaid in or upon any adjoining or neighbouring premises belonging to the said person or persons by reason of any act or thing done or suffered by any tenant of such adjoining or neighbouring premises, and that notwithstanding any actual or constructive notice of such act or thing to the said person or persons."

By an indenture of underlease dated the 3rd of August, 1899, and made between the plaintiff White and Thomas Harrow, the said premises were demised unto the said Thomas Harrow for the term of twenty-one years.

The said indenture contained a covenant by the underlessee that he would not, without the previous written consent of the lessor, object to any works to adjoining premises which might be sanctioned by or on behalf of the lessor or the superior landlords, and would not claim any easement against the lessor or his superior landlords in, over, or upon any adjoining or neighbouring premises belonging to the lessor or his superior landlords by reason of any act or thing done or suffered by any tenant of such adjoining or neighbouring premises, and that notwithstanding any actual or constructive notice of such act or thing to the lessor or his superior landlords.

The Marylebone District Property Co., of which company the plaintiff White was a director, acquired from the superior landlords a lease of certain ground in Little Marylebone-street, adjoining the said premises No. 24, High-street, Marylebone, and commenced to erect buildings thereon.

The plans of the proposed buildings were submitted by the company to the surveyor of the Portland Estate, who, after introducing certain modifications therein, so as to protect the interests of the defendant Harrow amongst others, gave his sanction to them.

The said Thomas Harrow carried on business at 24, High-street in partnership with Stanley Harrow. Thomas Harrow having retired from the partnership the benefit of the underlease of 1899 was claimed by Stanley Harrow, the defendant in the above-named action, *White* v. *Harrow*, who was in possession of the premises.

Stanley Harrow being of opinion that the buildings in course of erection by the company would interfere with his ancient lights, commenced the above-named action of *Harrow* v. *The Marylebone District Property Co*, in which he claimed an injunction to restrain the company from erecting upon their premises any building of such a height as to darken, hinder, or obstruct the access of light to the windows of No. 24, High-street. The plaintiff White was not made a party to that action.

The plaintiff White thereupon commenced the above-named action of *White* v. *Harrow*, in which he asked (*inter alia*) that the action of *Harrow* v. *The Company* might be stayed.

For the purposes of this motion it was admitted that the buildings proposed to be erected by the company would prove a material obstruction to the defendant Harrow's lights.

Hughes, K.C., and *Wace*, for the plaintiff White.—Our client is not a party to the action of *Harrow* v. *The Company* and cannot raise his objection in that action. Inasmuch as the defendant Harrow is acting as owner of the sub-lease he is liable under the covenant: *Mander* v. *Falcke*, [1891] 2 Ch. 554, 39 W. R. Dig. 103. That being so, we are entitled to have the action stayed: Judicature Act, 1873, *s.* 24. The section is quite plain; the relief is not limited to the parties to the action; any person whether a party to it or not can apply. If necessary we ask leave to amend by entitling this motion in the action of *Harrow* v. *The Company* as well as in *White* v. *Harrow*.

Younger, K.C, and *Edward Ford*, for the defendant Harrow.—Before the Judicature Act, 1873, the action *White* v. *Harrow* might, perhaps, have been maintained. There is no way now by which we can be compelled to add White as a defendant in *Harrow* v. *The Company*. Moreover, the covenant does not enable the lessors to take away anything expressly demised. Such a construction is impossible. It would enable the lessor to pull down a building on his estate even though by doing so he might let down our building. The covenant must be construed most strongly against the lessor, especially when, as here, there is a covenant for quiet enjoyment: *Liech* v. *Schweder*, 22 W. R. 633, 9 Ch. App. 463. If the plaintiff's view is correct the second part of the covenant as to acquiring an easement is unnecessary.

JOYCE, J., directed the motion to stand for a week, the notice of motion to be amended by entitling it in the action of *Harrow* v. *The Company* as well as in the action of *White* v. *Harrow*.

Nov. 29.—JOYCE, J.—This is a curious case. The lessee of No. 24, High-street, Marylebone, commenced an action on the 31st of October against the Marylebone District Property Co. in order to restrain them from causing an injury to his right of light. For the

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

purposes of this motion it was admitted that the proposed building would interfere, to some extent at least, with his light, but I am not at all sure that the interference can be of a serious nature. It then appeared that the plaintiff in that action held by an underlease from White containing the covenant in question. No doubt the covenant is not quite happily expressed. For the defendant it is urged that the covenant operates as a derogation from the grant. I do not see it in that way. It was rather a limitation of the grant, and the covenant for quiet enjoyment does not affect it.

That being so, how would the case have stood before the Judicature Act? To institute an action to restrain works is to "object" to them in a very forcible manner. Before the Act the plaintiff would have been entitled to an injunction to restrain the action, and that being so, having regard to the Judicature Act, 1873, s. 24 (5), I think the plaintiff is entitled to have the proceedings in the action of *Harrow* v. *The Marylebone District Property Co.* stayed, but the costs to be paid by the defendant shall be limited to such as he would have had to pay if the motion had been only in that action.

Solicitors, *Samuel Lithgow; Cooper & Bake.*

Chan. Div.
Wright, J.
Nov. 30.

In re LONDON AND NORTHERN BANK.
ARCHER'S CASE. (*a.*)

Company—Winding up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Refusal of witness to answer at private examination—Evidence required for purposes of action brought by company.*

An ex-officer of a company in liquidation is bound, on an examination under section 115 *of the Companies Act,* 1862, *to answer questions relating to documents belonging to the company which it was alleged he had handed over to the defendant in an action for libel brought by the company, even although the information sought was required merely for the purposes of such libel action.*

A bank registered under the Companies Acts, shortly before passing resolutions for voluntarily winding up, had commenced a libel action against a newspaper. An ex-manager of the bank had, in that action, handed over to the solicitors for the newspaper a letter belonging to the bank.

The liquidator obtained an order in the winding up for the private examination of the ex-manager under section 115 of the Companies Act, 1862, and in the course of such examination the ex-manager refused to answer questions with regard to other documents belonging to the bank which it was alleged he had parted with without the bank's authority. The matter was referred to the court by the registrar before whom the examination took place.

Tindal Atkinson, K.C., and *F. Cooper Willis,* for the liquidator.

Muir Mackenzie and *Montague Lush,* for the witness, relied on *In re North Australian Territory Co.*, 38 W. R. 561, 45 Ch. D. 87, and argued that the answers were really required for the purposes of the libel action.

WRIGHT, J., said that in the case of *In re North Australian Territory Co.* the witness was examined under section 115 as a "person whom the court might deem capable of giving information concerning the trade, &c., of the company"; in the present case the witness was an officer of the company. These documents formed part of the assets of the bank and the liquidator was entitled to know what had been done with them; even if the sole ground of the application had been to obtain evidence in the libel action, the bank surely was entitled to use its own documents in deciding whether it had a good cause of action. The witness must answer what documents of the bank he had had in his possession and what had become of them, and there must be an order on him to attend at his own expense and be further examined.

Solicitors, *Helder, Roberts, Walton, & Thomas,* for *Simpson & Simpson,* Leeds; *G. H. Hoyle.*

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.)
Nov. 20, 21.

CRABTREE (*Appellant*) *v.* THE FERN SPINNING CO. (LIMITED) (*Respondents*). (*a.*)

Factory—Master and servant—Self-acting machine—Safety—Employment of "young person"—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 9, *sub-section* 2.

Section 9, *sub-section* 2, *of the Factory and Workshop Act,* 1895, *provides that "a person employed in a factory shall not be allowed to be in the space between the fixed and traversing portions of a self-acting machine unless the machine is stopped, with the traversing portion on the outward run. . . ."*

A boy, a "young person" within the meaning of the Factory and Workshop Act, 1878, *was employed in a factory by a man who was in the employment of the respondents, the occupiers of the factory, and who was in charge of a self-acting machine. This man ordered the boy to clean a certain part of the machine, and in order to do so the boy was obliged to be in the space between the fixed and the traversing portions of the machine. At the time the order was given the traversing portion of the machine was stopped on the outward run. While the boy was still in the said space the man in charge, thinking the boy was clear of such space, re-started the machine, whereby the boy received injuries from which he died.*

Held, that, as the man when he re-started the machine thought that the boy was clear of the space, the boy was not at the time of the accident "allowed" to be within the space by the occupiers of the factory or by any person for whom they were responsible.

The court could not interpret the words "shall not be allowed" in sub-section 2 *of section* 9 *as meaning "shall be prevented."*

Case stated.

This was an appeal by the plaintiff, an inspector of factories and workshops, from a decision of justices of Oldham.

An information was preferred by the appellant against the respondents, under sub-section 2 of section 9 of the Factory and Workshop Act, 1895, which was as follows: The information and complaint of John Henry Crabtree, one of his Majesty's inspectors of factories and workshops, Home Office, who saith that on the 10th of May, 1901, at Shaw, in Lancashire, the Fern Spinning Co. (Limited) were then and there the occupiers of a certain factory, the same being a factory within the true intent and

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

meaning of the Factory and Workshop Acts, 1878 to 1895, wherein, on the said 10th of May as aforesaid, a person, to wit, William Ralph, was allowed, contrary to the said Acts, to be in the space between the fixed and traversing portions of a self-acting machine, the said machine not being stopped, with the traversing portion on the outward run, whereby the said Fern Spinning Co. (Limited) are liable to a penalty not exceeding £3.

The following facts were proved or admitted: The appellant was his Majesty's inspector of factories for the Oldham district. The respondents were the occupiers of a factory at Shaw, in Lancashire, on the 10th of May, 1901, the same being a factory within the true intent and meaning of the Factory and Workshop Acts, 1878 to 1895. William Ralph was, on the said 10th of May, 1901, in employment at the said factory as a little piecer, and was a young person within the meaning of the Factory and Workshop Acts, 1878 to 1895. The said William Ralph was so employed by one John Oliver Driesen, who was then in the employ of the respondents, and in charge of a self-acting machine, and on the said 10th of May, 1901, was ordered by him, the said John Oliver Driesen, to clean the scavenger cloth, hung under the roller beam of the said machine for the purpose of cleaning the top of the carriage as the said carriage passes under the said cloth. In order to do so the said William Ralph was obliged to be in the space between the fixed and traversing portions of the said self-acting machine, and was, at the time of the accident, at a distance of sixteen yards or thereabouts from the starting-handle of the said machine, where the said John Oliver Driesen was stationed. At the time the said order was given the traversing portion of the said self-acting machine was stopped, with the traversing portion thereof on the outward run. While the said William Ralph was still in the space between the fixed and traversing portions of the said self-acting machine, and while cotton threads were stretched over the said space, the said John Oliver Driesen, thinking the said William Ralph was clear of the said space, started the said machine. The said William Ralph was in consequence caught between the carriage, which is the traversing portion of the said machine, on the inward run and the spring piece, which is a part of the fixed portion of the said machine. The said John Oliver Driesen, finding that something prevented the said carriage from running in up to its full extent, stopped the said carriage on its next outward run and saw the said William Ralph fall down between the said spring piece and the said carriage. The said William Ralph had received injuries from which he shortly afterwards died. The carriage of the self-acting machine passes about 4in. underneath and about 10in. beyond the roller beam. The space traversed by the carriage on each run is about 64in. from the front stop to the spring piece, against which the said William Ralph was crushed. The said carriage on the inward run traverses the 64in. in about two seconds. While on the outward run it moves comparatively slowly, traversing the same space in about ten to twelve seconds. There were no regulations or instructions in the said factory whereby persons employed in the space between the fixed and traversing portions of a self-acting machine as aforesaid should report themselves when they had left such space.

It was contended by the appellant at the hearing before the justices that the respondents had allowed the said William Ralph to be in such space contrary to the provisions of section 9, sub-section 2, of the Factory and Workshop Act, 1895, and the case of *Prior* v. *Slaithwaite Spinning Co. (Limited)*, 46 W. R. 488, [1898] 1 Q. B. 881, was referred to. It was contended on behalf of the respondents that they had taken adequate precautions to prevent the said William Ralph from being in such space as aforesaid. The justices dismissed the information, on the ground that the respondents were not responsible for the said William Ralph being in such space as aforesaid, and were of opinion that the said John Oliver Driesen improperly started the machine and was responsible for doing so.

The inspector appealed.

Section 9, sub-section 2, of the Factory and Workshop Act, 1895, is as follows: "A person employed in a factory shall not be allowed to be in the space between the fixed and traversing portions of a self-acting machine unless the machine is stopped, with the traversing portion on the outward run, but for the purpose of this provision the space in front of a self-acting machine shall not be included in the space aforesaid."

H. Sutton (*Sir R. B. Finlay, A.G.*, with him), for the appellant.—The magistrates did wrong in dismissing the information. They should have convicted the respondents under section 9, sub-section 2, of the Factory Act, 1895, or have punished the respondents' servant under the provisions of section 87 of the Factory Act, 1878. Although the boy was lawfully allowed to go into the space behind the machine while the machine was stationary, the moment the machine was re-started he was unlawfully allowed to be there. The words "shall not allow" should be construed as meaning "shall prevent."

R. B. D. Acland, for the respondents.—No offence had been committed under the statute; at the time the accident happened the respondents' servant thought that the boy was clear of the machine; he could not, therefore, be said to have allowed the boy to remain in the space while the machine was not stationary. The words "shall not allow" cannot possibly be construed as meaning "shall prevent"; that would amount to striking out the word "allow" altogether.

Sir R. B. Finlay, A.G., replied.

Lord ALVERSTONE, L.C.J.—This case is, in my opinion, one of considerable difficulty, but upon the whole I think the magistrates were right and that we ought not to send the case back to them.

By section 9, sub-section 2, of the Factories and Workshop Act, 1895, a person employed in a factory shall not be allowed to be in the space between the fixed and the traversing portions of a self-acting machine unless the machine is stopped with the traversing portion on the outward run; that is to say, he shall only go in when the machine is stopped in a given position.

The words which have created considerable difficulty in my mind are those at the end of sub-section 3—namely, "any person allowed to be in the space aforesaid shall be deemed to be employed contrary to the provisions of the Act." Sections 83 and 87 of the Act of 1878 are also material. Section 83 provides that the occupier of a factory can be summoned in the event of a person being employed contrary to the Act; and section 87 provides that when the occupier is charged with the offence, and he alleges that there is an actual offender who has caused or committed the offence, he may bring him before the court, and if he shows that the offence was committed without his knowledge, consent, or connivance the other person may be dealt with, and it is also provided that the inspector may, of his own initiative, bring the actual offender before the court if he has reason to think the occupier had

nothing to do with the matter and had taken proper steps to avoid the accident.

In this case the magistrates have found that the boy was let in, or went in, when the machine was stopped upon the outward run, and that the accident occurred owing to the man in charge of the machine starting the engine, he thinking that the boy had got clear of the space.

In my opinion if there had been a negligent allowance by any person, servant, or employee of the occupier, *primâ facie* there would have been an offence within sub-section 2; the offence, in my opinion, is not confined to an act that the occupier has himself allowed, but includes an allowance by a servant or agent of the occupier, otherwise no proper effect could be given to the words in sub-section 3, "a person allowed to be in the space shall be deemed to be employed contrary to the provisions of the Act."

If I had come to the conclusion that there was any evidence that the man in charge of the engine had allowed the boy to be in the space after the machine had been re-started I should have thought that the magistrates ought, if they had decided to acquit the occupiers, to have dealt with the matter under section 87 of the Act of 1878. The case, however, finds that the man in charge of the engine, when he re-started it, thought the boy was clear of the space; in other words, that he did not intentionally or negligently allow the boy to be within the space. The Factory Acts ought to be construed strictly in the interests of human life and limb, but they do not purport to deal with cases of negligence which are inconsistent with a previous breach of the statute. I therefore come to the conclusion that the accident was occasioned by the man starting the engine under the belief that the boy was not in the space, and that being so the boy was not allowed to be within the space by the occupiers of the factory or by any person for whom they were responsible.

I only wish to add that any evidence of allowance by an agent of the occupier, whether negligent or not, or whether intentional or not, would in my opinion create a *primâ facie* case which would have to be dealt with under section 87 of the Act of 1878. In this case, upon the findings, I think that the magistrates were right, and that their decision ought to be affirmed.

DARLING, J.—I am of the same opinion. It seems to me that the case for the appellant can only be logically put upon the ground on which Mr. Sutton put it—namely, that the words "shall not allow" must be construed as meaning "shall prevent." He went this length, that if the master allowed the boy to get into the space when the engine was stopped, and then the boy himself started the engine and was injured, nevertheless the master was liable under this statute because he did not prevent the boy from starting the engine. I cannot, however, bring myself to think that that is what the statute meant. I think that if the Legislature had meant anything of the kind they would have made use of the words "shall prevent," and not the words "shall not allow."

It seems to me that a man cannot be said to allow that of which he is unaware or which is something he cannot prevent. In the present case the respondents allowed the boy to go into the space behind the machine and to be there while the machine was stationary. That they were perfectly justified in doing. Then their servant negligently, as I assume, having forgotten that the boy was there, started the machine. The respondents only allowed one thing—namely, the boy's presence in the space while the machine was stationary. It is true that they did not prevent the boy from being there after the machine was started, but to this the statute does not apply. They did not prevent the negligence of their servant, but they did not allow it; they merely failed to foresee it, and doing so, to forbid the boy to remain in the space. I do not think their servant "allowed" the boy to remain in the space after the machine was started, because he did not remember that the boy was there. I think it would be straining the words of the statute beyond what the Legislature could have intended to hold that the words "shall not allow" mean "shall absolutely prevent."

CHANNELL, J.—I agree. I base my decision entirely upon the finding that the respondents' servant, when he re-started the machine, thought the boy was clear of the space behind it. I do not think that it is necessary to say whether or not in some places in these Factory Acts it may be right to read the words "shall not allow" as meaning "shall prevent," or as meaning that reasonable care shall be taken to prevent. That may be so; but applying the words of sub-section 2 to the facts that are found, it seems to me quite impossible to say that the respondents' servant allowed the boy to be in the space where he believed him not to be. The very foundation of the complaint is that he, possibly wrongly, thought that the boy had gone away when he had not done so. If he did in fact, however wrongly, think that the boy had gone away, it seems to me quite impossible to say that he allowed him to be there. Consequently, having regard to that finding, it seems to me that there is no evidence upon which we could possibly say that the magistrates could have held that anybody allowed the boy to be in the space at the time of the accident.

I quite agree with what my lord has said about the master and the servant and their liability. The decision of the magistrates must therefore be affirmed.

Appeal dismissed.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitors for the respondents, *Chester & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 12.

SOAMES *v.* NICHOLSON AND WIFE. (*a.*)

Landlord and tenant—Lease—"Subject to a three months' notice on either side at any time to terminate this agreement"—Such notice given between dates when rent was payable—Validity.

By an agreement of tenancy dated the 15th of May, 1895, the plaintiff let to the defendants certain licensed premises "from the 1st day of May, 1895, at a yearly rent of £40, payable every three months in advance if required, on the 1st day of May, the 1st day of August, the 1st day of November, and the 1st day of February in each year, the first payment being due and payable on the 1st day of May, subject to three months' notice on either side at any time to terminate this agreement."

Notice to quit was given on the 24th of January, 1901, in the following terms: "I hereby give you three months' notice and require you to quit and deliver up to me or my assigns on the 25th of April, 1901, all that messuage, &c."

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Held, that the notice was good under the terms of the agreement, and that it was not necessary for the validity of the notice that it should be a notice to terminate the tenancy on one of the quarter days named.

Appeal by the plaintiff from a decision of his Honour Sir Horatio Lloyd, sitting at the Wrexham County Court.

The action was brought by F. W. Soames, trading as F. W. Soames & Co., a brewer, at Wrexham, against the defendants, who were tenants of a public-house in Church-road, Southsea, Bereham, Denbighshire, and the question was whether a notice given by the plaintiff to the defendants to quit the said licensed premises were valid or not.

The agreement of tenancy was from the 1st of May, 1895, "at the yearly rental of £40, payable by equal payments every three months in advance if required, on the 1st day of May, the 1st day of August, the 1st day of November, and the 1st day of February in each year, the first payment being due and payable on the 1st day of May, subject to three months' notice on either side at any time to terminate the agreement."

The plaintiff gave notice in writing to the defendants to quit on the 24th of January, 1901, and to deliver up to him or his assigns the premises on the 25th of April.

For the defendant the point was taken that the notice was bad, as to be valid it must end on one of the quarter days mentioned in the agreement when rent was payable. The county court judge held that the notice was not sufficiently clear and explicit as an express stipulation for a notice expiring at any time, and he accordingly entered judgment for the defendants.

The plaintiff thereupon appealed on the ground that the learned judge was wrong in law in deciding that the notice to quit the premises on the 25th of April, 1901, was invalid.

Bryn Roberts, for the plaintiff.—The landlord is entitled to determine the agreement by giving three months' notice at any time. In the lease the words "at any time" are much more explicit than were the words in *Kemp* v. *Derrett*, 3 Camp. 510, where the tenant was "always to be subject to quit at three months' notice," and are indistinguishable from the words used in *Bridges* v. *Potts*, 17 C. B. N. S. 314, 33 L. J. C. P. 338. Where in an agreement for a lease of iron mines for twenty-one years it was agreed that the lessee was to be at liberty at "any time thereafter to terminate the agreement for lease" by giving six months' notice of his intention to do so: see also *Doe d. King* v. *Grafton*, 18 Q. B. 496, 21 L. J. Q. B. 276, 16 Jur. 833.

Ellis Griffiths and *Samuel Moss*, for the defendant.—We submit that on the true construction of the clause in this agreement the notice is bad. It expressly gives the dates upon which rent is payable and says the tenancy may be terminated by either party giving three months' notice. But there are no words that point to such a notice expiring at any time other than on one of the days upon which rent is payable. The learned judge based his decision on *Kemp* v. *Derrett*, and his decision ought to be supported.

Lord ALVERSTONE, L.C.J.—In this case the learned county court judge has decided that a notice to quit on the 25th of April, 1901, given to the tenant by the landlord on the 24th of January, 1901, was a bad notice, because it did not expire on one of the quarter days on which rent was payable. The lease expressly states that rent is to be payable on the 1st of May, the 1st of August, the 1st of November, and the 1st of February in each year. There is no magic in these particular days, they are not recognized as quarter days in Denbighshire, at any rate no argument has been addressed to us to show that in that part of the country they were customary quarter days upon which tenancies usually changed, and therefore we have not to consider what effect evidence of such a custom might have on the minds of the parties. All we have to do is to construe the plain words of the contract itself. It seems to me that we ought to give the words "subject to a three months' notice on either side at any time to terminate this agreement" their ordinary natural meaning, and read in that light the notice must be considered a good notice. There are, no doubt, cases where the court might come to the conclusion looking at the other clauses in an agreement and the surrounding circumstances, that it was only intended to be a three months' notice which should expire either at the date when the tenancy commenced or upon any usual or customary quarter day; but in this case we think the fair deduction from the authorities is that where there is no express stipulation, which proves or from which it can be implied that a yearly tenancy is created—if the parties had contracted that a tenant might quit or be dispossessed at the end of any given notice, there is no reason why they should not contract upon those terms, and if that appears to be the natural meaning of the words effect should not be given to them.

In this case we have not been told of any particular reason why the tenancy should be determined on one of the four days that are mentioned as days when rent became due and payable.

I think, therefore, we ought clearly to come to the conclusion that this was a tenancy to let at so much a year subject to three months' notice to determine it given by either side at any time.

The county court judge ought, therefore, in my opinion, to have held that the agreement was subject to such a notice as I have just indicated. The notice to quit on the 25th of April, 1901, is therefore a valid notice, and this appeal succeeds.

DARLING, J.—I concur.

CHANNELL, J.—I also agree that this appeal must be allowed. I only desire to say that in my opinion it seems quite impossible to give any meaning to the words "at any time" except that which this court has arrived at.

Solicitors, *Rooke & Son*, for *W. Wynn-Evans*, Wrexham; *Busk & Co.*, for *S. P. Bevon*, Wrexham.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 8.

GOODRICH v. TOWN CLERK OF GRIMSBY. (a.)

Election law—Registration—Parliamentary franchise—Misdescription in list—Declaration for correcting—Power of revising barrister to amend—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict.* c. 26), s. 24.

Where a voter has made a statutory declaration under section 24 *of the Parliamentary and Municipal Registration Act*, 1878, *in order to correct an erroneous description on the list of voters of the nature of his qualification and the description of his qualifying premises, the revising barrister ought to amend the list by making the necessary corrections.*

Foskett v. Kaufman, 34 *W. R.* 90, 16 *Q. B. D.* 279, *applied.*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Lord *v.* Fox, [1892] 1 *Q. B.* 199, 40 W. R. Dig. 165, *distinguished.*

Case stated by the revising barrister appointed to revise the list of voters for the borough of Great Grimsby.

On the 24th of September, 1901, the name of Robert Mitchell was duly objected to. The said name appeared on the overseers' list of "occupiers," division 1, for a "dwelling-house" at 84, Watkin-street, and the objection was that he had not occupied the said premises for the full twelve months prior to the 15th of July last. The objection was admitted to be good and was held so by the revising barrister, and the name was expunged from the list. A "statutory declaration for correcting misdescription in list" had been duly filed with the town clerk prior to the 5th of September, of which the following is a copy:

"Declaration for correcting misdescription in list.

"I, Robert Mitchell, of No. 84, Watkin-street, in the parish of Great Grimsby, in the Parliamentary borough of Great Grimsby, and in the municipal borough of Great Grimsby, do solemnly and sincerely declare as follows:

"(1) I am the person referred to in Division 1, in North-West Ward (Polling-station No. 1) of the occupiers' list of Parliamentary electors and burgesses made out for the parish of Great Grimsby by an entry as follows:

Name as described in List.	Place of abode as described in List.	Nature of Qualification as described in List.	Description of Qualifying Property.
Mitchell, Robert.	84, Watkin-street.	Dwelling-house.	84, Watkin-street.

"(2) My correct name and place of abode and the correct particulars respecting my qualification are and ought to be stated for the purposes of the register of parliamentary electors and burgesses for the parish of Great Grimsby as follows:—

Correct Name.	Correct Place of Abode.	Correct Nature of Qualification.	Correct Description of Qualifying Property.
Mitchell, Robert.	Scartho.	Yard and Stables.	Back of 84, Watkin-street.

"Dated this 30th day of August, 1901.

"(Signed) R. MITCHELL.

"Made and subscribed before me this 30th day of August, 1901.

"J. FLETCHER, justice of the peace for the borough of Great Grimsby."

It was proved to the revising barrister's satisfaction that the said Robert Mitchell had for the whole of the twelve months prior to the 15th of July last occupied the yard and stables mentioned in the declaration adjoining the dwelling-house in question, which "yard and stables" were of the requisite value; and it was submitted that the revising barrister ought to correct the list according to the suggested amendment in the declaration, and substitute "yard and stables" for the former qualification of "dwelling-house."

The revising barrister, however, was of opinion that in the circumstances of this particular case the declaration could not be treated as the correction of a "misdescription," or that it dispensed with the necessity for a formal claim with its incidents of timely notices to overseer, publication and possible challenge.

He accordingly held the declaration to be insufficient, refused to accept it as a correction of the former qualification, and expunged the name of Robert Mitchell from the list of occupation voters.

From this decision R. Mitchell, by his authorized agent, appealed.

Percival Hughes, for the appellant.—The declaration made by Mitchell was made by virtue of section 24 of the Parliamentary and Municipal Registration Act, 1878, and in the form given as "Form M" in the schedule to that Act. Section 24 provides that "any person who is entered on any list of voters for a Parliamentary borough . . . and whose name or place of abode or the nature of whose qualification or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act." The section further provides that the revising barrister shall receive the declaration as evidence of the facts declared to, and that the declaration shall be open free of charge to public inspection. The declaration here was quite sufficient and the revising barrister ought to have corrected the list and substituted "yard and stables" for the former qualification of "dwelling-house." In *Foskett* v. *Kaufman*, 34 W. R. 90, 16 Q. B. D. 279, the point raised in the present case was not decided, as in that case no declaration had been made, but it clearly appears from the judgment of Lord Esher, M.R. (34 W. R., at p. 92), that where there is a declaration the revising barrister has power to amend. The judgment of the court in the case of *Plant* v. *Potts*, [1891] 1 Q. B. 256, 39 W. R. Dig. 142, supports this view. As no one appears for the respondent it is perhaps right that the attention of the court should be called to the case of *Lord* v. *Fox*, [1892] 1 Q. B. 199, 40 W. R. Dig. 165.

The respondent did not appear.

Lord ALVERSTONE, L.C.J. — We are of opinion that this appeal ought to be allowed. The nature of the appellant's qualification was erroneously stated in the overseers' list as "dwelling-house" instead of "yard and stables." I think that the Court of Appeal have decided that the effect of a declaration made by virtue of section 24 of the Registration Act, 1878, is to give the revising barrister power to make corrections which he could not otherwise make. It should be noted that these declarations when made are exhibited and open to public inspection free of charge. In the case of *Foskett* v. *Kaufman* there was no declaration, and for that reason the Court of Appeal held that it was necessary to affirm the decision of the Divisional Court.

Lord Esher, M.R., there says, referring to a statutory declaration: "If the voter acts under section 24 of 41 & 42 Vict. c. 26, then the reason for taking away this power of the revising barrister does not apply, because this declaration must be sent to the clerk of the peace or town clerk, as the case may be, by a certain date, and the objector has the power of seeing that declaration and the opportunity of inquiring whether the new claim and the declaration in support of it are true or not, so that he is not taken by surprise at the hearing; and there is a very good reason why the limitation of the revising barrister's power should not take effect in that case." The particular point raised in the present case has, therefore, been decided by the Court of Appeal. Our attention has very properly been called to the case of *Lord* v. *Fox*, where Lord Coleridge, L.C.J., referred to sub-section 13 of section 28 of the same Act, which says: "Nor shall the revising barrister be at liberty to change the description of the qualification as it appears in any list, except for the purpose of more clearly and accurately defining the same"; and he expressed his opinion that where the effect of amending would be to change the description of the qualification by making it applicable to a list to which it did not apply, the revising barrister had no power of amendment.

If that is an authority against anything I have said in this case then I think it is inconsistent with the case of *Foskett* v. *Kaufman*, by which we are bound. But it is important to observe that in *Lord* v. *Fox* the point of there being a declaration was not pressed upon the attention of the court.

DARLING, J.—I agree.

CHANNELL, J.—I also agree. We express no opinion whether the amendment could have been made if there had been no declaration; but when a declaration can be made under section 24 of the Act of 1878 it has the effect of enlarging the revising barrister's power of amendment, and he ought to amend the list in accordance with the declaration.

Where an amendment cannot in the ordinary course be made without making a new claim, and the time for doing so has passed, the voter is allowed to correct the omission on condition that he makes a statutory declaration. That view is supported by *Foskett* v. *Kaufman* and *Plant* v. *Potts*, although it is true that the expressions of the learned judges are only *dicta*, for there was no declaration in either of those cases. *Lord* v. *Fox* is the only case in which there was a declaration. That case was only argued on one side, and nothing was said by the court about the effect of the declaration. Consequently that case does not stand in the way of our decision.

Appeal allowed, with costs.

Solicitors for the appellant, *Routh, Stacey, & Castle*, for *Henry Thompson & Sons*, Grantham.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 8.

HALL v. MICHELMORE. (a.)

Election law—Registration—Parliamentary franchise—Household qualification—Inhabitant occupier as owner or tenant—Wife owner of house—Husband breadwinner—Representation of the People Act, 1867 (30 & 31 *Vict.* c. 102), *s.* 3.

A man who lives with his wife in a house of which she is the sole and separate owner, her name appearing on the rate-book as the owner and his name as the occupier, the rates and all expenses of maintaining the house and household being paid by the husband, is not, in the absence of any evidence of a tenancy, entitled to be registered as a voter under section 3 *sub-section* 2, *of the Representation of the People Act*, 1867.

Case stated by the revising barrister appointed to revise the list of voters for the Torquay division of the county of Devon.

George William Prideaux Laskey duly objected to the name of the appellant, John Hall, of 13, Laburnum-street, Torquay, being retained in the occupiers' list (division 1) of the voters of the said county.

It was proved or admitted before the revising barrister that the appellant resided with his wife in a house of which the latter was the sole and separate owner, the wife's name appearing on the rate-book as the owner, the appellant's name as the occupier, of the said house. The appellant was the breadwinner, the furniture in the house belonged to him, the rates and all expenses of maintaining the house and household were paid by him, the wife having no means of support save and except the value of her ownership in the said house. No agreement of tenancy had been entered into between the appellant and his said wife, nor had any rent at any time been paid by him to her in respect of the said premises.

The names of forty-seven other persons, being either voters already upon the said list, or claimants to be inserted therein, whose names and descriptions were set out in the schedule attached to the case stated, were objected to under similar circumstances.

The revising barrister decided upon the above facts that there was no evidence that the appellant occupied the qualifying premises as owner or tenant, and that therefore he was not entitled to remain upon the list of voters in respect of the qualification of inhabitant occupier of a dwelling-house; and the revising barrister accordingly expunged the names of the appellant and of forty-five of the said forty-seven other persons from the said list, and disallowed the claims of the other two of such forty-seven said persons.

Due notice of appeal from this decision was given, and the revising barrister ordered the appeal in all the before-mentioned cases to be consolidated.

Percival Hughes, for the appellant.—The question here is whether the husband, the appellant, comes within section 3 (2) of the Representation of the People Act, 1867. That sub-section provides that a person is qualified to vote who has on the 31st of July in any year been an inhabitant occupier, as owner or tenant, of any dwelling-house during the preceding twelve months. No question of rating arises here as the appellant is on the rate-book, and in that respect this case differs from others. Where the husband supports the family and pays the rates this court should presume a tenancy. A tenancy at will during the qualifying period is sufficient to give a right to a vote. In *Loveridge* v. *Gardom*, Smith's Reg. Cas. 186, there are reported two cases, *Gillo's case* and *Matthews' case*. The present case differs from *Gillo's case*. In that case the claimant occupied with his wife and family a house of which his mother was owner and in respect of which she was entered in the rate-book as being the occupying owner. In that respect the present case differs from *Gillo's case*. In *Matthews' case* the son after the death of his father continued to live with his mother and his wife and family in a house of which his father had been tenant to the landlord, but in respect of which the mother's name had been and remained on the rate-book. The son

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

paid the rent to the landlord and the rates and taxes and maintained the household out of his earnings, but his name was not substituted for his father's on the rent book. Held, that there was evidence to support the revising barrister's decision that the son occupied as tenant; and that he was entitled to a vote.

The respondent did not appear.

Lord ALVERSTONE L.C.J.—We do not think it is possible to reverse the revising barrister's decision. It seems to me that the case is *a fortiori* as compared with the facts in *Gillo's case*. In that case Lord Russell of Kilowen, L.C.J., and my brothers Grantham and Wright, JJ., decided that where a son was living with his mother and was the bread winner and there was no evidence of a tenancy, or facts from which a tenancy could be presumed, there was no proper qualification. In *Matthews' case*, where the claimant was occupying a house, there being a third person—namely, the landlord, the revising barrister came to the conclusion that the claimant's occupation could only be justified on the basis of some tenancy, and that there was evidence from which he could infer a tenancy.

In the present case the house is the property of the appellant's wife, and the appellant lives there with her. No agreement of tenancy had been entered into between them, nor had rent at any time been paid by the appellant to his wife in respect of the premises. On these facts it would be quite impossible for us to overrule the revising barrister's decision—viz., that there were no facts sufficient to justify him in holding that the appellant was an inhabitant occupier of a dwelling-house as owner or tenant. Therefore the appeal must be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am also of the same opinion. I should think there may be cases where, without any rent being paid, or without any express agreement being entered into, you have to account for the occupation of a person whom you find on the premises, and you may then infer that the person occupies as tenant at will in some way or other; but nothing of that sort arises when you can account for the occupation. In the present case you can account for the occupation. The appellant occupies the house, and is living there with his wife, because she is the owner of it. These circumstances absolutely negative any inference which might have arisen otherwise on account of your not being able to account for his presence there without holding that he was a tenant at will.

Appeal dismissed.

Solicitors for appellant, *Brooks, Jenkins, & Co.*

K. B. Div.
(Kennedy and Phillimore, JJ.) } May 9, 10, 1901.

In re THE SURREY COUNTY CRICKET CLUB. (*a.*)

Revenue—Corporation—Duty—Real property—Cricket ground—Principle of assessment—"Annual value"—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict.* c. 51), *s.* 11.

The Surrey County Cricket Club, an unincorporated body, were lessees of the Kennington Oval Cricket Ground. Parts of the property comprised in the lease were underlet by the club, but the rest was in their possession. The club had also certain investments of stock from which they received income. The other receipts of the club were members' subscriptions, gate-moneys, and other payments received from the public for viewing cricket and other matches played on the ground.

Held, that the gate-money and other payments received from the public are not "annual value, income, or profits of the property" within section 11 *of the Customs and Inland Revenue Act*, 1885, *and that, for the purposes of assessment to duty under section* 11, *the "annual value" of the real property of the club should be ascertained on the basis of assessments to income tax under Schedule A of the Income Tax Act*, 1842, *subject to deductions for repairs and ground-rent; and, further, that in respect of income derived from stocks, the club should be assessed under Schedule C, and in respect of their income from land under Schedule B.*

In this case a petition by way of appeal was presented by Charles William Alcock, of the Surrey Cricket Club, Kennington Oval, in the county of London, the secretary of the Surrey County Cricket Club, for and on behalf of the said club.

The petition was against an assessment of duty under Part II. of the Customs and Inland Revenue Act, 1885, made by the Commissioners of Inland Revenue on property of the Surrey County Cricket Club.

The Surrey County Cricket Club is an unincorporated body, and is governed by rules, to a printed copy of which the appellant craves leave to refer.

The club is lessee of the ground known as the Kennington Oval at a rent of £750 per annum (the lessee paying all rates and taxes). Certain parts of the property comprised in the said lease are underlet by the club, and the rents received on these underlettings are stated in the revenue account hereinafter set forth under the head of "Rents received." The rest of the ground is in hand and in possession of the club. The club has also certain investments of stocks the income of which appears in the said revenue account.

The only other receipts of the club are (first) the subscriptions and entrance fees paid by members of the club, and (secondly) gate-moneys and other payments received from the public for viewing the cricket and other matches played from time to time on the ground.

Except as hereinbefore stated the club has no property real or personal.

The following is a copy of the revenue account of the club for the year ended the 31st of December, 1898, as printed and issued to the members. [The revenue account of the club for the year ending the 31st of December, 1898, was here set out. It showed a surplus balance of receipts over expenses of £3,735 3s. 7d.]

Having been furnished with the said revenue account the Commissioners of Inland Revenue assessed the duty payable by the club under Part II of the Customs and Inland Revenue Act, 1885, in respect of property belonging to the club during the year ending the 5th of April, 1900, at £102 18s. 6d., being 5 per cent. on £2,058 9s. 1d. The petitioner submitted that this sum of £2,058 9s. 1d. was very largely in excess of the amount in respect of which the club is properly chargeable with duty. The said commissioners by notice of charge dated the 11th of May, 1900, demanded payment of the said sum of £102 18s. 6d.

The commissioners together with the said notice of charge forwarded an account showing in detail how the assessment so made by them was arrived at. The following is a copy of the account so made out by the commissioners:—

(*a.*) Reported by R. G. STILLWELL, Esq., Barrister-at-Law.

CORPORATION DUTY, 1899-1900.—SURREY COUNTY CRICKET CLUB.

Receipts.

	£	s.	d.
Rent of the Surrey Tavern	300	0	0
„ One and All Cricket Club ...	28	0	0
„ Surrey Bicycle Club	25	0	0
„ South London Harriers... ...	20	0	0
„ Printers	157	10	0
Stands	1,129	14	6
Gate-money	6,325	18	0
	7,986	2	6
Interest on Investments ... £151 18 2			
Deposit Interest ... ... Nil			
	151	18	2
Gross Assessable Income ...	£8 138	0	8

Expenditure.

	£	s.	d.
Match Expenses, as per account for year ended 31st December, 1898	3,650	4	1
General Expenses—			
Secretary's Salary	400	0	0
Clerks	107	1	4
Office Wages	35	3	9
Cricket Instructor's Salary	150	0	0
Printing and Stationery	290	5	1
Postages and Telegrams	76	11	6
Law Costs	30	14	11
Accountants	169	4	0
Telephone	22	0	0
Sundries	67	4	10
Ground Expenses, as per account for year ended 31st December, 1898 ...	3,811	18	5
	£8,810	7	11

Total receipts (including subscriptions), £14,316 17s. 8d.
Proportion of assessable income to total receipt —
say $\frac{8,138}{14,316}$ say $\frac{8}{14}$ or $\frac{4}{7}$ ths,
therefore $\frac{4}{7}$ths of admissible deductions to be allowed.

Deductions admissible, viz —	£	s.	d	£	s.	d.
$\frac{4}{7}$ths of	8,810	7	11	5,034	10	3
„ in full—						
Rent, Ground ...	750	0	0			
Insurance	4	3	6			
Rates	257	10	4			
Rent, 61 The Oval	33	6	8			
				1,045	0	6
Total deductions				£6 079	10	9

	£	s.	d.
Gross Assessable Income...	8,138	0	8
Less Deductions	6 079	10	9
Net amount assessed...	£2.058	9	11
Duty at 5 per cent. ...	£102	18	6

The following is a summary of the account submitted to the court by the club and shows the principle upon which the club contended they ought to be assessed:

CLUB'S ACCOUNT.

Corporation Duty.—Assessment, 1899-1900, based upon the published accounts to the 31st of December, 1898.

Assessment, 1898, Schedule A:	£	s.	d.
Building (gross)	1,000	0	0
Land	400	0	0
Rent received (Tavern)	300	0	0
Income received from investments in Stocks	151	18	2
	£1,851	18	2

Deductions:	£	s.	d.	£	s.	d.
Ground-rent	750	0	0			
Interest on mortgage of lease	65	7	5			
Repairs. 10 per cent. on £1,400 (the gross annual values of the building and land) ...	140	0	0			
				955	7	5
				£896	10	9

Five per cent. on £896 10s. 9d. is £44 16s. 4d.

Pursuant to section 50 of the Succession Duty Act, 1853, the petitioner, on behalf of the club, duly gave notice of intention to appeal against such assessment, and furnished to the commissioners the following statement of the grounds of appeal—viz.:

1. The assessment ought to be made and made only on the net annual value of the property of the club in hand and on the net income of property let and of investments.

2. The gate-money and the receipts at the Oval are not annual value, income, or profits of real or personal property belonging to the club within the meaning of the Act 48 & 49 Vict. c. 51.

3. If (which the appellants deny) the receipts at the Oval are as such subject to taxation under the Act, the items a proportion of which are allowed as deductions under the heads of "match expenses," "ground expenses," and "general expenses" ought severally to be allowed in full, and not merely such a proportion thereof as the so called "assessable income" bears to the total receipts of the club, including subscriptions.

4. The assessment is wrong in principle and also in detail, and the amount assessed is very largely in excess of the amount in respect of which the appellants are properly chargeable with duty under the said Act.

The duty has not been paid.

The petition prayed:

That it might be declared that the assessment of duty on the said club under the said Acts ought to be made only on the net annual value of the property of the club in hand and on the net income of property actually let and of investments belonging to the club.

And that the gate-money and other payments received at the Oval as hereinbefore mentioned are not annual value, income, or profits of real or personal property belonging to the club within the meaning of the said Act.

Or if it should be held that the said receipts at the Oval are subject to taxation under the said Act that it might be declared that the several items, part only of which in proportion to the total receipts of the club including subscriptions and entrance fees of members had been allowed by the commissioners as deductions under the heads of "match expenses," "ground expenses," and "general expenses" respectively, and a proportion of the establishment charges ought to be allowed in full, or that it might be declared what deductions ought severally to be allowed in respect thereof.

And that it might be ascertained and declared what is the amount in respect of which the club is properly chargeable with duty under the said Act, and that for that purpose all necessary and proper inquiries might be made, directions given, and accounts taken.

A. T. Lawrance, K.C. (*Vaughan Hawkins* with him), for the petitioner.

Sir Edward Carson, S.G., and *S. A. T. Rowlatt*, for the Crown.

The arguments of counsel sufficiently appear in the following judgments.

The following cases were referred to: *The Duke of Norfolk* v. *Lamarque*, 38 W. R. 382, 24 Q. B. D. 485; *Dobbs* v. *Grand Junction Waterworks*, 32 W. R. 433, 9 App. Cas. 49.

KENNEDY, J.—Upon the whole I am in favour of the petitioner in this case. It is not, to my mind, a matter free from doubt, because it would unquestionably have been very easy to say in the Act itself that with regard to real property duty was to be paid at the rate of 5 per cent. upon the annual value according to Schedule A if the Legislature had so intended. That not having been said one credits the Legislature with having had, for good reasons perhaps, some different intention.

It is contended for the Crown that what ought to be got at is the annual value of the club's property having regard to what is actually earned from this property during the year. It is undoubtedly important if you come to deal with these things upon principle, that both in taxation and in rating matters one sometimes must, in order to maintain a principle, which shall be of general application for the benefit alike of the Crown and the subject, adopt a rule which shall in its working come as nearly as you can get to the intention of the Legislature in taxing the person who has to pay; and on the whole I think it comes much nearer to effecting the real purpose of section 11 of the Customs and Inland Revenue Act, 1885, to adopt the principle upon which the club ask to be taxed in this particular case. As regards their real property the club take as the basis of taxation the property tax assessment under Schedule A of the Income Tax Acts. They put the gross estimated value of the building at £1,000 and of the land at £400, and they add the sum of £300 which they receive as rent in respect of the tavern. And in addition to that they add the income derived from their personal property as set out in the scheme which they put forward as the right scheme for taxation. They say they are entitled by the later words of the section to a deduction from what you may call the basis to be found in Schedule A, a deduction in respect of necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of the property. I confess it seemed to me at first as if making that kind of claim was imperilling the view which they wished to be taken with regard to the applicability of Schedule A as the basis of taxation; but Mr. Lawrance has, I think, satisfied me that there is nothing inconsistent in taking the words "properly incurred in the management of such property" as applying to expenses, costs, and charges which have been or may be properly incurred in the management of the property. I think there is a good reason for that view because in the case of property being actually in the possession of the person who is taxed those costs, charges, and expenses must be treated, in a sense, as matters of estimate—just as in getting at what the hypothetical tenant would give you treat as a matter of estimate the calculation for the purpose of taxation under Schedule A. The difficulty of adopting any other plan is this, that as is illustrated by the present case, the Crown have to say, in getting at the annual value of real property you ought to look unquestionably at the use to which that property is actually put by the person who is sought to be taxed under section 11. It is true the land here is used for a business transaction; it is used for the purposes of a club for social enjoyment and also for earning gate-money which goes to maintain the club; expenses are incurred in relation to what one may call business matters—the getting up of matches and the payment of the players, and so on, and a large sum of money in respect of members' subscriptions is brought into the funds of the club.

I do not see how you can separate the annual value of the property, or if you like the income and profits of the property, from the annual value, income, or profits of the undertaking carried on on the property: in other words, from the management of the property, as it is used, with such an item or element as the members' subscriptions, which the Crown admit cannot be taxed. It must be remembered that the club is paying income tax in the usual way under Schedule D. What they are now here asked to pay is a duty imposed by Parliament because they escape liability to probate, legacy, or succession duty. It would be therefore unfair, if they have been taxed in respect of income under Schedule D, to bring at all into a tax upon the property anything which is in the nature of income, and so charge them, as it were, twice over, once under Schedule D of the Income Tax Act, and again under this section of the Customs and Inland Revenue Act, 1885. And, further, upon the face of the account which is presented by the commissioners, and upon which the Crown asks us to act, there arises this question of subscriptions. The Solicitor-General, with perfect frankness, has, from the first, admitted that the question is dealt with in the account upon a principle which rests upon no principle or rule which could be generally applied.

My reading of section 11 is this: I think the tax as to real property was intended to be levied upon the annual value. "Annual value" is a term which has already got an understood meaning in revenue and taxing Acts with regard to real property, and I think that the term "annual value" ought to be taken to mean substantially annual value as assessed under Schedule A. But it may be that a portion of this property is personal property. You then want to get at something which annually accrues to the body taxed from that kind of property. If there is a regular periodical return, that would be covered by the term "income," which is intended to relate to personal property as "annual value" relates to real property; but there may be gains from personal property which cannot properly be called "income." The word "profits," however, is more general. It covers all these incidental advantages of a pecuniary kind which may come from personal property, and, if they do come, are intended to be subject to the duty which this section imposes. I think, therefore, that substantially the scheme which is proposed by the club is the right one to adopt, charging the realty in accordance with the assessment under Schedule A as annual value, and subject to a deduction of some sort in respect of the words at the close of the section. The deduction here is 10 per cent., which seems fair. Then the personal property should be charged, as it is here, in respect of income with 5 per cent. as in the club's scheme. Therefore upon the whole I think the petitioner is entitled to succeed.

PHILLIMORE, J.—I am of the same opinion. I think that, assuming the figures given by the club are correct, and assuming that the Crown does not claim any special rate for repairs, the scheme tendered by it is right. This is a question of corporation duty, which is made analogous to or substituted for the death duties; it is a tax or toll which the corporation pays for the privilege of living; and just as the living man, while he is alive, if he is a landowner, pays under Schedule A; if he is an occupier of land, under Schedule B; if he is a receiver of income from stocks, under Schedule C; if he carries on a business, under Schedule D; and if he fulfils all those conditions, pays under all four; so the corporation, in

addition to this toll for the privilege of living, pays that which every living person pays; and every unincorporated association is in the same position—it pays under Schedules A, B, C, and D if it has income derivable from those sources. Then in addition to the income tax there arises this 5 per cent. Now I can see no logical halting-place for the contention of the commissioners short of saying that a portion of the tax which the club pays under Schedule D is to be levied over again upon them as corporation duty—*i.e.*, they are to pay income tax under Schedule D, then they are to pay 5 per cent. on their income derived from the occupation of land in addition. Now that must be wrong, and I think the Solicitor-General so admitted, but I see no logical halting-place between that and the contention of the petitioners. The contention for the club is that in respect of their income from stocks the assessment ought to be under Schedule C, and in respect of their income from land under Schedule B.

Now I entirely agree with my learned brother that the words "annual value" in this Act must be taken to have been intended to mean the same thing as in the other taxing Acts; and it is only reasonable to suppose, as obviously the commissioners did suppose when thay first issued the form of return, that the annual value is that which is ascertained for the purpose of assessing the income tax under Schedule A. The rules for that are clear, and in this case perfectly easy of application, and a Schedule A assessment has been arrived at. In respect of their income from stocks there is no question that they must take their Schedule C assessment or an equivalent. But the Act of Parliament goes further. It has imposed this additional duty on the corporation, and it gives them certain privileges. To begin with, they cannot act except by an agent, so it allows them what other owners are not allowed, the privilege of deducting the salary of the receiver; and secondly, it goes on to allow them to make certain other deductions from the annual value. Now in the metropolis by the operation of the Metropolis Valuation Act, 1869, the annual value is the gross annual value. Then the statute says: From that annual value so obtained certain deductions may be made. The only deductions the club seek to make here are ground-rent, which is unquestionable, and 10 per cent. for repairs and insurance; and, assuming that the commissioners do not complain of that percentage, it seems to me that these deductions are right. Subject, therefore, to any question as to particular figures, the assessment ought to be on the account tendered by the club—that is, on the basis of Schedule A, minus repairs.

Judgment for petitioner.

Solicitors for petitioner, *Wilsons, Bristows, & Carpmael.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Prob. Div. & Adm. Div. Divorce. } Dec. 6.

WAUDBY *v.* WAUDBY AND BOWLAND. (*a.*)

Divorce—Wife's costs—No security—Disagreement of jury—Second trial—Co-respondent's costs.

A husband petitioned for a dissolution of marriage on the ground of his wife's adultery with the co-respondent. The respondent alleged that the petitioner had been guilty of cruelty and adultery, and the jury were discharged without giving a verdict, as they were not able to agree on all the issues. The wife had not applied for security for costs before the trial, and the court declined to make any order after the trial, on the ground that, as a second trial was pending, the application was premature. The wife then obtained security for her costs of the second trial. The jury at that second trial found that the respondent and co-respondent had committed adultery, and that the petitioner had committed adultery, but that it had been condoned by the respondent.

Held, that the wife was entitled to her full costs of both trials, and that the co-respondent must pay the costs of the issues on which he had failed.

This was a husband's suit for dissolution of marriage on the ground of the wife's adultery with the co-respondent.

The case was first tried in May, 1901, before the President and a special jury and resulted in the jury being discharged without a verdict being recorded as they were unable to agree on all the issues before them.

The second trial resulted in the jury finding (*a*) the respondent and co-respondent had committed adultery; (*b*) that the petitioner had committed adultery with a domestic servant in his own house; (*c*) that the respondent had condoned that adultery.

Bargrave Deane, K.C., and *Rayden*, for the petitioner, did not press the court to grant a decree under section 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

Barnard, for the respondent, asked for her costs of the first trial, but no security for the costs of that trial had been obtained. He also asked for the costs of the second trial, for which she had obtained an order for security.

Grazebrook, for the co-respondent, contended that he ought not to be condemned in costs, as the petitioner, knowing that he had committed adultery, ought never to have brought his petition at all.

BARNES, J., in delivering a considered judgment, said that the first question the court had to consider was whether it ought to exercise its statutory discretion in favour of the petitioner. After considering the authorities he had come to the conclusion that this was not a case in which he should exercise his discretion. The question had been already considered in *McCord* v. *McCord*, 23 W. R. 684, L. R. 3 P. & D. 237, *Storey* v. *Storey*, 36 W. R. 190, 12 P. D. 196, and *Grosvenor* v. *Grosvenor*, 34 W. R. 140. It was not, however, necessary for him to review those cases, as Mr. Deane had not pressed him to exercise his discretion in favour of the petitioner. It was, however, urged that there had only been a single act of adultery, that it had occurred a long time ago, and that it had been condoned. The court could not, however, overlook the fact that the act was the seduction of a maid servant during the absence of the wife, and that the girl had given birth to a child. The substantial question, however, which the court had to consider was that of costs. The case had been tried twice; on the first occasion the findings were not recorded, as the jury were unable to agree on all the issues. They, however, did intimate that they were agreed as to the adultery and cruelty of the petitioner, although they could not agree as to whether the respondent had condoned her husband's conduct, nor as to whether the respondent and co-respondent had committed adultery. At that time the respondent had not applied to the court for an order for security for her costs, but she had obtained such an order for £200 before the second trial. It therefore followed that as to the costs of the second trial there

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

was no substantial question to consider, as the wife had not only got her order, but also an extension of it, and according to the usual practice she was entitled to her full costs. At the conclusion of the first trial the wife had applied to President for her costs, relying on the fact that no finding had been recorded against her, but the President declined to make any order on the ground that the application was premature, there being at that time no order for security. The conclusion the court had now come to was that the wife was in a sense successful at the first trial, and that she had succeeded at the second trial in getting the petition dismissed. After giving the matter full consideration, he had come to the conclusion that the wife was entitled to her full costs of both trials, being guided by the principles laid down in *Barnes* v. *Barnes*, L. R. 1 P. & D. 572. As to the costs of the co-respondent, the court had been asked to make no order against him, and it had been suggested that he might even be allowed his costs. As to this part of the case, there were many authorities showing that co-respondents had been condemned in costs, even though the petition had been dismissed. The learned judge referred to *Bremner* v. *Bremner*, 11 W. R. 687, 33 L. J. Prob. 202; *Storey* v. *Storey*, and *Morgan* v. *Morgan and Porter*, 17 W. R. 688, L. R. 1 P. & D. 644, and said that he had examined the original records of the court and found that the report of *Morgan* v. *Morgan* in the Law Reports was incomplete, as the case had only been reported on the question of the court's discretion under the 31st section of the Divorce Act. He found from the records that in that case the jury had found that the petitioner had committed adultery with one woman, whose name was mentioned in the pleadings, but had negatived a charge with another woman. The court was then asked to exercise its discretion and to grant a decree *nisi* and to extend the time for applying for a new trial. The court, however, refused to pronounce a decree *nisi* and gave the wife her full costs, except as to the issue on which she had failed. Subsequently a new trial was granted, and the respondent and co-respondent did not defend, and in the result the second jury negatived the charge of adultery against the petitioner which the former jury had convicted him of. A decree *nisi* was accordingly pronounced, and the co-respondent was condemned in the full costs. None of these facts, however, appeared in the Law Reports. Again, in *Grosvenor* v. *Grosvenor*, the report was silent as to the costs, but in that case he (the learned judge) found from the records that the petition had been dismissed, and the co-respondent, who had not appeared or defended, had been condemned in the costs. Following the authorities, the court now ordered that the co-respondent should pay the costs of the issues on which he had failed.

Solicitors, *Iliffe & Co.; Long & Gardiner; Ridsdale & Co.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Dec. 7, 9, 10.

BAGOT PNEUMATIC TYRE CO. *v.* CLIPPER PNEUMATIC TYRE CO. (*a.*)

Company—Contract with third person for intended company — Privity — Adoption—Inferred contract — Right of action.

The plaintiff company entered into an agreement with A. B. to grant to him or a company to be formed by him an exclusive licence to use certain patents. A. B. then entered into an agreement with C. D. to sell the licence to him on behalf of the intended company, and this agreement was adopted by the intended company, the defendants, by another agreement to which A. B., C. D., and the defendant company were parties.

Held, that, there being no privity of contract between the plaintiffs and defendants, and no contract which could be inferred or considered as having been adopted by the conduct of the defendants, the plaintiffs had no right of action against them.

Decision of Kekewich, J. (49 *W. R.* 265, [1901] 1 *Ch.* 196), *affirmed.*

This was an appeal from the decision of Kekewich, J. (reported 49 W. R. 265, [1901] 1 Ch. 196).

The plaintiff company was incorporated in 1896.

By an agreement dated the 3rd of March, 1897, the plaintiff company agreed with one Phelps to grant to him or to a company then in course of formation by him (being the defendant company) an exclusive licence to use certain patents belonging to the plaintiffs. The consideration for the grant was that after setting aside each year a cumulative preferential dividend equal to £8 per cent. on the capital of the proposed company, that company should pay to the plaintiffs in each year "out of their remaining profits available for dividend" a sum equal to 8 per cent. upon a fixed capital of £150,000, and the plaintiffs were to receive a further sum equal to one-half of the balance (if any) of net profits of such company available for dividend in each year.

On the 4th of March, 1897, the plaintiffs granted to Phelps an exclusive licence according to the agreement. This licence, after a recital of the agreement of the 3rd of March, was expressed to be given in consideration of that agreement, and of the payment therein agreed to be made by the licensee to the licensors, and it contained a covenant by the licensee not to assign the licence without the consent of the licensors, except to the intended company.

On the 5th of March, 1897, Phelps entered into an agreement with Ernest Piercy, as a trustee for the intended company (Phelps being therein described as "the vendor"), to sell to him as such trustee (*inter alia*) the agreement of the 3rd of March and the exclusive licence of the 4th of March for £120,000, of which £60,000 was to be paid in cash, and the balance in cash or shares at the option of the directors of the proposed company.

On the 8th of March, 1897, the proposed company was incorporated with a capital of £150,000 in £1 shares under the title of the defendant company, and the agreement with Piercy was then adopted with the modification that the purchase price of £120,000 was to be paid as to £40,000 in cash and as to the balance in fully paid-up shares. The licence was never actually assigned by Phelps to the defendant

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

company, though they made use of it. In March and September, 1898, the defendant company issued balance-sheets showing a profit, but no amount was placed to reserve fund, and no dividend was declared. In October, 1899, they issued a balance-sheet showing large profits, out of which a sum was carried to reserve fund and a sum of £3,000 was written off as depreciation and towards the extinction of the "cost of licences and contracts." A circular was about the same time sent to the plaintiffs, stating that the year's trading of the defendants allowed a dividend of 6 per cent. to the defendants' shareholders, and that they proposed in future to provide out of profits for the depreciation and ultimate extinction of the item of £138,000, the sum at which, by additions, the licences, &c, stood in the balance-sheet. The plaintiffs then brought this action to have it declared, among other things, that the defendants were not entitled to write off against profits any sums for depreciation, and to have the dividend for the year covered by the balance-sheet ascertained.

Kekewich, J., held, following the decision in *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38, and distinguishing *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156, that the plaintiffs had no cause of action, and on that ground dismissed the action.

The plaintiffs appealed.

Haldane, K.C., Warrington, K.C., and *E. F. Spence*, for the plaintiffs.

Neville, K.C., and *Sargant*, for the defendants.

VAUGHAN WILLIAMS, L J., after reading the agreement of the 3rd of March, 1897, the licence grant of the 4th of March, 1897, and the agreement on the 5th of March, 1897, and pointing out that under the latter agreement Phelps was described as "the vendor," said that this agreement treated the grant of the licence and the agreement of the 3rd of March generally as matters carried out by the Bagot Co. with Phelps not as trustee for anybody, but for his own benefit. The main question raised in the present case was whether there was a direct contract between the Bagot Co. and the Clipper Co., and such a privity of contract as enabled the former company to sue the latter. In addition to that a question was raised whether, on the true construction of the agreement of the 3rd of March, there were, prior to the bringing of the present action, any profits available within the meaning of that agreement for payment of any sum to the Bagot Co. which had not been truly paid. Dealing first with the wider question, looking at it merely as a question of law, there was no doubt whatever that there was no direct contract between the Bagot Co. and the Clipper Co. enabling the former company to sue the latter. That was not denied; but it was suggested that though that might be so, though it might be true that the Bagot Co. could not sue the Clipper Co. under the contract of the 3rd of March, yet there might be evidence of a new contract having been entered into between the two companies on the same basis as the agreement of the 3rd of March. It was not suggested that there was any new contract in writing or by resolution communicated to the Bagot Co., but what had been suggested was that there might be a new contract entered into by the implication of a contract between the parties. A suggestion of that sort was made and rejected in *In re Northumberland Avenue Hotel Co.* But, in the first place, the the statement of claim neither alleged nor suggested any such contract. Even if it did, there was no evidence whatever of any such contract having been entered into. It was quite true that there had been many things done by the Clipper Co. which they might well have done if they had been parties to the agreement of the 3rd of March; but the answer was that all such acts were equally referable to the contract of the 5th of March and to the obligations of the Clipper Co. to Phelps. His lordship thought, therefore, that there was not ground for saying that there was evidence of any such contract. Then, that being so, there was really only one more ground suggested for saying that the Clipper Co. were directly liable to the Bagot Co. It was this: That though it was quite true that they were not liable in law, yet they were liable in equity, because, although the contract of the 3rd of March was not a contract with them, and also the licence of the 4th of March was not a licence to them, yet they had had the benefit of the licence, and that made them in equity directly answerable to the Bagot Co. But there was no law justifying such a proposition, and never had been. In *Cox* v. *Bishop*, 8 De G. M. & G. 815, Knight Bruce, L.J., in giving judgment, said this: "The substantial question upon this appeal is whether an equitable assignee of a term of years granted in mines, or mines and other hereditaments, under a reserved rent and certain covenants, is liable to be sued in equity by the lessor for rent which became due and damages in respect of breaches of some of the covenants committed during the time that the assignee was in the possession and enjoyment of the demised property as the equitable assignee of it, which he has now ceased to be. There is not any special or other circumstance in the case that is in my view material. It was properly conceded, on the part of the respondents, that the liability would not have existed but for the possession or enjoyment of the property under the equitable assignment. It appears, however, to me, I acknowledge, that the possession and enjoyment make no difference. They do not, in my opinion, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter." And Turner, L.J.'s, judgment was to the same effect. That principle applied to the present case, and, indeed, to all cases of a similar kind. If that principle had been rightly applied in the case of an equitable assignee of a lease, *a fortiori* it must apply in a case where that which had been taken possession of or enjoyed was not land the subject of a lease, but was personalty or a chattel. The principle so laid down in *Cox* v. *Bishop* was not a new principle, for in *Moore* v. *Greg*, 2 Ph. 717, Lord Cottenham expressed an opinion which was in substance the same as that of Knight Bruce, L.J. His lordship then proceeded to comment upon *Werderman* v. *Société Générale d'Electricité*, 30 W. R. 33, 19 Ch. D. 246, which he said had been referred to as supporting the proposition that where a person obtains possession of the subject-matter of a contract with notice of the terms of the bargain the person so in possession is liable to perform the contract and may be sued upon it though he was not a party to it. That case, however, did not support the plaintiffs' contention. If it did it would be in direct conflict with the principles laid down in *Cox* v. *Bishop*, but it did not assert any such proposition. All that it decided was that if you have a contract whereby a charge is imposed upon property, the person who takes the property takes it subject to the charge. That did not involve the proposition that the person taking the property was liable to be sued on the contract. The utmost that it did was to impose a charge upon the property, not to impose an obligation on the person to perform the terms of a contract to which he was not a party. There was no ground whatever for saying that there was any privity of contract in the present case between the Bagot

Co. and the Clipper Co. That practically disposed of the whole case, but it was necessary, perhaps, to say a word or two upon another matter, and that was that it was conceded that at the time of bringing the action there was no sum of money which under the terms of the contract of the 3rd of March was payable to the Bagot Co. and which had not been paid; and under those circumstances it did seem, quite apart from the question of privity of contract, that this action would have failed as being premature at the moment it was brought. His lordship thought that, if there had been privity of contract, under the circumstances of this case there would have been no immediate cause of action between the Bagot Co. and the Clipper Co. The appeal failed and must be dismissed with costs.

ROMER, L.J., said he would first dispose of what he might call the merits of the case—namely, the pecuniary question involved—and that was whether the Clipper Co. had earned any profits within the meaning of the agreement of the 3rd of March, 1897, or whether that company was dealing with its income in a manner inconsistent with the contract. That resolved itself into the question whether the company was justified in doing what it purported to do in its balance-sheet for the year 1899 in making an allowance of £3,000 for the amount to be written off in respect of licences and contracts. In his lordship's opinion the company was quite justified in doing so. There was in this case no question of bad faith. It was not said that the licences of the company had not depreciated in value below the amounts at which they stood in the books of the company. But it was said that the Clipper Co. was not entitled to make any allowance in writing off the depreciation of its property, as a matter of principle, as against the the Bagot Co. His lordship did not agree that the Bagot Co. had any right, even on the footing suggested, to say that the Clipper Co. could not properly apply out of its income for the year this £3,000 before ascertaining the profits available for dividend. He did not think that the agreement of the 3rd of March was intended to deprive the Clipper Co. of the right of ascertaining in good faith what were the available profits of the company in any particular year. He was of opinion that if the Clipper Co., acting *intra vires* and in good faith and in the ordinary course of business, made certain payments out of income before ascertaining what was available for dividend, the Bagot Co. would not have any right to interfere with the Clipper Co. Not only had that company a right, before saying what profits in this year 1899 were available for dividend, to write off a sum for depreciation of the value of the licences, but in doing so they were only doing what was honest and proper for them to do. This made the question of law that had been raised merely an academical question.

Upon the question whether there was any contract between the two companies, his lordship was of opinion that there was clearly no direct contract between them; and it was equally clear that there was a contract between Phelps and the Clipper Co. Phelps was not a mere shadow or nominee, but a direct contractual party who entered into a direct contract with the Bagot Co. and also had rights under a direct contract with the Clipper Co.; but there was no contract, by virtue of those contracts, between the two companies themselves. Was there, then, any other sort of contract between them? All that had been done by the Clipper Co. was clearly referable to the contract with Phelps of the 5th of March, and to that contract alone; there was nothing to justify the court in holding that there was any fresh contract between the two companies. But it must be understood that his lordship was not saying that, in an unforeseen case of the Clipper Co. making profits hereafter, the Bagot Co. might not have rights against Phelps or might not have a right of using Phelps's name in any proceedings to recover a share of those profits, or that the Bagot Co. might not in such a case bring proper proceedings, to which Phelps would be a party, to recover certain rights and remedies. This was not a case in which leave to amend should be given to the plaintiff company. There were no merits, for there was no money coming to the plaintiffs, and therefore it would not be right to give them leave to amend for the purpose of raising a mere academical question. Nor did he say that the plaintiffs might not raise any question such as arose in the *Werderman case*; but the principle of that case, even if it applied, did not, in his lordship's opinion, support the implication of any contract between these two companies, and he could not find any repudiation by the Clipper Co. of any obligation cast upon it by reason of its contract with Phelps. He agreed that the appeal failed. In framing the form of order it must be seen that it carried out the principles of the present judgment of the court.

COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitors, *Capel-Cure & Ball; Beale & Co.*

From Chan. Div.
Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 7; Dec. 2.

THURSTON *v.* NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY. (*a.*)

Infant—Building society—Infant member—Advances—Mortgage—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 32), *s.* 1—*Building Societies Act,* 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 38.

Though the Building Societies Act, 1874, *authorizes an infant to become a member of a building society, it does not authorize him to borrow money by means of advances on his property, as it is not a necessary part of a member's position that he should have advances or mortgage his property.*

An infant member of a building society purchased a piece of land by means of a loan from the society, and gave the society a mortgage to secure the loan and further advances which were expended in building houses on the land.

Held, that the society was entitled to a charge on the land for the actual purchase-money, with interest at 4 *per cent. thereon, but that by reason of the Infants' Relief Act,* 1874, *the mortgage was void as against the infant, and must be delivered up to be cancelled*

Decision of Joyce, J. (49 *W. R.* 56, [1901] 1 *Ch.* 88), *varied.*

This was an appeal from a decision of Joyce, J. (reported 49 W. R. 56, [1901] 1 Ch. 88).

The plaintiff, Mrs. Thurston, who did not attain the age of twenty-one years until the 25th of March, 1900, was in June, 1898, admitted a member of the defendant society, a building society duly incorporated under the Building Societies Act, 1874. Being

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

desirous of purchasing certain land with the intention of erecting houses thereon, the plaintiff applied on the forms of the society for an advance of £1,200, and offered the land and houses as security.

The application was accepted, the society being ignorant that the plaintiff was then an infant.

The land was conveyed to the plaintiff, as purchased by her by means of her separate estate, by an indenture dated the 21st of July, 1898; and by an indenture of mortgage dated the 22nd of July, 1898, and made between the plaintiff of the one part and the defendant society of the other part, in consideration of £1,200 paid and advanced to her by the society, the plaintiff conveyed unto the society in fee the land therein specified with the six houses then erected or in course of erection, subject to a proviso for redemption, and it was declared that the monthly subscription payable by the mortgagor in respect of the advance of £1,200 amounted to the sum of £10 4s. The plaintiff had also borrowed money from her stepmother for the purposes of the same transaction.

In October, 1898, the defendant society discovered for the first time that the plaintiff was an infant. Up to that time the society had advanced £1,070, which had been spent by the plaintiff partly in the purchase of the land and partly in the erection of houses and purchase of materials.

The last instalment paid by the plaintiff was in September, 1898, and in the following month the defendant society entered into possession of the mortgaged property. Some of the houses were at that date unfinished, and the society expended about £270 in completing them. The society has ever since been in receipt of the rents and profits.

The plaintiff claimed (1) a declaration that the mortgage deed of the 22nd of July, 1898, was void and not binding on her; (2) delivery up of the mortgage deed and of the title deeds to the property comprised therein; and (3) possession of the mortgaged premises.

The defendants did not make any charges of fraud or misrepresentation against the plaintiff.

Joyce, J., held that the conveyance of the land to the plaintiff and the mortgage were really one transaction, and that the plaintiff could not repudiate one part of the transaction and affirm and take the benefit of the other part. On this ground the learned judge dismissed the action, without expressing any opinion upon the question whether the Building Societies Act, 1874, enables an infant member of a building society to execute a valid mortgage as a security for advances made to him by the society.

By section 13 of the Act, "Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estates by way of mortgage." By section 38, "Any person under the age of twenty-one years may be admitted as a member of any society under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances; but during his non-age he shall not be competent to vote or hold any office in the society." The rules of this society did not prohibit the admission of infant members.

By section 1 of the Infants' Relief Act, 1874, "All contracts, whether by specialty or simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void. Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

The plaintiff appealed.

Badcock, K.C., and *E. Ford*, for the plaintiff.

Hughes, K.C., and *Freeman*, for the defendants.

Badcock, K.C., replied.

The arguments used and cases cited were similar to those in the court below.

Cur. adv. vult.

Dec. 2.—VAUGHAN WILLIAMS, L.J.—I cannot agree with the conclusion at which Joyce, J., has arrived in its entirety. I think that the mortgage deed is void and not binding on the plaintiff. It seems clearly to come within section 1 of the Infants' Relief Act, 1874, as being a contract for repayment of money lent; and I cannot regard the transaction of the purchase of the land and the advance of the money for building as all one transaction. The transaction of the purchase was a transaction between the vendors and Mrs. Thurston, whereas the transaction of the advance of the money was between the building society and Mrs. Thurston. The former transaction was voidable, and Mrs. Thurston has affirmed it. The latter was void so far as the contract to repay is concerned. I think that the advances of money for building stand on a different footing from the £250 paid by the building society for the purchase of the land and the expenses of conveyance. The money advanced for building was simply money lent, and the society has no security except the mortgage, which, in my judgment, is void as a contract for repayment of money lent; whereas in the transaction of purchase the society acted as the agents of Mrs. Thurston to carry through the purchase for her by paying the purchase-money and obtaining a conveyance to her. In my opinion, Mrs. Thurston could not adopt the act of her agents and claim to have the title deeds and conveyance handed over to her by the building society without paying to them the purchase-money which they paid to obtain the conveyance; and I think that, without any contract to that effect, the society have a lien of charge on the title deeds and conveyance for the money which they paid to obtain the property, which Mrs. Thurston now claims. If Mrs. Thurston adopts the acts done by the society she must discharge the cost and indemnify the society against the same. I thought during the argument that the only security which the building society held for the £250 which they had paid for purchase-money was the lien on and right to retain the title deeds and conveyance until the money had been repaid; but I am satisfied now, after discussing the matter with my brethren, that the society, having paid off the vendor, have a right to the remedies of the vendor—have a right, that is, to enforce the vendor's lien. It is true that the society were not the vendor, but, having paid off the vendor, the society, as against the purchaser, stand in the place of the vendor. It follows, in my judgment, that the plaintiff is entitled to a declaration that the mortgage deed is void and not binding on her, and is entitled to delivery up of the same and to have it cancelled, but is not entitled to have the title deeds given up discharged from any lien or charge of the society unless and until she pays to the society the purchase-money which the society paid for the land. I think, moreover, that the society, the defendants, are entitled to have a declaration that they have a lien or charge on the land for the amount of the said purchase-money and expenses, and that so far as is necessary, the plaintiff is trustee for them of the land conveyed to her.

The only other matter with which I have to deal is an argument put forward on behalf of the defendants that section 38 of the Building Societies Act, 1874, which enables minors to become members of these societies, validates contracts by them to repay moneys which are lent to them by the society. I cannot agree. On this point I take the same view as Joyce, J. The section only validates the contract of membership. Borrowing money is not the necessary consequence of membership. In fact the majority of members do not borrow of the society. The society can only make advances on the security of land mortgage; and I think it would be straining section 38 very much to hold that it authorized an infant to raise money on mortgage of his land. It only remains to deal with costs. I think each party should bear his own costs of this appeal and below.

ROMER, L.J.—The first question is, Whether the Building Societies Act of 1874 enables a minor, by becoming a member of a building society, to borrow money by means of advances on mortgage of his property. I do not think it does. As pointed out by Vaughan Williams, L.J., though the Act enables a minor to become a member, it has not in terms authorized his borrowing while under twenty-one years of age, and it is not a necessary part of a member's position that he should have advances or mortgage his property. Many members never want advances, and many others, even if they desired advances, could not obtain them, by reason of having no sufficient property to give as security. A minor, who cannot legally contract for a loan, or mortgage his estates, is in no worse position than the members I have last mentioned. And to hold that the Building Societies Act has given a minor general power in the shape of advances to borrow, and to mortgage his estates, would practically to a great extent destroy the protection intended to be given to infants by the Infants' Relief Act, 1874. A building society is not bound to see to the application of its advances by the members advanced. All it need look to is the sufficiency of the security. And if the Building Societies Act authorized any infant to take advances, and mortgage his or her estates for the amount advanced, then every infant with an estate might borrow to the extent of that estate as a security, by merely joining a building society. I do not think the Building Societies Act has authorized this, or has the effect contended for by the defendant society. The case then has to be considered according to ordinary principles regulating dealings by infants.

Now, to the extent to which the money advanced by the defendant society went to complete the purchase by the plaintiff, I agree with Joyce, J., in thinking that the plaintiff cannot affirm the purchase and repudiate the advance. But for that advance the vendor would have had a vendor's lien on the estate purchased for the amount, and to that extent I think the defendant society can stand in the shoes of the vendor. But beyond this I do not think we can go with the judgment in the court below. To my mind, it is impossible to treat the advances which were made subsequent to the completion of the purchase as forming one transaction with the purchase, and I think these advances cannot be treated as binding the infant on the ground adopted by Joyce, J. Nor can the mortgage be held on that ground to bind the plaintiff. At first I was inclined to think that some other good ground might be found by which the advances, as binding the estate, and the deed of mortgage might be supported, at any rate to some extent. But I have been unable to find any such ground. The Infants' Relief Act, 1874, is too strong. No doubt the result will be a great hardship on the defendant society, but the Legislature thought it necessary, for the benefit of the community at large, to provide that all contracts by infants for repayment of money lent should be absolutely void. If this results in a hardship to an individual lender, it cannot be helped. He must suffer for the public good. Of course different considerations would arise if the infant had been guilty of fraud. But here no charge of fraud is made. The plaintiff did not represent or induce the building society to believe that she was of full age. On what other ground then can the court hold that a contract that is void gives the lender a charge on the borrower's land? I know of none. Even if the borrower had, as a matter of fact, and for his own purposes only, used the money to buy some chattels or lands, the lender could not have claimed those chattels or lands, or any charge on them. And, if the borrower had chosen to spend the money in building on his land, that fact, in itself, would not give the lender a charge on the land. It occurred to me that as the building society in this case advanced its money by instalments to the infant in order to pay her builder, and, inasmuch as the contract to build, as between infant and builder, was not one of loan, and might not be void under the statute as a contract for goods supplied, the building society might stand in the shoes of the builder. But, even if that were the case, it would not help the society in this case, for the builder had no lien or charge on the land in respect of the building work done. Lastly, it was suggested on behalf of the building society that, inasmuch as it has a charge on the plaintiff's land for the sum paid on completion of her purchase to the vendor, the plaintiff, being obliged to redeem the land from that charge, is bound to do equity, and that it would not be equity to allow the plaintiff to redeem without paying the moneys subsequently advanced by the society, at any rate to the extent to which the land has been benefited by those moneys. But the short answer is that a court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void. It follows that there must be a declaration that the mortgage is void as against the plaintiff, and the mortgage deed should be cancelled. But it should also be declared that the society was, at the date of the completion of the purchase, entitled to a charge for the limited sum above-mentioned, with interest thereon at 4 per cent., and was entitled to retain the title deeds accordingly. I agree with the Lord Justice in thinking that there should be no costs. The defendant society, having only an equitable charge, was not entitled to take possession of the mortgaged property. The proper remedy of the society was to obtain a receiver. But I do not think it would be right to insist on the plaintiff being at once let into possession, as the defendant society ought to have time to consider its position, and to apply for a receiver if so advised. There should, therefore, only be liberty reserved for the plaintiff to apply for possession. No further relief can be granted in this action.

COZENS-HARDY, L.J.—I agree, and I have very little to add. Two contracts have to be considered. The first was a contract for the purchase of the land. This was voidable only, and not void, and has been adopted and confirmed by the plaintiff since she attained twenty-one. Under this contract, and as a legal consequence of it, there arose a vendor's lien for unpaid purchase-money. The second was a contract for the repayment of money lent and to be lent. This was absolutely void under the statute of 1874

and not capable of confirmation. The defendants are in no better position, and they ought not to be in a worse position, than if the plaintiff had been adult, but the mortgage deed were proved to be forged. Even in that case the defendants would be entitled to stand in the shoes of the vendor to the extent to which their money discharged the vendor's lien: see *Brocklesby* v. *Temperance Building Society*, 43 W. R. 606, [1895] A. C. 182. The result is that we must declare that the defendants had a charge for the amount paid by them to the vendors with interest at 4 per cent.

Solicitors, *Beyfus & Beyfus; Peacock, Goddard, & Co.*, for *Rothera & Son*, Nottingham.

App. Bankruptcy.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 15.

In re A DEBTOR.
Ex parte THE PETITIONING CREDITORS. (*a.*)

Bankruptcy—Petition—Production of debtor's books—Calling debtor to prove acts of bankruptcy—Practice.

Upon the hearing of a bankruptcy petition, the petitioning creditor is entitled to call for the production of the debtor's books.

Semble, *the petitioning creditor is also entitled to call the debtor for the purpose of proving the acts of bankruptcy alleged against him.*

This was an appeal against the decision of Mr. Registrar Brougham refusing to allow the petitioning creditors to call for the production of the debtor's books. Upon the hearing of a bankruptcy petition the petitioning creditors' counsel called for the production of the debtor's books for the purpose of proving the acts of bankruptcy which were alleged against him. The learned registrar held that according to the practice in bankruptcy the debtor's books could not be used against him for such a purpose. From this decision the petitioning creditors now appealed. Upon the appeal the question was also argued (though it did not actually arise for decision) whether upon the hearing of a bankruptcy petition the debtor could be called as a witness and be examined as to the alleged acts of bankruptcy in support of the petition.

Herbert Reed K.C., and *Carrington*, for the petitioning creditors.

Muir Mackenzie, for the debtor.

The following cases were referred to: *In re Holloway*, 1 Bank. & Ins. Rep. 244; *Williams* v. *Williams* 6 M. & W. 170; *Udal* v. *Walton*, 14 M. & W. 254; Starkie on Evidence, p. 191; *Ex parte Castrique*, 10 L. T. Rep. 767, 12 W. R. Ch. Dig. 7.

VAUGHAN WILLIAMS, L.J., said the petition must go back to the registrar. No doubt for a number of years it had been the practice in bankruptcy not to allow a petitioning creditor to call the debtor in support of a petition which was adverse to him. It might not be necessary to go into that question on the present occasion as it was the ground of the appeal that the registrar had not allowed the debtor to be called. But his lordship thought it better that he should say a few words on the point. The mere fact that this had been the practice of the Bankruptcy Court for a long period was not sufficient to make it right that the court should exclude the evidence unless it could recognize the principle of the exclusion. It was said that the practice was founded on the old rule which excluded the evidence of interested persons, but his lordship did not agree with that contention. In the cases cited by Mr. Reed the evidence was excluded on the ground of interest, but that could not apply to a bankruptcy petition. The reason for the practice was that bankruptcy proceedings were regarded as in some sense of the nature of criminal proceedings, and in a common law court you could not call a prisoner to prove his own guilt. That was not always a principle of English law, but the rule had been gradually evolved by the judges on the ground that it would not further the interests of justice to allow an accused person to be called as a witness against himself. The principle was now recognized by statute, for though an accused person could now give evidence, he could not be compelled to do so. The question was discussed in the case of *In re Holloway*, where counsel was asked why was not the bankrupt examined. That did not mean why did you not call him, but why did you not examine him. It had never been the practice to examine a bankrupt. The only other case was *Ex parte Castrique*, where it was held that there was no jurisdiction to compel a bankrupt to be examined. That had been acted upon ever since. It was said that there was no ground to support the practice. Since the year 1861 things had been altered. The bankruptcy practice may have been a very wholesome one, but it was difficult to say that proceedings were any longer of a criminal nature now that a debtor could present a petition against himself. His lordship supposed that this bankruptcy practice must now be altered. With regard to the debtor's books, it was quite plain that if they were produced they would be *primâ facie* evidence against the debtor, and they must be produced. It was said that their production was immaterial, but obviously they might be very material as to the alleged acts of bankruptcy.

ROMER, L.J., agreed. He thought that it was impossible now to say that bankruptcy proceedings were of a criminal nature so as to preclude the petitioning creditor from calling the debtor to prove the allegations in the petition. It had no doubt been the habit of the Court of Bankruptcy not to allow the debtor to be called as a witness. But if the petitioning creditor was legally entitled to call the debtor, no habit of the court could establish a "practice" within the meaning of the bankruptcy rule, which preserved the old practice of the court when not expressly altered. If the petitioning creditor was legally entitled to call the debtor, no habit of the court could prevent him from insisting on his legal right. Of course the debtor when called would be entitled to refuse to answer any question which might tend to criminate himself. His lordship thought there would be very few cases in which a petitioning creditor would run the risk of calling the debtor. But his lordship could not see why the petitioning creditor, if he could establish an act of bankruptcy in the shortest way by calling the debtor himself, should not do so, instead of having to call perhaps a number of other witnesses. His lordship agreed as to the books.

COZENS-HARDY, L.J., concurred.

Appeal allowed; leave to appeal to House of Lords refused.

Solicitors, *Michael Abrahams & Co.; Osborn & Osborn.*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

App. Bankruptcy.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 15.

In re DUNN.
Ex parte THE SENIOR OFFICIAL RECEIVER. (*a.*)

Bankruptcy—Report of official receiver—Offence under Debtors Act—Consideration by the court—Order to prosecute—Debtors Act, 1869 (32 & 33 *Vict. c* 62), *s.* 16—*Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 164.

Where an official receiver reports that a bankrupt has been guilty of offences under the Debtors Act, it is the duty of the court to consider the report and to decide whether the bankrupt should be prosecuted; but there is no duty imposed on the court to decide at any particular time as to a prosecution.

This was an appeal against the refusal by Mr. Registrar Hope of an application by the official receiver that the court would consider his report dated the 9th of August, 1901, made in the bankruptcy of Archibald Joseph Dunn, and make such order as to the prosecution of the bankrupt or otherwise as the court might think fit.

The report stated that in the opinion of the official receiver the bankrupt had been guilty of offences under the Act, but it did not say whether, in the opinion of the official receiver, there was a reasonable probability of the bankrupt being convicted if he were prosecuted for the offences, nor whether, in the opinion of the official receiver, it was desirable that the bankrupt should be prosecuted. Nor did the official receiver ask the court to direct a prosecution. In those circumstances the learned registrar made the order declining "to take into consideration the report of the official receiver with a view to making any order for the prosecution of the bankrupt or otherwise, there not being a specific application before the court for an order to prosecute; but without prejudice to any application to be made by the official receiver, if so advised, for an order for the prosecution of the bankrupt."

The senior official receiver, at the instance of the Board of Trade, appealed, *ex parte.*

By section 16 of the Debtors Act, 1869, "where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence."

By section 164 of the Bankruptcy Act, 1883, "section 16 of the Debtors Act, 1869, shall be construed and have effect as if the term 'a trustee in any bankruptcy' included the official receiver of a bankrupt's estate, and shall apply to offences under this Act as well as to offences under the Debtors Act, 1869."

By section 166, "where the court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution."

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

Sir R. B. Finlay, A.G., H. Sutton, and *Muir Mackenzie,* in support of the appeal, admitted that it had been the practice of the bankruptcy registrars to make such orders as that made in the present case, but they contended that the practice was wrong, and that it was the duty of the court at some time or other to consider the report and to decide one way or the other whether a prosecution ought to be directed.

They referred to the Debtors Act, 1869, s. 16; Bankruptcy Act, 1883, ss. 66-69, 164, 166; Bankruptcy Rules, 1890, 333-4; Bankruptcy Act, 1890, ss. 3, 8; *Ex parte Barnes,* 44 W. R. 433, [1896] A. C. 146.

VAUGHAN WILLIAMS, L.J., said he did not quite see what was the substantial reason for this application. Section 16 of the Debtors Act, 1869, provides that where a trustee in bankruptcy reports that a bankrupt has been guilty of offences under the Act, the court shall, if it appears that there is a reasonable probability of conviction, order the trustee to prosecute the bankrupt. There was therefore no doubt that if a report was made by the official receiver that the bankrupt had been guilty of offences under the Act the court must consider whether there was a reasonable probability of the bankrupt being convicted, and, if the court arrived at the conclusion that there was such a probability, it must order the bankrupt to be prosecuted. That being so, a question had arisen as to the practice. It was said that, according to the practice, the report was not considered or filed unless and until the official receiver applied for an order directing a prosecution. If that were so, his lordship entirely agreed that the report ought to be filed. But the practice had been to do nothing upon the report unless the official receiver asked for a prosecution. It was contended that the official receiver was entitled to apply to the court for its directions, and that, if he could not come to a conclusion whether there ought to be a prosecution, it was still the duty of the court to determine, on his application for directions, whether or not the bankrupt ought to be prosecuted. But his lordship said that, although it was the duty of the court to consider the report, no duty was imposed upon it to do this at any particular time. It could do this when it pleased, and if it chose it could decline to give any directions whatever. It was neither convenient nor expedient that the court should determine whether a prosecution should be ordered until all the necessary facts were put together so as to satisfy the official receiver that there was a reasonable probability of conviction. The order which the registrar had made was not in the right form. He ought not to have declined to consider the report, but if he had looked at the report and had come to the conclusion that the facts were insufficient he would have been justified in refusing to give directions. If he had after looking at the report refused to give directions he was entitled to do so. But here the registrar refused to take the report into consideration. That was not the form in which the order ought to have been made. His lordship could not help thinking that in many cases the fact that the official receiver did not think fit to ask for a prosecution ought to be taken into account when the registrar was considering whether he ought to direct a prosecution. It was not necessary to say more upon this, which was an *ex parte* appeal. The official receiver could go back to the registrar and ask him to consider the report and give directions, and the registrar, on looking at the report, could consider whether there ought to be a prosecution, or he could give no directions at all.

ROMER, L.J., said that under section 16 of the

Debtors Act, 1869, as affected by section 164 of the Bankruptcy Act, 1883, it was clear that when the official receiver reported to the court that the bankrupt had committed offences under the Act it was the duty of the court to consider the report and to determine whether there should be a prosecution or not. Under the Act it was clear that the determination of the question rested with the court and not with the official receiver. So that the court could not refuse to consider the report simply because no application was made to prosecute the bankrupt. The court must at some time or other consider the report, and the registrar was wrong in declining to do so. When a report was sent in it ought to be filed. The official receiver might apply for directions, but the court was not bound at once to decide as to a prosecution, it might postpone its decision or give no directions. It was not in any way fettered as to the time for giving its decision, but it must at some time or other decide the question.

COZENS-HARDY, L.J., concurred.

Appeal allowed.

Solicitor, *Solicitor to the Board of Trade.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 13.

BOARDMAN *v.* SCOTT & WHITWORTH. (*a.*)

Master and servant—Employers' liability—"Accident"—Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

A workman in the course of his employment was removing an empty yarn beam from a loom when a sudden strain, caused by his shifting it in order to get it more evenly balanced on his shoulder, had the effect of tearing some of the fibres of the muscles of his back.

Held, that the injury was caused by an "accident" within the meaning of section 1, *sub-section* 1, *of the Workmen's Compensation Act,* 1897.

Appeal from an award of the judge of the Manchester County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a skilled power-loom overlooker, and was employed in the factory of the employers. It was part of his ordinary duty to remove empty yarn beams from looms in the factory. He had removed a beam weighing about 100lb. from a loom, and was carrying it on his shoulder, when, finding that it was not evenly balanced on his shoulder, he shifted it in order to get it more evenly balanced, and he immediately felt something crack in his back, and subsequently discovered that he had sustained an injury. The medical evidence showed that the sudden strain caused by shifting the beam had the effect of tearing some of the fibres of the muscles of his back. It appeared that before this he had been in good health, and that he had often removed similar beams without difficulty.

The county court judge found as a fact that whilst lifting the beam the applicant suddenly tore some of fibres of the muscles of the back, that the muscles were not ruptured, but the fibres were torn. He was of opinion that the injuries sustained by the applicant were caused by an accident, and he made an award for compensation.

The employers appealed.

Arthur Powell, for the employers.—The facts of this case do not show anything in the nature of an accident. An accident implies the happening of some fortuitous and external event: see the three cases of *Hensey* v. *White, Lloyd* v. *Sugg & Co.,* and *Walker* v. *Lilleshall Co.* (*Limited*), 48 W. R. 257, [1900] 1 Q. B. 481; *Timmins* v. *The Leeds Forge Co.,* 16 Times L. R. 521, 49 W. R. Dig. 109; *Roper* v. *Greenwood & Sons,* 83 L. T. Rep. 471, 49 W. R. Dig. 113.

Rugg, K.C., and *Edmond Browne,* for the applicant.

COLLINS, M.R.—I think this was a clear case of an accident. All the authorities are agreed and all are opposed to the contention of the employers. In my opinion both the elements of an accident are found in this case—viz., those of being fortuitous and unexpected. The decision of the county court judge was therefore right, and the appeal must be dismissed.

STIRLING and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the employers, *Wm. Hurd & Son,* for *Payne, Galloway, & Payne,* Manchester.

Solicitors for the applicant, *Indermaur & Browne,* for *Gardner & Son,* Manchester.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div.
Byrne, J. Dec. 9.

FROGLEY *v.* PHILLIPS. (*a.*)

Practice—Fund in court—Payment out—Person entitled to take out letters of administration—Fund under £20.

Where a person entitled to a fund in court has died intestate, the court will not allow the fund to be paid out to the person entitled to take out letters of administration to the estate of the intestate, but who has not done so, even although the fund is under £20.

Hinings *v.* Hinings, 2 *Hem. & M.* 32, 12 *W. R. Ch. Dig.* 3, *not followed.*

Petition.

This was an application to vary an order made upon a petition for the distribution of a sum of about £1,000 New Consols and £35 cash in court, standing to the credit of the above action to a separate account.

The order provided for the payment of various shares to various persons entitled, and to the personal representatives of others who had died. One of these latter was a lady, who had died intestate, and whose husband, a respondent to the petition, had not obtained letters of administration to her estate. Her share amounted to less than £15.

An application was now made on behalf of the husband and of some other respondents that the order should direct that the shares of legatees who had died, being under £20, should be paid to the persons entitled to obtain administration to the estates, and that the necessity of actually obtaining letters of administration might be dispensed with.

G. Welby King, for the petitioners.

S. Leeke, for the husband and other respondents.—It is the practice of the court to allow sums under £20 belonging to a legatee who has died intestate to be paid to the person entitled to take out letters of administration without putting him to the expense of

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

doing so: *King* v. *Isaacson*, 9 W. R. 369; *In re Cabel*, 3 W. R. 280; *Hinings* v. *Hinings*, 2 Hem. & M. 32, 12 W. R. Ch. Dig. 3; Dan. Ch. Pr. (7th ed.), vol. 2, p. 1498. [BYRNE, J.—Letters of administration to an estate under £100 can be obtained for 15s.] If the practice is not followed, the result will be that if the legatee dies before the order letters of administration for a fund of £15 or less must be obtained, while if the legatee survives the order for a single day, a fund up to £100 might under the Supreme Court Fund Rules, 1894, r. 62, be paid to the persons entitled without their being required to obtain letters of administration.

BYRNE, J.—I must refuse the application. The judges of the Chancery Division have carefully considered the practice adopted in *Hinings* v. *Hinings*, and have decided that it is not to be followed. If the applicant is dissatisfied he must go to the Court of Appeal.

Application refused.

Solicitors, *Guedalla & Cross*, for *Wilkins & Toy*, Chipping Norton; *Withall, Trotter, & Patteson.*

Chan. Div. } Farwell, J. } Nov. 22.

In re HUXTABLE.
HUXTABLE *v.* CRAWFURD. (*a.*)

Will—Legacy for charitable purposes agreed upon—Admissibility of evidence.

A testatrix bequeathed £4,000 to C. "for the charitable purposes agreed upon between us."

Held, that there was a limited charitable purpose, and that evidence was admissible to show what were the terms agreed upon.

In re Fleetwood, 29 *W. R.* 45, 15 *Ch. D.* 594, *followed.*

Originating summons.

The testatrix, Mrs. Huxtable, by her will dated the 7th of August, 1899, made the following bequest: "To my friend the Rev. Charles Hubert Payne Crawfurd I leave the sum of £4,000 sterling for the charitable purposes agreed upon between us."

The testatrix died in March, 1901.

This was an originating summons by the plaintiffs, who were the executors of the will, in order to determine the validity of the bequest.

Errington for the executors.

Ashworth James, for the defendant Crawfurd, did not claim any beneficial interest in the fund. He submitted that there was a good charitable disposition of the income of the fund.

Parker, for the Attorney-General.

Butcher, K.C., and *C. James*, for the residuary legatees.

FARWELL, J., after referring to the will, said: An affidavit has been put in by Mr. Crawfurd, in which he states that the charitable purposes agreed upon were purposes which come to an end with his own lifetime. He does not himself now claim any beneficial interest in the fund, although he states in his evidence that the intention was, that subject to his applying the fund to charitable purposes during his lifetime he was to have the corpus. That is not claimed for him now at the bar. Mr. Parker says, for the Attorney-General, here is a general charitable trust shown, and as I understand him to say, I ought not to regard the evidence, but should direct a scheme for the whole £4,000. I do not think I could do that. I quite agree that the evidence would not be admissible if it were to contradict the will—that is to say, supposing the affidavit had been that the lady was under a misapprehension, and that she never agreed to any charitable purposes at all with him, that would be contradicting the will, and I do not think it would be admissible here. But here we have got by the terms of the will, not a general charitable purpose, but a limited charitable purpose—namely, for those actually agreed upon, and I do not see that there is any contradiction of the will in saying that the charitable purposes agreed upon exhausted the whole income of the fund, but lasted only for a limited time and did not go on for ever. I should have had some little doubt as to the admissibility of the evidence at all if it had not been for the decision of Hall, V.C., in *In re Fleetwood*; that is a decision more than twenty years old, and I certainly feel bound to follow it. I am not sure that Mr. Parker objected in form to my admitting the evidence. It seemed that if he had, I should have overruled the objection and admitted it. The case he chiefly relied upon was the case of *The Commissioner of Charitable Donations and Bequests* v. *Cotter* (which I believe should be read *Sullivan*), 1 Dr. & War. 501. There this particular question did not arise, because the gift being to two reverend gentlemen "to be by them applied to charitable purposes according to my instructions deposited with the Rev. Andrew O'Connell," it appeared that no written instructions had ever been deposited with Mr. Andrew O'Connell, but his testimony was, "I had instructions given to me, but they were verbal and general for charitable purposes, and with this proviso only, that the money was to be exclusively applied for charitable purposes." Then, says the Lord Chancellor, "here the intention expressed is consistent with the will; whether the Statute of Frauds may or may not interfere with it I do not think myself called upon to say, as I can decide without reference to the statute." If I may respectfully say so, I entirely agree. There was on the face of the will there, a general charitable intent and so far as the parol evidence went it was exactly in accordance with that, and there was no difficulty at all. Here there is not on the face of the will a general charitable intent, but a limited charitable intent—namely, to the extent agreed upon. It seems to me I must admit the evidence on the authority of that case to show what the parties agreed upon. That being so, the scheme will be limited to dealing with the fund during the lifetime of Mr. Crawfurd.

Solicitors, *Bridges, Sawtell, & Co.; Waltons, Johnson, Bubb, & Co.; Solicitor to the Treasury; Clutton & Johnson.*

Chan. Div. } Buckley, J. } Dec. 4.

In re BOLES AND BRITISH LAND CO.'S CONTRACT. (*a.*)

Trustee—Trust for sale—Retirement of trustee—Purchase by him of property subject to trust.

Where a trustee of an instrument containing a power of sale has retired from the trust, he is entitled to purchase property subject to the trust, provided there is nothing to show that at the time of his retirement a sale was contemplated or that he is taking advantage of any

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

information which he might have obtained when he was a trustee.

This was a summons taken out by the purchasers under the Vendor and Purchaser Act, asking for a declaration that their requisitions had not been duly answered and that the vendor had not deduced a good title in accordance with the contract.

The facts of the case were as follows: A testator devised certain lands to four trustees (among whom was the vendor, Boles) upon certain trusts with a power of sale; on the 27th of May, 1885, the testator died; on the 27th of July, 1885, one of the trustees disclaimed the trusts of the will; on the 4th of August, 1885, Boles concurred with the two other trustees in paying off a mortgage on part of the testator's estate; by an indenture of the 11th of November, 1885, Boles, under the power contained in section 32 of the Conveyancing and Law of Property Act, 1881, retired from the trust, and the trust property thereby became vested in the two remaining trustees; by an indenture of the 13th of November, 1897, under the power of sale contained in the will Boles purchased some of the lands therein comprised from the remaining trustees for the sum of £5,325; on the 3rd of May, 1901, Boles contracted with the purchasers to sell them the property at the price of £6,000. In their requisitions the purchasers took exception to the purchase by the vendor of the lands in question from the testator's trustees on the ground that he himself had once been a trustee of the testator, and demanded that he should show a proper title thereto. The vendor declined to comply with this requisition and thereupon the purchasers took out the present summons.

T. L. Wilkinson, for the applicants.—The rule which precludes a trustee from buying trust property extends after his retirement; if, therefore, he wishes to buy, he must either obtain the consent of his *cestuis que trustent*, or, if they are incapable of giving such consent, of the court.

He relied on *Ex parte Lacey*, 6 Ves. 625; *Ex parte James*, 8 Ves. 337; and *Coles* v. *Trecothick*, 9 Ves. 234.

H. Wace, for the respondent.

Buckley, J., stated the facts, and continued: Apart from any case of doubt or suspicion is there any rule of this court that a man who has ceased to be a trustee of an instrument which contains a power of sale for twelve years cannot be a purchaser of the property subject to the trust? I think there is not. The doctrine as to purchases by a trustee from his *cestuis que trustent* is founded on this—that a trustee for sale is bound by a duty to his *cestuis que trustent* to do everything in his power for their benefit, and may not, irrespective of any question of undervalue, purchase their property; and further, he may not purchase their property if he has retired from the trusteeship with that end in view. But if he has retired, and there is nothing to show that at the time of his retirement there was any idea of sale, is there anything to prevent him from becoming a purchaser? I have to see whether Boles was taking advantage of any information which he might have obtained when he was a trustee; so far as I can see, he was not. I have discovered a case which is not exactly in point, but which is illustrative of the principle on which I have to decide this case. In *Clark* v. *Clark*, 9 App. Cas. 733, 33 W. R. Dig. 88, there were two executors, one of whom had not proved but had not disclaimed; it was held in the supreme court of the colony that until he had absolutely disclaimed he could not buy from his co-executor. Sir Arthur Hobhouse, in delivering the judgment of the Privy Council reversing this decision, said: "Their lordships cannot agree that a sale is to be avoided merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased, though in point of fact he never does become such. A man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction.... But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others and a purchaser on his own behalf." That is not this case; it was the case of a man who might become a trustee; but in my opinion the same principle must prevail—the mere fact that a man was a trustee for sale of property twelve years before, does not preclude him from purchasing it.

Summons dismissed.

Solicitors, *Russell & Russell; E. F. & H. Landon.*

Chan. Div. } Nov. 23, 26.
Joyce, J. }

Poisson and Woods v. Robertson and Turvey. (a.)

Trade secret—Medical prescription—Secret recipe—Joint ownership—Right of one joint owner to demand inspection of recipe in the hands of another joint owner.

Where A. and B., each claiming under assignments from C., had been held at the trial of an action between A. and B. to be joint owners of a secret remedy, and each entitled to make and sell the remedy, but the paper upon which the secret recipe was written had been destroyed,

Held, that A. (to whom the recipe had never been communicated) was not entitled, upon an application made under the liberty to apply given at the trial, to demand from B. either a copy or an inspection of the secret recipe.

This was a motion in the above-named action by the plaintiff Poisson that he might be at liberty to inspect (and take copies of) the original recipe for the manufacture of the secret specific or remedy known as "Tacquaru" handed by George Rowland Edwards to the defendant Robertson, and then in the possession, custody, or power of the defendant Turvey, and that the defendant Turvey might be ordered to produce the said recipe for such inspection.

The subject-matter of the action was a secret specific for the cure of drunkenness.

By an agreement dated the 2nd of March, 1896, George Rowland Edwards, the former owner of "Tacquaru," entered into partnership with the defendant Robertson for the purpose of dealing with the said remedy, and under that agreement Robertson became entitled to one-half the profits, he undertaking the whole business management, and Edwards being in the position of a sleeping partner.

By an indenture dated the 11th of March, 1896, Edwards assigned his interest in the remedy to one Woods, who, however, was not to be entitled to know the secret of the remedy.

On the 23rd of March, 1896, Woods, by an indenture, assigned to the plaintiff Poisson one-half of his half interest in the remedy.

On the 6th of July, 1897, the defendant Robertson, by a document in writing, assigned one quarter of his half interest to the plaintiff Poisson, but without communicating the secret to him, though there was no

(a.) Reported by H. Claughton Scott, Esq., Barrister-at-Law.

covenant to the effect that it should not be communicated to him.

Subsequently, on the 1st of August, 1900, Robertson affected to sell to the defendant Turvey the sole rights in the said remedy, and he thereupon communicated the secret to Turvey, handing to him the original paper upon which it was written.

The plaintiffs thereupon sought a declaration that the last-mentioned assignment was a fraud on their rights and void, and an order that the defendant Turvey should deliver up the recipe and other documents handed to him by the defendant Robertson. They further asked for an injunction to restrain the defendant Turvey from manufacturing, selling, or dealing with the remedy or from disclosing the secret to any person other than to the plaintiff Poisson; a declaration that the plaintiff Poisson was entitled to have the remedy communicated to him; an order directing the defendant Robertson to deliver to the plaintiff Poisson a true copy of the recipe; and an account of all dealings with the remedy by the defendant Turvey.

Upon hearing the action Kekewich, J., in his judgment decided that, there being no fraud in the sale of the 1st of August, 1900, the effect of the various assignments was to vest three-eighths in Turvey, three-eighths in Poisson, and two-eighths in Woods. But his lordship further held that this did not entitle the plaintiffs to an account. Each was entitled to make the remedy and to sell it for his own benefit. His lordship gave no decision upon the question of the right of the plaintiff Poisson to inspect the recipe or to have the documents handed over to him.

This motion was brought on by the plaintiff Poisson under the liberty to apply given in the action.

It appeared in the evidence that the original paper upon which the recipe was written had become worn out, and was consequently, since the hearing of the action, destroyed by the defendant Turvey, who, however, had taken and kept a copy of it.

Hughes, K.C., and *Harman*, for the applicant.—The result of Kekewich, J.'s, judgment is that we are interested in the recipe to the extent of three-eighths. Under the assignment of two-eighths our client Poisson is not entitled to know the recipe; but as owner of the remaining one-eighth he entitled to know it. This is so whether we are in the position of joint owners or partners.

Wright Taylor, for the defendant Turvey.—In the first place, this is an application which cannot be made under the liberty to apply which appears in the order of Kekewich, J. But assuming that he can do so, the applicant has no right to ask me to divulge the secret to him. The original piece of paper is no longer in existence and there is nothing in which he can claim any property.

JOYCE, J.—This is a most extraordinary case, and I regret that I do not see my way to make the order asked for. My present impression is that the plaintiff could only succeed by showing that he had some property, legal or equitable, in the piece of paper upon which the specific was written, or some contract, express or implied, for the production of it. It is not like the case of a title deed or copyright. Under the assignments prior to one dated the 6th of July, 1897, Poisson and Woods had shares in what was called the secret remedy, but only under documents which provided that they should not know the secret. It was only under the document of that date that Poisson became entitled to know the secret. The truth is that Poisson ought not to have paid his money until he had seen the document, or he should have had inserted a covenant for its production.

Robertson affected to assign the whole remedy to Turvey, who took without notice of the earlier assignment. Then at the trial of the action before Kekewich, J., Poisson asked by his pleadings for an order for the delivery of the recipe to him, and by amendment that Turvey should shew it to him. Notwithstanding that the judgment gave no such relief, but merely a declaration as to the interests of the parties in the remedy. So the plaintiff is in a difficult position in coming to ask the court now for a remedy which he failed to obtain on that occasion. For these reasons I do not see my way to make a positive order on Turvey to shew the paper. This is, however, without prejudice to any subsequent application.

Solicitors, *J. A. Maxwell; Maurice Moseley.*

Chan. Div.
Swinfen Eady, J. } Dec. 6, 7.

In re THE SPIRAL GLOBE (LIMITED). (*a.*)

Company—Debentures—Extension of time for registration—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 15 *—Application subsequent to resolution for voluntary winding up—Form of order.*

An application for an order under section 15 *of the Companies Act*, 1900, *extending the time for registration of debentures was not made until after the passing of a special resolution for the voluntary winding up of the company and the appointment of a liquidator.*

Held, that the principle of Crew *v.* Cummings, 36 *W. R.* 908, 21 *Q. B. D.* 420, *and* In re Parsons, Ex parte Furber, 41 *W. R.* 468, [1893] 2 *Q. B.* 122, *extended to cases in which the rights of third parties had actually accrued and might be prejudicially affected if registration were allowed without protecting those rights. The order was consequently made "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."*

This was an application under section 15 of the Companies Act, 1900, by the holders of debentures in the Spiral Globe (Limited) for an extension of the time within which such debentures might be registered.

Mark Romer, for the debenture-holders.

Harold Simmons, for the voluntary liquidator.

The facts and arguments adopted by counsel appear sufficiently in the judgment.

Cur. adv. vult.

Dec. 7.—The following written judgment was delivered by

SWINFEN EADY, J.—This was an application of Messrs. William Watson & Co., bankers, and Thomas Edward Vickers, made under section 15 of the Companies Act, 1900, to extend the time for registration of ten debentures of £100 each, numbered 11 to 20 inclusive, and forming part of a series of twenty like debentures created by the company, on the ground that the omission to register was due to inadvertence. The company was incorporated in the year, 1897, and by a resolution of the board of directors passed on the 28th of August, 1900, it was determined to authorize the issue at par of debentures of £100 each to the amount of £2,000. At a meeting of the board on the 31st of August, 1900, the form of

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

debenture was submitted and approved, and it was resolved that the seal be affixed to twenty debentures of £100 each bearing interest at 6 per cent., and the same were sealed accordingly, such debentures all ranking *pari passu* and being charged upon the whole of the assets and undertaking of the company by way of floating charge. On the 24th of September, 1900, the company issued to Messrs. William Watson & Co. ten of the debentures, but the balance—those numbered 11 to 20—which are the subject of the present application, were not then issued. On the 3rd of January, 1901, it was resolved that the remaining ten debentures be deposited with the company's bankers, Messrs. William Watson & Co., and this was done on the 5th of January, 1901, the debentures being so deposited as security for an overdraft. Subsequently in February, 1901, it was arranged that Mr. Thomas Edward Vickers should advance to the company £500 in part discharge of the company's overdraft and receive in respect thereof five of the ten last mentioned debentures, and this was done. On the 18th of April, 1901, the company passed a special resolution for winding up voluntarily and a liquidator was appointed. On the 3rd of July, 1901, Messrs. William Watson & Co., on behalf of themselves and all other holders of mortgage debentures, commenced an action for the purpose of enforcing all the debentures, and on the 30th of July, 1901, judgment was pronounced in the matter directing the usual accounts and inquiries. In prosecuting the inquiries under the judgment it transpired that the debentures issued on the 5th of January, 1901, had not been registered pursuant to section 14 of the Companies Act, 1900.

I am satisfied that the omission to register was due to inadvertence and am willing to make an order extending the time, but with the addition of the words "This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." Mr. Romer, for the applicants, said that an order in this form would probably be of little use to him, having regard to the winding up and the appointment of a liquidator, and asked to have those words omitted, and contended, further, that the omission to register could only have prejudiced the position of creditors who had become such since the issue of the debentures, and that at all events the order should only preserve the rights of such creditors, and should not extend to persons who were creditors of the company when the debentures were issued, or to the liquidator. In support of his argument he referred to *Crew* v. *Cummings*, 36 W. R. 908, 21 Q. B. D. 420, and *In re Parsons, Ex parte Furber*, 41 W. R. 468, [1893] 2 Q. B. 122, cases decided under the Bills of Sale Act, 1878, and which did not appear to have been referred to in the recent case before Buckley, J., of *In re Joplin's Brewery Co. (Limited)*, *ante*, p. 75, [1901] W. N. 216. These cases, he contended, showed that the object of section 14 of the Bills of Sale Act, 1878 (which is in *pari materia* with section 15 of the Companies Act, 1900), was only to protect the rights of persons in whom any property of the mortgagor had actually vested before the registration of the debentures. I am unable to accept this view. It is true that on the winding up of a company the property does not become vested in the liquidator as it does become vested in the trustee of a bankrupt on the bankruptcy of an individual. But the principle of the cases before referred to is not limited in its application to those cases in which the ownership of or property in goods or chattels has actually changed; it extends, in my judgment, to cases in which the rights of third persons have actually accrued and in which they would be prejudicially affected, if registration were allowed without saving and protecting those rights. Upon a winding up the rights of the whole body of the company's creditors have intervened, and this position of the liquidator, and through him, of all the general creditors of the company, would now be very much prejudiced if the time for registration were unconditionally extended; the company being now in liquidation, the difficulty cannot be avoided by issuing fresh debentures. The order will therefore be made, but with the addition of the words before mentioned.

Solicitor, *J. J. Hands*, for all parties.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 20.

REX *v.* JUSTICES OF ESSEX. (*a.*)

Poor law—Rating—Appeal—Valuation list—Appeal against subsequent rate—Second notice of objection to assessment committee—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

By 27 & 28 *Vict. c.* 39, *s.* 1, *it is enacted that before any appeal shall be heard by any special or quarter sessions against a poor rate, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee: provided, that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by the committee, unless he shall have given the committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just.*

The appellants, having been assessed in May, 1900, *to a poor rate in conformity with a valuation list, gave notice of their objection to the list, and the committee reduced the assessment but refused to do so to the extent claimed by the appellants. The appellants then appealed to special sessions, when the assessment was still further reduced, but not to the extent claimed by the appellants. A subsequent rate was made in October*, 1900, *which was not appealed against. In May*, 1901, *another poor rate was made, under which the appellants were assessed on the valuation decided by the justices in special sessions. The appellants appealed to quarter sessions against this rate, but gave no fresh notice to the committee, of objection to the valuation list upon which this rate was made. The justices refused to hear the appeal, on the ground that no proper notice had been given to the committee.*

Held, on a rule for a mandamus *to the justices, that no proper notice of objection to the valuation list had been given to the assessment committee before the second appeal was brought, and therefore such appeal could not be heard. Under section* 1 *of the Act of* 1864 *it is a condition precedent to an appeal that the appellant shall make an objection before the committee to the valuation list.*

Where there is a second rate and a second appeal a second notice of objection to the valuation list must be given.

Reg. *v.* Great Western Railway Co., 17 *W. R.* 670, *L. R.* 4 *Q. B.* 323, *followed.*

Rule calling on the justices of Essex to show cause why a writ of *mandamus* should not issue to them commanding them to enter continuances and hear and determine an appeal of Messrs. F. & B. Tolhurst & Cox against a rate or assessment made for the relief of the poor of the parish of Prittlewell, in the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Rochford Union, in the county of Essex, on the 4th of May, 1901.

The following facts appear from the affidavit on which the rule was granted:

In June, 1900, the appellants' premises were assessed, under a poor rate made on the 8th of May, at the gross estimated rental of £180 and at the rateable value of £160.

Being dissatisfied with this assessment the appellants on the 23rd of June, 1900, duly gave notice of their objection to the list, and on the 5th of September, 1900, the assessment was reduced to £150 gross estimated rental and £135 rateable value, but the assessment committee refused to reduce the assessment to the extent claimed by the appellants—namely, to £90 gross estimated rental and £81 rateable value.

Being still dissatisfied they appealed to the justices in special sessions, assembled in pursuance of section 6 of 6 & 7 Will. 4, c. 96, against the above rate, and on the 6th of November, 1900, the appeal was heard, and the justices determined not to reduce the assessment of the premises to the extent claimed by the appellants, but they amended the rate by reducing such assessments to £130 gross estimated rental and £117 rateable value.

A poor rate made the 26th of October, 1900, was the rate which was current at the date this appeal was heard, and the next poor rate made thereafter was dated the 4th of May, 1901, the rate now appealed from.

By this rate the appellants were assessed in respect of their premises as follows: gross estimated rental, £130; rateable value, £117.

On the 12th of June, 1901, they gave notice of appeal against this rate on the grounds that their premises were assessed at sums exceeding the true gross estimated rental and rateable value thereof; that there were certain other specified premises in respect of which the respective occupiers were assessed in the said rate unfairly and incorrectly, and at sums less than the true gross estimated rentals and rateable values thereof, and that certain other rateable hereditaments, in respect of which the occupiers were liable to be rated were omitted from the said rate.

On the 3rd of July, 1901, at the general quarter sessions, the appeal came on for hearing, when the following preliminary objections were made on behalf of the respondents: (1) That as regards the first of the said grounds of appeal, the appellants were concluded by the finding of the special sessions on the 6th day of November, 1900, that finding not having been appealed against, and being, therefore, binding and conclusive under section 6 of 6 & 7 Will. 4, c. 96. (2) That, as regards the same ground of appeal, the appellants were not entitled to appeal to quarter sessions against the said rate without again objecting before the assessment committee to the valuation list on which the rate was based, the appellants not having so objected since they made an objection on the 23rd of June, 1900. (3) That, as regards the second and third of the grounds of appeal, the appellants could not be heard, because they had not at any time objected to the valuation list on any of such grounds.

The court of quarter sessions allowed the objections and dismissed the appeal.

No alteration in the premises or in the value thereof had taken place, or had been alleged by the overseers to have taken place, since the appellants objected to the assessment. The appellants did not object before the assessment committee to the assessments of the premises which they alleged were insufficiently rated, or to the omission from the valuation list of the hereditaments which they alleged were liable to be rated, because they considered they were not required by section 1 of the Union Assessment Committee Amendment Act, 1864, to make such objection before appealing to quarter sessions against a poor rate on the ground of the inadequacy of the assessments of other persons, or the omission from the rate of the premises of other persons, and that the committee would not be authorized to grant the appellants the relief they claimed in relation thereto.

Avory, K.C. (*J. C. Earle* with him), for the assessment committee, showed cause.—The rule should be discharged. This was a second appeal against a second rate, and no notice has been given in respect thereof to the assessment committee. Section 1 of the Union Assessment Committee Amendment Act, 1864, enacts that "no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just." The justices at quarter sessions were therefore right in refusing to hear the appeal on that ground. In the case of *Reg.* v. *The Great Western Railway Co.*, 17 W. R. 670, L. R. 4 Q. B. 323, the appellants, having been assessed to a poor rate in conformity with a valuation list, gave notice to the committee of their objection to the list, but the committee refused to alter the list, and on appeal the rate was confirmed, subject to a case. While the case was pending a second rate was made in conformity with the list which remained unaltered as to the appellants, and the appellants having given the twenty-one days' notice of appeal against the rate to the committee, applied to the quarter sessions to enter the appeal against the second rate, without having given a fresh notice to the committee of objection to the list, and it was held by the court (Cockburn, C.J., Mellor, Lush, and Hayes, JJ.) that a fresh notice of objection to the list was a condition precedent to the right to enter the appeal against the second rate. That is a decision which governs the present case and should be followed. It is true that in subsequent cases some doubt has been thrown upon that decision, but it is still a binding authority on this court. In *Reg.* v. *The Justices of Wiltshire*, 4 Q. B. D. 326, 27 W. R. Dig. 151, it was held that an appellant who has given notice of objection to the valuation list and failed to obtain relief before a rate is made in conformity with the list is not bound by section 1 of 27 & 28 Vict. c. 39 to give a fresh notice of objection to the list after the rate is made in order to be entitled to appeal. That case is distinguishable from the present case. In *The Queen* v. *The Justices of Derbyshire*, 19 W. R. 934, the appellants objected to the valuation list, a rate was made, the objection was subsequently heard, and a deduction made. The appellants, however, were dissatisfied with the deduction and gave notice of appeal against the original rate, but did not give the assessment committee any notice of appeal or further objection, and it was held that they were entitled to have their appeal heard. That, again, is not the present case. In the case of *Reg.* v. *Justices of Denbighshire*, 33 W. R. 784, 15 Q. B. D. 451, the *Great Western Railway case* was discussed, and to an extent doubted; but that case is distinguishable from the present one: see also *Reg.* v. *Justices of Kent*, 19 W. R. 205, L. R. 6 Q. B. 132. None of those cases, however, go so far as to say that *Reg.* v. *Great Western Railway Co.* was wrongly decided. It has never been overruled and is still good law.

Mackenzie, K.C. (*Alex. Glen* with him), in support of the rule.—The magistrates at quarter sessions should have heard the appeal. Notice of objection to the valuation list had already been given to the assessment committee, and that one notice is sufficient. This is an attempt to set the case of *Reg.* v. *Great Western Railway* on its legs again. That case has long been doubted, and the cases already cited on the other side go to show that it should not be relied on. *Reg.* v. *Justices of Denbighshire* is a clear authority in support of such contention. There it was held that a person who has once given to the assessment committee notice of objection against a valuation list and failed to obtain such relief as he deems just, may appeal to quarter sessions against any subsequent poor rate made in conformity with the list, and section 1 of the Act of 1864 does not make it a condition precedent of such appeal that previously thereto he should repeat his application to the committee for relief. Thus the solitary authority on the other side is disposed of. In *Reg.* v. *Justices of Essex*, 43 W. R. 183, [1895] 1 Q. B. 38, Lopes, L J., at p. 42, referring to *Reg.* v. *Justices of Denbighshire*, says: "It was a decision under section 1 of the Act. Speaking for myself, I think that case was rightly decided on that section." As to the point that the justices could not listen to the appeal because the appellant had not taken the third parties before the assessment committee there was no need to do so as the committee have no jurisdiction to deal with them, and, therefore, the justices were wrong in refusing to hear the appeal on that ground: *Reg.* v. *London and North-Western Railway Co.*, 25 W. R. 59; *Reg.* v. *Price* 62 L. J. M. C. 71, 41 W. R. Dig. 165. The answer to the last point is to be found in section 18 of the Union Assessment Committee Act, 1862. That section is not repealed by the Act of 1864: see also *Reg.* v. *Langriville*, 33 W. R. 213, 14 Q. B. D. 83; *Reigate Union* v. *South-Eastern Railway Co.*, 42 W. R. 585, [1894] 1 Q. B. 411.

Alex. Glen followed.

Lord ALVERSTONE, L.C.J.—This rule was moved upon three grounds: firstly, because there had been an appeal to special sessions, which was final in the sense of binding the value for the purpose of that particular valuation list, whatever rates might be made under it. That point is not and could not be insisted upon, because it is quite clear there may be subsequent proceedings. The second ground was that no proper notice had been given; and the third ground was that the notice which was given included the undervaluation of other people, and the omission of certain hereditaments which, it was admitted, had not been before the assessment committee at all.

I think that the objection that no proper notice was given is a good objection and that the rule ought to be discharged, because there was not a proper notice of objection to the assessment committee before the second appeal was brought.

I think that when the authorities are carefully considered it will be seen that there is really no discrepancy between them. The substance of them is that under section 1 of the Union Assessment Committee Amendment Act, 1864, if you have been before the assessment committee and have failed to obtain relief in respect of the matter which you are making the subject of the appeal, then you need not go before the assessment committee again; but unless that is the real state of things it is a condition precedent to the appeal that you shall have gone before the assessment committee and have failed to obtain relief, and you shall not be empowered to appeal unless you have done so.

The case of *Reg.* v. *The Great Western Railway Co.* is a distinct authority that where there is a second rate, and a second appeal, a second notice shall be given. It is said that that case has been doubted and is no longer to be regarded as law and is inconsistent with *Reg* v. *The Justices of Denbighshire*. Of course if that were the true view we should be bound by it, but I do not think that any of the criticisms upon *Reg.* v. *The Great Western Railway* touch the substance of it.

It is true that in the case of *Reg.* v. *The Justices of Wiltshire* Cockburn, C.J., said that the discussion in that case had somewhat shaken his confidence in the correctness of his decision in *Reg.* v. *Great Western Railway Co.*, but in each of those cases the real question was entirely different from that in the *Great Western Railway case*.

In *Reg.* v. *Justices of Wiltshire* it was decided that you need not go a second time before the assessment committee on the same rate; that is to say, where you have been before the assessment committee, and a rate is made and you determine to appeal, you having een before the assessment committee with regard to the valuation on which that rate is founded, need not go before them a second time. The case of *Reg.* v. *Justices of Denbighshire* went a little further, and said that where you have been before the assessment committee and have got a certain amount of relief, but you are not satisfied, and you intend to appeal, you need not go a second time before them because you have not got the relief which you asked for, and to which you think you are entitled.

Then came the case of *Reg.* v. *The Justices of Denbighshire*, and the real decision there was, I think, this and this only, that where a rate is made, which is the first effective rate after any relief which you have obtained from the assessment committee, then you can appeal without going before them a second time. In other words, that case is only a development under slightly different circumstances of the two cases of *Reg.* v. *Justices of Wiltshire* and *Reg.* v. *Justices of Denbighshire*. That being so I think the case of *Reg.* v. *Great Western Railway Co.* is applicable to a second appeal, and the subsequent cases show that persons must fulfil, with regard to that state of circumstances, the conditions of section 1 of the Act of 1864. This seems to me to be most reasonable. Valuation lists in the country are not like valuation lists in London. They last for a considerable number of years until someone is minded to have the parish re-valued. Circumstances may alter. A man goes before an assessment committee immediately after the rate is made and he either gets relief or he does not. If he does not get relief he need not appeal; he may pay and years may go on, and then the circumstances in the parish or the character of the land alters and he thinks that he ought to be rated at a lower rate. Under those circumstances it would be a monstrous thing that that man should not go before the assessment committee again, especially when that committee may be responsible for and made to pay the costs.

I think the present case is a much stronger case for saying that where there is a subsequent rate and a subsequent set of proceedings the formalities of section 1 must be fulfilled.

In this case everything with regard to the May rate of 1900 was over. There was an October rate, against which there might possibly have been an appeal, but which was paid. Then in May, 1901, after a period of twelve months, the appellant is minded to raise the question again in respect of a subsequent rate. In my opinion, as poor rates are made from year to year and you have a right to appeal if you think fit, you must, having that right, fulfil the provisions of the section. With regard to the third point—namely, that the notice which was

given included the undervaluation of other people and the omission of certain other hereditaments from the rate, I propose to express no opinion, beyond saying that I think it is an extremely difficult point, and one which will have to be argued in some case where it is necessary to decide it. There are authorities which assume that the only means of raising other persons valuations and including omitted hereditaments is by a proceeding under section 18 of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), and there are authorities which follow the view that the Act of 1864, by necessary implication, gives the assessment committee power to summon the people before them and deal with the matter on a representation by a person who is going to appeal. I think there is a great deal to be said for both views. It is not, however, necessary to decide the point, and I must not be supposed to be expressing any opinion upon it in this particular case. I decide this case on the ground that no proper notice of objection was given to the assessment committee, and, in the words of the section, that there was no failure to obtain relief. I think the rule should be discharged.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Rule discharged with costs.

Solicitors for the Assessment Committee, *Kingsford, Dormer, & Co.*, for *W. & F. Gregson*, Southend-on-Sea.

Solicitors for the appellants, *Sismay & Cook*, for *B. & F. Tolhurst & Cox*, Southend-on-Sea.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 10.

JONES *v.* HUMPHREY. (*a.*)

Practice—Assignment of debt—Moneys to become due—Salary—Unascertained amount—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

By a document in writing entered into between one J. Kerr and the plaintiff it was stated that Kerr did thereby assign to the plaintiff "so much and such part of my income, salary, and other emoluments" from the defendant and other sources "to which I am now or may at any time hereafter become entitled, as shall be necessary and requisite for payment to you of the sum of £22 10s., or for any further or other sums in which I may at any time hereafter become indebted to you, to hold the same for your own use absolutely."

In an action by the plaintiff as assignee of a chose in action *under the Judicature Act*, 1873, *to recover the sum of £24, being two months' salary alleged to be due by the defendant to the said Kerr,*

Held, that the document could not be sued upon, as it was not a sufficiently absolute assignment within the meaning of section 25, *sub-section* 6, *of the above Act, there being no definite or ascertained sum thereby assigned.*

Appeal from county court.

This was an appeal from his Honour Judge Lumley Smith, K.C., sitting at the Westminster County Court.

The action was brought by the plaintiff as assignee of a *chose in action* under the Judicature Act, 1873, s. 25, sub-section 6, to recover the sum of £24, being two months' salary alleged to be due by the defendant, a schoolmaster, to one James Kerr, an assistant schoolmaster in his employ.

On the 24th of May, 1900, the said James Kerr made the following assignment to the plaintiff:

"In consideration of £15 this day advanced by you to me I do hereby assign, sell, and transfer to you, the said Julius Jones, so much and such part of my income, salary, and other emoluments from Leonard Humphrey, of 101, Windsor-road, Forest Gate, the proprietor of the Commercial College, Forest Gate, and from the East Ham School Board, or from any other source whatsoever to which I am now or may at any time hereafter become entitled as shall be necessary and requisite for payment to you of the sum of £22 10s. or for any further or other sums in which I may at any time hereafter become indebted to you, to have, hold, receive, and take the same for your own use absolutely. (Signed) James Kerr."

Notice of the assignment was duly given by the plaintiff to the defendant on the 30th of October, 1900, since which date the said sum, and upwards, was alleged to have accrued due from the defendant to Kerr for salary earned, and it was alleged that Kerr, at the date of the writ, was indebted to the plaintiff in the sum of £28 0s. 6d. Kerr was not a party to the action.

The learned county court judge was of opinion that under the assignment the defendant could not, without taking the account between Kerr and the plaintiff, know for certain what was assigned and how much he ought to pay to the plaintiff and how much to Kerr; and that to bring a case within section 25, sub-section 6, of the Judicature Act, 1873, there must be something definite and ascertained, and not fluctuating and requiring the taking of accounts, and he therefore gave judgment for the defendant.

From that decision the plaintiff now appealed.

R. Bray, K.C. (*Montague Lush* with him), for the appellant.—The question here is whether this assignment is a good equitable assignment within section 25, sub-section 6, of the Judicature Act, 1873. It is submitted that it is so. Notwithstanding that one part might be bad as being against public policy—which is not admitted—yet the remainder of the assignment is not necessarily bad. It is a good assignment so far as the defendant is concerned, and the amount assigned is sufficiently defined and ascertained. In *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523, it was held that an assignment of future book debts was sufficiently defined, and that it passed the equitable interest in all book debts incurred after the assignment. In *Brice* v. *Bannister*, 26 W. R. 670, 3 Q. B. D. 569, it was held that there might be a valid assignment of moneys to become due in the future, and that decision is referred to by Chitty, L.J., at p. 773, in his judgment in the case of *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 46 W. R. Dig. 9. This court is bound by the decision of Coleridge, L.C.J., and Lindley, J., in the former case, that part of a future debt is assignable. In the present case there was an absolute assignment and not a mere charge on the salary. As regards the point whether this assignment is bad as against public policy, an assignment may be good in part and bad in part, and yet be held good. An assignment is divisible both as an absolute assignment or an equitable assignment: *In re Clarke, Coombe* v. *Carter*, 36 W. R. 293, 36 Ch. D. 348.

Counsel also referred to *Clements* v. *Matthews*, 11 Q. B. D. 808, 31 W. R. Dig. 23, and *Mercantile Bank of London* (*Limited*) v. *Evans*, [1899] 2 Q. B. 613, 48 W. R. Dig. 145.

The respondent.—In this case the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

plaintiff has obtained judgment against Kerr, therefore the original debt is altogether gone, and another debt, the judgment debt, substituted. Further, there was no absolute assignment, but only a charge. You cannot in law or equity assign that which does not exist. Jessel, M.R., in *Collyer* v. *Isaacs*, 30 W. R. 70, 19 Ch. D. 142, at p. 151, says, "A man cannot in equity, any more than at law, assign what has no existence." A sum that is not due cannot be assigned; there can only be a contract to assign it: see also *Ex parte Nicholls, In re Jones*, 31 W. R. 661, 22 Ch. D. 782. Lastly, it is against public policy to assign a weekly salary in such a case as this, where there exists a duty to the state on the part of the man to support a wife and family.

Montague Lush, in reply, referred to *Walker* v. *Bradford Old Bank (Limited)*, 32 W. R. 644, 12 Q. B. D. 511, and *Comfort* v. *Betts*, 39 W. R. 595, [1891] 1 Q. B. 737.

Lord ALVERSTONE, L.C.J.—I think there is no doubt that an absolute assignment of future debts, and also an assignment of so much out of future debts may both be good assignments under the Judicature Act, 1873, but in order to bring a case within that Act you must be able to find from the document an assignment of a definite debt so that the debtor may know how much he has to pay to the assignee, on receiving notice of the assignment. We have been asked to say that the assignment is good as to the £22 even if the rest of the document is bad, but I have great doubt whether the argument as to divisibility applies to this document at all; but, looking at the document as a whole, I agree with the learned county court judge that it is not a sufficiently absolute assignment under the statute. It is clear, on looking at the document, that it cannot be said to be an absolute assignment of any definite sum; it says, "I do hereby assign to you so much and such part of my salary as shall be necessary for payment to you of the sum of £22 10s." In my opinion the legal purport of this document is much more in the nature of a charge than an assignment. It does not purport to assign any definite thing, but only so much as may be necessary to pay a certain debt, and I have come to the conclusion I have arrived at on that ground—namely, that nothing definite is assigned. I therefore think this appeal should be dismissed.

DARLING, J.—I am of the same opinion. I think it is impossible to say exactly what was purported to be assigned by this document. It appears to me that no ascertained debt has been assigned by it. The sum affected might be any part of what the defendant owed to Kerr—or it might be more. I do not know of any authority for saying that the assignment of part of a debt comes within the Judicature Act of 1873.

CHANNELL, J.—I agree. I am clearly of opinion that by the document in question there was not an assignment of an entire debt nor of any ascertained part of a debt.

Appeal dismissed with costs.

Solicitors for the appellant, *Ralph Raphael & Co.*

Solicitors for the respondent, *Emmanuel & Simmonds.*

Prob. Div. & Adm. Div. Probate. } Dec. 5.

BIRCH v. BIRCH AND ANOTHER. (a.)

*Probate—Grant of—Allegation of fraud—*Res judicata *—Parties having interest in suit.*

Although fraud be not alleged against any party to a probate suit in which judgment has been given, nevertheless an action may be maintained to set aside the judgment, on the ground that it was obtained by fraud by a person interested under the suit.

Motion.

This was a motion by the defendants to dismiss the action on the ground that the subject-matter thereof was *res judicata*.

Bargrave Deane, K.C., and *Pritchard*, in support, cited *Wytcherley* v. *Andrews*, 19 W. R. 1015, L. R. 2 P. & D. 327; *Priestman* v. *Thomas*, 32 W. R. 842, 9 P. D. 70, 210; *Barnesley* v. *Powell*, 1 Ves. Sen. 119.

Inderwick, K.C., and *Willock, contra.*—The only way that a judgment, alleged to have been obtained by fraud, can be called in question after the time for appealing against it has gone by is by an action. They cited *Flower* v. *Lloyd*, 25 W. R. 793, 6 Ch. D. 297, 27 W. R. 496, 10 Ch. D. 327; *Cole* v. *Langford*, [1898] 2 Q. B. 36, 46 W. R. Dig. 133; *Wyatt* v. *Palmer*, 47 W. R. 549, [1899] 2 Q. B. 106.

Richards, for Henry Guise, followed.

BARNES, J., in delivering judgment, said that it appeared that two actions had been brought in this court, the first one on the 12th of December, 1899, by Ada Rose Guise, and a second one on the 16th of December, 1899, by Edwin Birch against Walter George Birch, and these actions had been consolidated. On the 14th of June, 1899, letters of administration of the estate of the deceased, Arthur Birch, had been granted to Walter George Birch, Jesse Joseph Birch, and Edwin Birch, the brothers of the intestate, he having died on the 18th of April, 1899. The plaintiff claimed revocation of the letters of administration, and set up a will of the 8th of December, 1897. The defendants set up a will of the 18th of December, 1897. On the 20th of February, 1900, Ada Rose Guise delivered a defence supporting the claim of the plaintiffs in the second action for revocation of the grant. Walter Birch pleaded that the alleged wills of the 8th and 18th of December, 1897, were not duly executed, and were not signed by the deceased or by anyone at his direction. The plaintiffs, in the second action, in their reply, traversed the allegations of the defence, and on the 22nd of June, 1900, the case was tried by the President. The witnesses to the will were not called because they could not be found, but Henry Guise, the husband of Ada Rose Guise, was called, and gave evidence to the effect that he had found a certain man who was a witness to the instructions of the will. That man was also called as a witness. It appeared that when Henry Guise was making his inquiries he was acting on behalf of his wife, Ada Rose, and was taking care of her interest. He also was an executor under the will of his wife's sister. The President pronounced for the will of the 18th of December, 1897, and ordered the letters of administration which had been granted on the 14th of June, 1899, to be revoked. On the 26th of June, 1901, a writ was issued by Walter George Birch, and he alleged in his statement of claim that the judgment had been obtained by fraud, and that, at the instigation of

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Henry Guise, the will of the 18th of December, 1897, had been forged. He went on to say that the man who had been a party to the fraud had gone to America and had written from there describing the circumstances under which the pretended will was executed, and he claimed that the judgment should be set aside. A motion was then made to dismiss the action, but it was twice adjourned, first to enable the plaintiff to file his statement of claim, and, secondly, because the court directed that what was asserted in the statement of claim should be put on affidavit. The plaintiff had now sworn that the originals of the letter and confession were, as he was informed and believed, in the hands of the commissioner of the police, and investigations had been and still were being made with reference to them by the authorities at Scotland-yard, and it was upon information and evidence collected and obtained by them and by his solicitor that he had commenced the action, and that he was informed and believed that the contents of his statement of claim were true. It appeared also that Henry Guise was a party to an action in Chancery in connection with the administration of the estate in which the plaintiff, Walter George Birch, was a defendant, and he submitted that Henry Guise should be made a defendant in this suit as he was materially interested in supporting the will. Now the counsel for the defendants in this action contended that such a suit would not lie, but the court thought that from the cases of *Barnesley* v. *Powell*, *Wyatt* v. *Palmer*, and *Priestman* v. *Thomas*, the suit could be maintained. The substance of the case in *Barnesley* v. *Powell* was summed up in a marginal note thus—"There may be relief against a decree obtained by fraud. Against a probate obtained by fraud relief must be here"—*i.e.*, in Chancery. The learned judge also referred to Mitford on Pleadings, where the following passage occurs: "If a decree has been obtained by fraud, it may be impeached by original bill without the leave of the court" (5th ed., p. 112). It should, of course, be clearly borne in mind that fraud in obtaining a will was one thing and fraud in obtaining probate of it was another. It was argued that where no fraud had been alleged against a party to the suit, the matter could not be reopened, but that was certainly not so in probate suits, for many persons who were not parties to the suit were bound by the decree: *Wytcherley* v. *Andrews*. It followed that a number of persons might be interested who were not parties to the suit, and it followed from that that if someone interested was guilty of fraud it affected the whole litigation, for, to take a hypothetical case, if a will was to be put forward and executors named in it and witnesses were procured the executors might propound the will in all innocency although it had been obtained by fraud. It would be absurd to allow that document to stand. It was undoubtedly clear that Mr. Guise had an interest in the suit and was acting in his wife's interests and she had left the matter in his hands. If fraud was established then they would not be entitled under the will, but the court particularly wished not to express an opinion one way or the other on the merits of the case and desired to confine itself simply to observing that, the plaintiff having sworn to the facts that he had, the the case must be allowed to proceed, and this motion must be refused, the question of costs being reserved, and Henry Guise must be added as a defendant.

Leave to appeal was given.

Solicitor for the plaintiff, *E. W. Reeves*.

Solicitor for the defendant, *McKie Sharp*.

Solicitor for parties cited, *J. W. Reid*.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 28, 29.

HAMILTON-RUSSELL v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—Settlement—Instrument of appointment—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 6, *sub-sections* 1 *and* 2—*First Schedule*, "*Settlement*"—*Exemption.*

By a deed of settlement dated the 26*th of June*, 1895, *the settlor granted to trustees certain funds, and by a deed dated the* 12*th of December*, 1896, *certain other funds, upon trust for his five children, but so nevertheless that the share of each child should be held by the trustees upon trust to pay the income thereof to such child during his or her life, and after his or her death upon trust for such one or more of the others as such child should by will appoint, and in default of appointment for the other children in equal shares. It was further provided that the trustees should have power, on or subsequent to the marriage of any of the children, to revoke the trusts of the settlement and to declare, as they thought fit, new trusts by way of resettlement for the benefit of such child, or any wife or husband of such child, or such child's children or remoter issue, or the next-of-kin of such child, but not in favour of any other person or persons, and to transfer the funds to the trustees of such settlement. These deeds were stamped with* ad valorem *duty as settlements.*

By two deeds, both dated the 10*th of April*, 1899, *the trustees of the settlements of the* 26*th of June*, 1895, *and the* 12*th of December*, 1896, *revoked the trusts of those settlements so far as they concerned the share of C. E. H.-R., one of the children, who was then about to be married, and declared that such share should, from and after the solemnization of the intended marriage, be held upon trust to pay the income thereof to C. E. H.-R. during his life, and after his decease to transfer such share to the trustees of the marriage settlement of C. E. H.-R., to be held by them upon the trusts declared in the marriage settlement. These deeds were each stamped with a duty of ten shillings.*

By the marriage settlement, a deed of even date with the two last-mentioned deeds, it was provided that after the death of C. E. H.-R. the trustees of the settlement should stand possessed of his share of the funds comprised in the settlement of the 26*th of June*, 1895, *and the* 12*th of December*, 1896, *upon the trusts of the settlement, which were, as regards the husband's fund, after the death of the husband, to pay the income to the intended wife during her life, and after her death upon trust for the children or remoter issue of the intended marriage as the intending husband and wife jointly, or the survivor of them, should appoint, and in default of appointment in trust for the children in equal shares.*

Held, that the marriage settlement was not, as regards the share of C. E. H.-R. in the funds comprised in the settlements of the 26*th of June*, 1895, *and the* 12*th of December*, 1896, *exempt from the payment of settlement duty, either under the exemption under the heading* "*Settlement*" *in the First Schedule to the Stamp Act*, 1891, *or under section* 106, *sub-section* 1, *of the Act.*

Decision of the Divisional Court, 49 *W. R.* 569, *affirmed.*

This was an appeal by Claud Eustace Hamilton-Russell from the decision of the Divisional Court

(a.) Reported by R. G. STILLWELL, Esq., Barrister-at-Law.

on a case stated by the Commissioners of Inland Revenue.

The facts of the case fully appear in the court below: see 49 W. R. 569.

Ingpen, K.C. (*A. Dunham* with him), for the appellant.

Sir R. B. Finlay and *S. A. T. Rowlatt*, for the respondents.

The arguments of counsel sufficiently appear in the following judgments.

COLLINS, M.R.—I am of opinion that this appeal should be dismissed. The question arises out of a settlement made in 1895 whereby property was given to trustees in their absolute discretion "at the request of any of the said five children either in contemplation of marriage or subsequently to marriage, to revoke the trusts hereinbefore declared concerning such child's settled share, and by way of settlement to declare such new or other trusts of and concerning the same as the trustees or trustee may think fit for the benefit of all or any to the exclusion of the others or other of the following persons—namely, such child or any wife or husband of such child or such child's children or remoter issue or the next-of-kin of such child, but not in favour of any other person or persons, and on any such resettlement such child's settled share may be transferred to trustees appointed by any such resettlement."

In 1899 another instrument was executed whereby the last-named instrument was revoked, and, by way of resettlement, it was declared that the one-fifth share of the appellant, in view of his intended marriage, "should from and after the solemnization of the said intended marriage be held upon trust to pay the income thereof to the said Claud Eustace Hamilton-Russell during his life and after his decease to pay or transfer at such time and in such manner as is hereinafter agreed and declared the capital of the said one-fifth share or the investments for the time being representing the same to the trustees or trustee for the time being of a deed already engrossed bearing or intended to bear even date with these presents and made or intended to be made between the said Claud Eustace Hamilton-Russell of the first part, the said Maria Lindsay Wood of the second part, the said Sir Lindsay Wood of the third part, and the marriage settlement trustees of the fourth part, being the settlement made . . . in contemplation of the said intended marriage to be held by such trustees or trustee upon the trusts, and with and subject to the powers and provisions declared and contained concerning the same in the said deed."

There was an execution of the power by the trustees under the settlement of 1895, and an appointment in favour of the trustees of the marriage settlement. The marriage settlement was executed upon the same day—viz., the 10th of April, 1899, and the question now arises whether that document is one to which the exemption in the schedule of the Stamp Act, 1891, applies. The provision as to stamping a settlement contained in that schedule is as follows: "Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever" shall bear a stamp duty of five shillings for every £100 or fractional part of £100 of the amount or value of the property settled or agreed to be settled.

It seems to me on the face of it that this marriage settlement is clearly an instrument whereby property "is settled or agreed to be settled in any manner whatsoever," and it, therefore, falls within the definition of "settlement," and becomes liable to the stamp duty imposed. It is said that rightly considered it falls within the exemption, which is in the following terms: "Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, when duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power."

It seems to me that for an instrument to be an appointment it is necessary that the appointors—that is, the donors of the original power of appointment—should be parties to the instrument and should make the appointment; but in this case they are not parties to the settlement at all. The appointment that was made was effected by the deed of revocation which passed the property in question from the trustees of the original settlement to the trustees of the marriage settlement. In the marriage settlement there is no appointment at all, but there are provisions declaring what is to be done and what is to happen to the fund after the death of the tenant for life, provisions which are not to be found in terms in the deed of revocation.

Mr. Ingpen contended that if you want to find out what the terms are on which the trustees of the marriage settlement are to hold the fund, then you have only to look at that settlement to see what those terms are. But the power of appointment has been made, and the deed of revocation being an appointment made and executed, is itself under the exemption and is not to be stamped. The marriage settlement does not become the subject of stamp duty merely because in the deed of revocation its terms are referred to as the terms upon which the fund is held in trust by the trustees of the marriage settlement. But when we come to look at the settlement, we find that it is itself, as Mr. Rowlatt has pointed out, an instrument, and it unquestionably falls within the language of the provision as to "settlement" and the stamping of "settlement" in the schedule to the Act.

The parties have chosen for their own convenience to put into the form of a solemn instrument under seal the terms which prescribed what they were to do with the fund. They were not content with having the whole thing, the deed of revocation and the terms of the marriage settlement, all put into one instrument. Possibly if they had done that they would have been excused from the second stamp duty, and might have brought it under the provisions of the exemption; but they have not chosen to do so. They have had a marriage settlement drawn up in the ordinary way and embodied in a separate instrument, and unless they can bring it within the express terms of the exemption they must fail. That instrument is not, and cannot be, an appointment, for the appointors are not parties to the deed at all. It cannot be treated as a mere sheet of paper to be referred to, because they have chosen to embody it in a solemn instrument, and that instrument does not fall within the exemption, whereas it does, *primâ facie*, fall within the provisions of the Act. Upon that point, therefore, I am of opinion that the decision of the court below was perfectly right.

Another point was taken by Mr. Ingpen on section 106 of the Stamp Act. He says that by

virtue of that section this instrument is relieved from taxation. That section says: "When several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds ten shillings, one only of the instruments is to be charged with the *ad valorem* duty." Mr. Rowlatt has answered that point, it seems to me, effectually. He says that that section clearly contemplates one settlement dealing with the same property, to take place at the same time, not a series of instruments extending over years, and that it cannot have been intended to embrace a settlement carried out by instruments creating powers in the first instance and instruments executing those powers later on, otherwise there would be no need for the special exemption. On these grounds I think this appeal must be dismised.

STIRLING, L.J.—I am of the same opinion. It is sought by the Crown to charge the marriage settlement of the 10th of April, 1899, with stamp duty upon the ground that it is a settlement within the meaning of the Stamp Act, 1891. A settlement, shortly, is any instrument by which property "is settled or agreed to be settled in any manner whatsoever." Reading this document by itself do we find that it is an instrument by which the property in question "is settled or agreed to be settled"? It recites that the parties are the intended husband and wife, the father of the wife, and the trustees of the marriage settlement; it refers to a previous settlement of 1895 and to certain deeds made supplemental to this settlement, and it recites that "one-fifth share of the trust funds in the said settlement of 1895 . . . is held upon trust after the solemnization of the said intended marriage to pay the income thereof to the intended husband during his life and after his decease to pay or transfer the capital of the said one-fifth share or the investments for the time being representing the same to the trustees or trustee for the time being of these presents to be held upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same." Then it goes on to recite that "upon treaty for the intended marriage it was agreed that such settlement should be made as is hereinafter contained"; and then it says: "This deed witnesseth that in pursuance of the said agreement and in consideration of the intended marriage the intended husband, the intended wife, and the said Sir Lindsay Wood do hereby respectively direct and the trustees do hereby declare and agree with the other parties hereto in manner following." Then clauses 9, 10, and 16 contain declarations of trust with respect to the fund in question.

Now upon the face of that document, reading it by itself it seems to me that it is an instrument by which this property is "agreed to be settled"; therefore, *primâ facie*, it is brought within the meaning of "settlement" in the Stamp Act, 1891; but from such "settlement" there is an exemption—viz., an "instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power." In order to see whether this property falls within that exemption we must look back to see what the deed of 1895 gave power to do and what has been done in the execution of that power. That settlement was for the benefit of five children, of whom the appellant was one, and there was contained this stipulation: "That it shall be lawful for the trustees or trustee in their, his, or her absolute discretion, at the request of any of the said five children either in contemplation of marriage or subsequently to marriage to revoke the trusts hereinbefore declared concerning such child's settled share, and by way of resettlement to declare such new or other trusts of and concerning the same as the trustees or trustee may think fit for the benefit of all or any to the exclusion of the others or other of the following persons—namely, such child or any wife or husband of such child or such child's children or remoter issue or the next-of-kin of such child."

Upon the occasion of this marriage the trustees thought fit to execute this power by a deed of the 10th of April, 1899, to which there are parties, firstly, the trustees of the settlement of 1895; secondly, the intended husband; and thirdly, the trustees of the marriage settlement; but not either the intended wife or her father, the latter of whom brought into the settlement a considerable sum of money. By this deed they revoked the trusts by the settlement of 1895 declared concerning the appellant's share "and by way of resettlement do hereby declare that the said one-fifth share of the trust funds in the settlement of 1896 comprised and thereby settled shall from and after the solemnization of the said intended marriage be held upon trust to pay the income thereof to the said Claud Eustace Hamilton-Russell during his life and after his decease to pay or transfer at such time and in such manner as is hereinafter agreed and declared the capital of the said one-fifth share or the investments for the time being representing the same to the trustees or trustee for the time being of a deed already engrossed bearing or intended to bear even date with these presents"—namely, the marriage settlement.

Then there comes an agreement on the part of the trustees to the deed of 1896 to transfer this property of the marriage settlement to trustees upon trust within six months after the death of the intended husband to be held by the trustees of the marriage settlement upon the trusts of the said deed of even date.

It appears to me that that document was an effectual resettlement of the share of the intended husband in those funds.

It is true that it does not in itself state all the trusts, but it refers to an existing written document in which those trusts are declared; and if nothing more had ever been done to that instrument it would still have been an effectual declaration of trust, and the deed engrossed and intended to be executed might have been referred to for the purpose of ascertaining what the trusts were. But matters did not rest there. The document which is referred to as the deed already engrossed and intended to be executed was executed, and we have to look and see what the effect of it is. In my opinion the effect of it is that it is brought within the definition of a "settlement" and that it does not fall within the exemption. It is an effective instrument of appointment relating to the appellant's share, and, therefore, it is quite right that it should not bear the *ad valorem* stamp, but that does not bar the claim of the Crown to the proper *ad valorem* stamp duty on the marriage settlement, which, in my judgment, is an instrument by which this property is "agreed to be settled." It was very fairly admitted by Mr. Rowlatt that if the trusts had been stated in full in the deed of revocation and resettlement the *ad valorem* stamp duty could not have been charged, but, nevertheless, the parties have seen fit to enter, in a separate instrument, into a solemn agreement under seal as to the trusts upon which this property is to be held, amounting to a resettlement, and having done so I think they cannot escape from the duty.

I have nothing at all to add as regards section 106, and I agree that the appeal ought to be dismissed.

MATHEW, L.J.—I am of the same opinion. I think that the parties here intended that this marriage settlement should be a settlement within the meaning of the Stamp Act, 1891. It is agreed that if they had thought fit they might have inserted in the deed of revocation and new appointment all the limitations and all the provisions contained in the marriage settlement; and it is said that in that case no additional duty would be chargeable; but they elected not to take that course, and took what was clearly, I think, a convenient course under the circumstances—a course which probably was contemplated from the very first—viz., that when the marriage took place there should be a marriage settlement and trustees appointed under it who should know from that document alone what their duties were in reference to the property. Having, as it appears to me, elected to have this separate and independent instrument, they must pay the tax upon it. It is not within the terms of the exemption contained in the statute.

Appeal dismissed with costs.

Solicitors for the appellant, *Tarry, Sherlock, & King.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 27.

In re A SOLICITOR (*a.*)

Solicitor — Certificate — Registrar of Solicitors — Discretion of registrar to refuse certificate—Discretion of judge—Undischarged bankrupt—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 23, 24.

The Registrar of Solicitors has no discretion to refuse to issue an annual practising certificate under section 23 *of the Solicitors Act,* 1843, *on the ground that the solicitor applying for it is an undischarged bankrupt. Neither has the judge such a discretion under section* 24 *of that Act.*

In re An Application under the Solicitors Act, 1843, 47 *W. R.* 575, *overruled.*

Appeal by a solicitor from a decision of a Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) dismissing an appeal from the refusal of Jelf, J., to order the Registrar of Solicitors to issue to the appellant an annual practising certificate in pursuance of section 23 of the Solicitors Act, 1843.

The appellant was admitted a solicitor in 1871, and from that year until the year 1900 inclusive he had taken out continuously his practising certificate. He was still on the roll of solicitors, and no application had ever been made for his removal from it.

On the 11th of November, 1901, he applied to the Incorporated Law Society, who are by section 21 of the Solicitors Act, 1843, constituted the Registrar of Solicitors, for a renewal of his practising certificate, but the society refused the application on the ground that he was an undischarged bankrupt. The appellant applied to Jelf, J., at chambers under section 24 of the Solicitors Act for an order directing the Registrar of Solicitors to issue the certificate. He contended that the society had no discretion to refuse the renewal on the ground stated, or on any other ground than that stated in the Act, which, by section 23, provides that the registrar is to deliver the renewed certificate "unless he shall see cause and have reason to believe that the party applying for such certificate is not upon the said roll of attorneys or solicitors." Jelf, J., dismissed the application on the authority of the case of *In re An Application under the Solicitors Act,* 1843, 47 W. R. 575.

The Divisional Court affirmed the decision of Jelf, J. The appellant appealed to the Court of Appeal.

Page, K.C. (*Muir Mackenzie* with him), for the appellant.—The registrar has no discretion as to whether he shall issue a certificate or not. By section 23 of the Solicitors Act, 1843, he is bound to grant a certificate as a matter of course, except in the one case specified. The words of the exception evidently point to the case of some difficulty arising on a question of identity. If in consequence of any such difficulty the registrar refuses to issue a certificate, the solicitor may apply to a judge under section 24, and the judge may make such order in the matter as shall be just. But under that section the judge is bound to have regard to what the law is, and cannot refuse a certificate merely because the solicitor is an undischarged bankrupt. There is no law disqualifying bankrupts from practising. If one judge could withhold a certificate on the ground that a solicitor was an undischarged bankrupt, another judge might withhold a certificate on the ground that a solicitor was a divorced person. The Divisional Court followed a decision of Wills and Ridley, JJ., given in 1899 in the case of *In re An Application under the Solicitors Act.* This case is in effect an appeal from that decision. From 1843 to 1899 it was the invariable practice to renew certificates to all solicitors who applied for them, notwithstanding that they were bankrupts. Since the decision in 1899 the Incorporated Law Society have refused to issue certificates in all cases where applicants were undischarged bankrupts. The appellant's view of the meaning of sections 23 and 24 is supported by the consideration of what the Legislature has since enacted on the subject. Section 16 of the Solicitors Act, 1888, which is substituted for section 25 of the Act of 1843, expressly says that the registrar shall have a discretion to grant or refuse a certificate in the case where a solicitor, after neglecting for twelve months to obtain a certificate, subsequently applies for a fresh certificate. And section 2 of the Solicitors Act, 1899, makes the last mentioned section applicable to the case of a solicitor who has been struck off the roll or suspended from practice.

Asquith, K.C. (*F. W. Hollams* with him), for the respondents, the Incorporated Law Society.—By section 23 of the Solicitors Act, 1843, the registrar is to grant the certificate unless he has reason to believe that the applicant is not upon the roll. But by section 24, if he declines to issue the certificate which he is by the Act directed and required to give—that is to say, if he declines to issue a certificate to a person who is upon the roll—the applicant may go to the court and ask for such order in the matter as may be just. Section 24 imposes on the court the duty of entering upon a judicial inquiry. If the construction of section 23 contended for by the appellant were right, there would be no object in enacting section 24. The Law Society do not suggest that the registrar has a discretion to grant or refuse a certificate. Section 23 does not confer any judicial power on him, but the combined effect of sections 23 and 24 is that the registrar has power to send the matter to the court. Section 24 does not give an appeal from a judicial decision of the registrar, it gives a simple right of application to a judge. The registrar is entitled, if he thinks fit, to hold his hand and tell the applicant to go to the judge.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Page, K.C., replied.

COLLINS, M.R.—In my opinion this appeal must be allowed. Jelf, J., at chambers considered himself bound by a decision of Wills and Ridley, JJ., and the Divisional Court also followed the same decision. The question is whether there is a discretion in the Registrar of Solicitors—that is to say, the gentleman who represents the Incorporated Law Society for that purpose—to refuse to issue an annual practising certificate to a person who has conformed with the conditions and satisfied the requirements of section 23 of the Solicitors Act, 1843. Section 21 of that Act appoints the Incorporated Law Society to be the Registrar of Attorneys and Solicitors. Section 22 enacts that the Commissioners of Stamps shall not grant a practising certificate to any attorney or solicitor until the registrar has certified that the applicant is entitled thereto. Then section 23 provides that for the purpose of obtaining such registrar's certificate a declaration in writing of certain particulars signed by the attorney or solicitor shall be delivered to the registrar; "and the said registrar shall, after the expiration of six days after the delivery of such declaration (unless he shall see cause and have reason to believe that the party applying for such certificate is not upon the said roll of attorneys or solicitors), deliver to the said attorney or solicitor, or to his agent, on demand a certificate in the form set forth in the third schedule to this Act annexed." That section constitutes a peremptory mandate to the registrar. He is bound to issue a certificate subject to one qualification—viz., unless he sees cause and has reason to believe that the party applying for the certificate is not on the roll of solicitors. It is admitted that the obligation is absolute, except in the case of there being any difficulty as to identity. That is the limit and measure of the registrar's jurisdiction. Then we come to section 24, and it is argued that the effect of that section is that, though the registrar's jurisdiction was originally limited, as I have stated, the right to apply to a judge to deal with the matter in accordance with considerations of what seem to him to be just enlarges the area of the registrar's jurisdiction. Section 24 is as follows: "And be it enacted that in case the said registrar shall decline to issue such certificate as he is hereinbefore directed and required to give, the party so applying for the same, if an attorney, shall and may apply to any of the said courts of law at Westminster, or to any judge thereof, or, if a solicitor, to the Master of the Rolls, who are hereby respectively authorized to make such order in the matter as shall be just, and to order payment of costs by and to either of the parties if they shall see fit." The argument is that this section modifies the peremptory nature of the mandate originally given to the registrar, and that at any rate the judge's jurisdiction is not limited to dealing with questions of identity. But how can the judge have under section 24 a general jurisdiction to come outside the registrar's mandate for the purpose of taking into consideration matters which could not have been considered by the registrar under section 23. On one matter—viz., on any question of identity—the registrar has jurisdiction to inquire into facts. If he does so, and makes a mistake in doing so, the judge has jurisdiction to review his decision. It seems to me to be clear that that is the jurisdiction given to the judge by section 24. I see nothing in the words of the section to bring me to the conclusion that, when once the judge has *seisin* of a case of this sort, it is open to him to inquire at large into any matters connected with the case for the purpose of arriving at a determination based upon considerations of justice. It would be impossible to know where to stop. To hold that section 24 confers on the judge a general jurisdiction to refuse the issue of a certificate would be tantamount to saying that he had power under this section to suspend a solicitor from practice. But the law has provided quite a different procedure for the obtaining of an order for suspension from practice.

This appeal is in substance an appeal from the decision of Wills and Ridley, JJ., to which I have referred. In that case Wills, J., held that the registrar had a discretion to refuse to issue a certificate under circumstances like the present, and that the court was not bound to order it to be granted, and his judgment was based on considerations founded on the word "just" in section 24. He thought that the expression "just" there ought not to be restricted to the narrower meaning it would have if the controversy were as to private rights between parties, but that it must mean what was right and fitting with regard to the interests of the public. With the greatest deference to Wills, J., I cannot agree with that judgment.

In this case counsel for the Law Society refrained from arguing that the registrar had a discretion to refuse to issue a certificate as held by Wills, J. On the contrary he admitted that the registrar had no jurisdiction to refuse to issue a certificate, but he argued that the registrar might hold his hand and send the applicant to the judge. In my opinion, however, his argument was substantially identical with the argument on which the judgment of Wills, J., was based. I think that section 16 of the Solicitors Act, 1888, and section 2 of the Solicitors Act, 1899, afford strong arguments against the view of Wills, J. In my opinion the registrar had no power to excercise a discretion to refuse a certificate, as he has done in this case, and the appeal must be allowed.

STIRLING and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitor for the respondents, *E. W. Williamson.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 12.

PRYCE v. PENRIKYBER NAVIGATION COLLIERY CO. (LIMITED). (a.)

Master and servant—Employer's liability—Accident—Compensation—Death of workman—"Wholly dependent on his earnings"—Sum coming to applicant on death of workman—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 1 (a) (*i.*).

A workman's sole means for the support of himself and his wife and family were his weekly earnings. He was killed by an accident, and his widow applied for compensation as being "wholly dependent on his earnings," within Schedule I., clause 1 (a) (*i.*), *to the Workmen's Compensation Act,* 1897. *It appeared that the workman was possessed of a sum of money of which the applicant received on his death the sum of* £100. *There was no evidence that this sum ever produced any income during his lifetime.*

Held, that the applicant was "wholly dependent on his earnings," as the £100 *which came to her after his death ought not to be taken into consideration.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from an award of the judge of the Aberdare County Court in proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who was killed by an accident arising out of and in the course of his employment. The only question was whether the applicant was "wholly dependent" upon the deceased man's earnings within Schedule I., clause 1 (*a*) (i.), to the Act. The deceased man's wages were £3 a week, and he died possessed of personal property of the value of £190. There was no evidence that this sum produced any income during his life, nor was there any evidence that there was any other source of income for his or his wife's maintenance except his wages. His widow was his personal representative and took out administration to him, and it was admitted that upon his death she benefited to the extent of £100 out of £190.

The employers contended that the widow was not wholly, but only partly dependent upon his earnings, as by his death she became entitled to £100, and that the Act meant that a person, to be wholly dependent, must be left entirely destitute; and they paid £275 into court. The county court judge decided that he could not take the £100 into account in seeing whether the applicant was wholly dependent or not. He accordingly adjudged her to be wholly dependent and awarded her £300. The employers appealed.

Ruegg, K.C., and *Anton Bertram*, for the employers.—A person is "wholly dependent" upon a deceased workman's earnings when he or she is left entirely destitute by his death. The applicant here was therefore only partly dependent upon his earnings, as she received £100 through his death. No doubt the county court judge may, under Schedule I., clause 1 (*a*) (ii.), in his discretion give the same amount of compensation where the applicant was only partly dependent as where she was wholly dependent. But the judge in this case did not exercise his discretion in that way. He held that the applicant was wholly dependent, and assessed the compensation on that basis. In that he was wrong. Where a widow sues for compensation under Lord Campbell's Act (9 & 10 Vict. c. 93), the jury, in awarding compensation, must take into account the provision made by the husband for her maintenance after his death: *Grand Trunk Railway Co.* v. *Jennings*, 37 W. R. 403, 13 App. Cas. 800. That rule ought to be applied here.

S. T. Evans, K.C., and *W. D. Benson*, for the applicant.—The words "wholly dependent on his earnings" mean wholly dependent at the moment of the workman's death. A workman cannot gain earnings after his death. If the applicant's means after the death of the workman had to be considered, then the arbitrator would have to take into account moneys coming to the applicant under a policy of insurance, or a legacy left to her by another person. The Legislature wished to avoid all these difficulties and to shut out any inquiries as to the applicant's income after the workman's death No question of dependency can arise under Lord Campbell's Act, as the amount recoverable is the actual pecuniary loss sustained by the death. No attempt is made by the Workmen's Compensation Act, 1897, to give full pecuniary compensation. Therefore the cases under Lord Campbell's Act do not apply. The county court judge was right in refusing to take the £100 into consideration.

Ruegg, K.C., replied.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The deceased man had been earning £3 a week, and when he died from the accident a certain sum came to his widow as his administratrix, of which sum it was admitted that she benefited to the amount of £100. The question is whether she was "wholly dependent on his earnings" within the meaning of Schedule I., clause 1 (*a*) (i.), of the Workmen's Compensation Act, 1897. The county court judge found that the widow was wholly dependent upon his earnings at the time of his death and made an award accordingly. It is said that the judge ought to have taken into consideration the fact that the widow received upon his death the sum of £100. That, it seems to me, would be introducing into the consideration of the question something which the Act did not intend should be introduced. The words mean dependent upon his earnings during his life, because no man can "earn" anything after he is dead. There was no evidence that there was any other source of income for the support of himself and his family than his weekly earnings. That was all they had to depend upon. The Act gives the arbitrator no discretion as to the sum he shall award, if the applicant was wholly dependent upon the deceased man's earnings. It is a condition precedent that the applicant should have been wholly dependent upon his earnings, and I take that to mean that there is no other source of income whatever. We are asked to say that the Act means that the applicant must be wholly destitute after the workman's death. The Act has not said so, and if we were so to hold we should be imposing very serious difficulties in the way of the adjustment of the scale of compensation. The amount of compensation in such a case is, by the Act, taken out of the discretion of the arbitrator, and the Act has fixed an arbitrary sum as the amount of compensation, which may or may not be a complete compensation. That is made even more clear by clause 1 (*b*). No one can tell what means of income may come to an applicant after the death of the workman, and so the Legislature has disregarded any sum which might arise from the small savings of the deceased man, knowing that the applicant would have to pay certain expenses consequent on his death, and has given her a lump sum, thereby getting rid of all inquiries as to her means of livelihood afterwards. The case of a legacy coming to the applicant after the death of the workman is an illustration of the difficulties that would arise upon any other view. The only logical time to take is the moment of the death. The words of the Act are clear, and we should be legislating if we departed from their plain meaning. I again repeat that in this case there was no evidence that there was any other income than the deceased man's earnings for the support of himself and his family during his lifetime. The case might be different if there had been. The appeal must therefore be dismissed.

STIRLING, L.J.—I am of the same opinion. The deceased man seems to have saved £190, which, so far as they knew, was yielding no income at all. The words "wholly dependent on his earnings" means that what the workman earns is the sole source to which the applicant can look for her maintenance at the time of the workman's death.

MATHEW, L.J.—We are asked to translate this enactment into different phraseology, and to say that the applicant cannot be said to be wholly dependent on the deceased man's earnings unless she has been reduced to absolute poverty by his death; and that she is not wholly dependent if anything comes to her out of the deceased man's estate after his death The truth is that Parliament saw that this class of case would not be likely to arise, and so it legislated for the general class of cases, and put aside any inquiry as to whether the deceased man had left any savings

and whether the expenses consequent on his death had absorbed those little savings. If we adopted the view contended for by the employers, why should we not have to take into account money arising from a policy of insurance, or a legacy coming to the applicant from another source after the death?

Appeal dismissed.

Solicitors for the applicant, *Riddell & Co.*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitor for the employers, *H. P. Becher*, for *Vaizie Simons*, Pontypridd.

High Court of Justice.

Chan. Div. } Nov. 20; Jan. 15.
Byrne, J. }

In re ALDAM'S SETTLEMENT. (*a.*)

Settled land—Mining lease—Mines and minerals—Varying minimum rent—Way-leave—Settled Land Acts, 1882-1890.

The court will not sanction in a mining lease, under the Settled Land Acts, 1882-1890, *a varying minimum rent nor the grant of a way-leave free of rent.*

Summons.

This was an application under the Settled Land Acts, 1882 to 1890, by Mr. William W. W. Aldam, tenant for life of certain real estates situate at Wickersley, in the county of York, asking for the approval of the court to a certain mining lease.

The respondents were J. R. Ford one of the trustees for the settlement and an infant remainderman.

The facts of the case were as follows:

By the will of William Aldam, bearing date the 18th day of December, 1884, the settled estate stood limited to the use of the said William W. W. Aldam for life without impeachment of waste, with remainder to the use of such one or more of the sons or daughters of the said William W. W. Aldam for such estates or estate in tail or such lesser estates as the said William W. W. Aldam should appoint, and in default of such appointment and in so far as such appointment should not extend, to the use of the said infant remainderman for life without impeachment of waste, with remainder over as there mentioned.

The applicant and Mr. Ford were trustees for the purposes of the Settled Land Acts.

By an agreement bearing date the 13th of February, 1901, and made between the said William W. W. Aldam of the one part, and the Dalton Main Collieries Co. of the other part, the said William W. W. Aldam as tenant for life entered into an agreement with the said company to lease to them a seam of coal under the said estates known as the Barnsley thick seam for a term of sixty years from the 1st of January, 1898.

The agreement so far as it is relevant for the present report was as follows:

Clause 3. The royalty or accruing rent shall be at the rate of £30 per foot per annum, but due allowance shall be made for bad, faulty, or unworkable coal, and coal so thin or cut off by such magnitude that it cannot be worked without loss. The lessees shall also pay a similar royalty rent for all coal and slack other than the Barnsley thick seam got in the drifting and sold off.

4. The minimum or certain rent is to be: For the first year, *nil*; for the second year, 2s. 6d. per acre; for the third year, 5s. per acre; for the fourth year, 10s. per acre; and for the fifth year and each succeeding year, £1 per acre. The minimum rent shall begin to be paid as from the 1st of January, 1899, &c.

6 Undergetting may be made up at any time during the term.

7. When all saleable coal, except such parts (if any) as are not to be worked or paid for, shall have been worked or paid for, a nominal rent of 10s. shall be paid for the remainder of the term in substitution for the royalty or minimum rent.

9. No way-leave rent is to be paid for any other part of the Barnsley thick seam of coal under any other land in the parish of Wickersley.

10. The lessees are to commence working the coal with all reasonable diligence, and bring to the surface as much coal as can be reasonably got with proper diligence.

The questions at issue between the applicant and respondents were:

(1) Whether a yearly minimum rent not commencing until the second year of the said term and increasing year by year until the fifth year of the said term could be legally reserved.

(2) Whether a lease could be granted containing a proviso for the cesser of the said minimum rent after all the demised minerals had been worked and paid for.

(3) Whether a way-leave for foreign coal could be reserved free of rent.

Dixon, for the applicant.

L. S. Bristowe, for the respondents.

In re Lowther, before Stirling, J. (see MacSwinney on Mines (2nd ed.), p. 178), was referred to.

The arguments will be found summarized in the judgment.

Nov. 20.—BYRNE, J., delivered a reserved judgment, which after stating the agreement of February, 1901, as above, continued as follows: The first question raised by the summons is whether or not the tenant for life has power, under the provisions of the Settled Land Acts, to grant a mining lease as proposed for sixty years, reserving a minimum yearly rent not commencing until the second year of the term, and increasing year by year until the fifth year of the term. A mining lease may be granted for sixty years, under section 6 of the Act of 1882. By section 7, sub-section 2, every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. Section 9, sub-section 2 clearly authorizes the reservation of a fixed or minimum rent, but there is no provision in terms authorizing a varying minimum rent. Under the Settled Estates Act, 1877, there is a provision for the reservation of the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine, provided always that in the case of (amongst others) a mining lease a peppercorn rent or any smaller rent, than the rent to be ultimately made payable may, if the court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease. No similar provision is contained in the Settled Land Acts, so far as regards mining leases, and apart from section 10 of the Act of 1882, giving the court power to sanction leases on special terms, the

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

question turns upon the meaning of section 9, having regard especially to the provisions of section 7 of that Act, and to section 4 of the Settled Land Act, 1884, which provides that a fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act. Now, although there are no words expressly authorizing any varying fixed or minimum rent, there are no words negativing the reservation of such a rent, and an unreported case before Stirling, L.J. (when Stirling, J.), of *In re Lowther's Settled Estate*, referred to in MacSwinney on Mines and Minerals, at p. 178, is relied on as justifying it. I have been furnished with a copy of the summons, affidavit in support, and order made in *In re Lowther*, and it appears that the order contains, first, a declaration following the terms of the amended summons to the following effect: "This court doth declare that Sir Charles Hugh Lowther, the tenant for life under the above-mentioned settlement, has power to grant a lease to Bolckow, Vaughan, & Co. (Limited), of the ironstone and iron ore within and under the lands forming part of the above-mentioned estate for a term of sixty years from the 1st day of January, 1892, at a certain yearly rent, until the 1st day of July, 1900, of £6,000, and after that day at the yearly rents of £6,000, £5,000, £4,000, £3,000, £2,000, and £1,000, according to the quantity for the time being remaining ungotten under the demise to be thereby made." Then follows a declaration in reply to paragraphs 2 and 3 of the amended summons: "And this court doth declare that in every year during the life of the said Sir C. H. Lowther there ought to be set aside as capital money arising under the above-mentioned Acts one-fourth part of the certain yearly rent and royalties for the time being payable under the said lease, and that in every year during the life of the said Sir C. H. Lowther in which the workings under the said lease shall be or exceed those thereby authorized in satisfaction of the certain yearly rent for the time being payable thereunder, the said Sir C. H. Lowther is entitled to receive for his own benefit the residue (after setting aside one-fourth part thereof as aforesaid) of the said certain yearly rent, and also of the royalties payable thereunder, in respect of such excess workings, if any. And that in every year during the life of the said Sir C. H. Lowther in which the workings under the said lease shall be less than those thereby authorized in satisfaction of the certain yearly rent for the time being payable thereunder, but would at the rates thereby prescribed amount to or exceed £1,000 in value, the said Sir C. H. Lowther is entitled to receive for his own benefit the residue (after setting aside such one-fourth part thereof as aforesaid) of so much of the said certain yearly rent as at the said rates would be equivalent to such workings, and that the remainder of the said certain yearly rent in the same year ought to be set aside as capital money arising under the said Acts. And that in every year during the life of the said Sir C. H. Lowther in which the workings under the said lease shall be less than those hereby authorized in satisfaction of the certain yearly rent for the time being payable thereunder, and would also at the said rates be less than £1,000 in value, the said Sir C. H. Lowther is entitled to receive for his own benefit the residue (after setting aside such one-fourth part thereof as aforesaid) of the sum of £1,000 out of or by means of the said certain yearly rent, and that the remainder, if any, of the said certain yearly rent in the same year ought to be set aside as capital money arising under the said Acts."

I think that the effect of that decision is that the fact that a varying minimum rent is reserved does not invalidate the lease, if it can be ascertained how much of such rent is in the nature of, and properly capable of being treated as, fine, but that so much as ought to be considered fine must be dealt with as capital money arising under the Act, and the way this is worked out in *In re Lowther* appears to be by treating so much of the varying fixed rent as exceeds the lowest amount of such rent as fine, and, therefore, capital money; no question arising where the royalty is in excess of the fixed rent for the time being. As I understand it, the tenant for life is entitled to receive what he would have received had a uniform minimum rent at the lowest rate of those mentioned been reserved, the balance being treated as fine.

There are several difficulties in applying the principle apparently applied in *In re Lowther* to the case now under consideration. In the first place the agreement provides for no rent being paid during the first year, and I cannot find any authority for such a provision. If a peppercorn rent may not be reserved, I fail to see what justifies absence of rent. It is not a sufficient answer to say that such absence of rent cannot affect the remaindermen to their injury, if it be something unauthorized by the Act. It is said that the case of *In re Lowther* was the case of reservation of a diminishing fixed rent, and consequently one which may obviously be detrimental to remaindermen, while the present is the case of a rising minimum rent, apparently to the advantage of the remaindermen, and consequently it is argued the principle acted upon in *In re Lowther* ought not to be applied. If this were a simple case between tenant for life and persons absolutely entitled in remainder, I might see my way to holding that no part of the rent received during the first four years ought to be treated as fine, inasmuch as the rent during those years is lower than the rent subsequently reserved, and consequently favourable to the remaindermen; but in the present case there is an infant tenant for life in remainder (whose estate is, it is true, subject to be defeated by an appointment), but whose estate unless so defeated is a present vested interest, and the present tenant for life might die in a year without appointing, in which case the infant tenant for life would apparently, until the maximum fixed rent becomes payable, be in receipt of less than he would have received had a uniform minimum rent been reserved. Passing by the objection that there does not appear to be any authority for non-reservation of rent for the first year of the term, I do not think that I can hold that the tenant for life is justified in granting the lease he proposes. If, however, a small though substantial rent were reserved for the first year, and if the greatest minimum rent—*i.e.*, the £1 per acre, were made payable as from the beginning of the fifth year, or from the death of the present tenant for life, whichever shall be the earlier, I think that might be justifiable. In my opinion, there is no objection to the reservation of a rising minimum rent if such rent is so reserved as to be equal (or in the simple case of tenant for life and remaindermen absolutely entitled upon his death so as to increase) after the determination of his life interest, nor is there any valid objection to the reservation of a diminishing rent where, as in *In re Lowther*, what is truly a fine can be separated from what is truly rent, and be dealt with accordingly. This is, of course, where the rent proposed is the best rent that can reasonably be obtained, regard being had to any fine taken. The case of *Doe dem. Sutton* v. *Harvey*, 1 B. & C. 426, relates to leases of surface. There was in that case a power to lease —"so as that in every such lease there be reserved to be payable during the continuance of the term and estate thereby to be granted the best and most beneficial

yearly rent or rents to be incident to the immediate reversion of the premises that, considering the nature of the case, can be reasonably had or obtained for the same at the time of making such lease without taking any fine, income, premium, or foregift for or in respect of making such demises or leases." There the leases had been granted upon terms and at rents which were found to be the most beneficial rents that could be obtained, but the court pointed out that, though that might be so as between lessor and lessee, it was not so between tenant for life and reversioner. Holroyd, J., says (1 B. & C., at p. 435): "As to the finding of the jury that the rents reserved under the two leases made under one bargain were the most beneficial that could be obtained, that may be so as between the person making the lease and the lessee; but in order to see whether it be so between the tenant for life and the reversioner we must look to the facts of the case independently of the opinion of the jury. Now, it is perfectly clear that as between them this was not the most beneficial rent. The former cannot make a bargain by which a larger rent is reserved at the first part of the term and a less at the latter." I do not read this as intending to decide that a lease may not be granted with a varying rent if it be so reserved as to be for the benefit of the remaindermen at the expense of the tenant for life.

The second and third questions asked by the summons are—(2) whether or not the tenant for life has power to insert in the lease a power for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as in accordance with the lease are not to be worked or paid for, shall have been paid for at the acreage rate reserved by the lease; and (3) whether the lease may contain a way-leave for foreign coal to continue after cesser of the minimum rent at a nominal rent, or whether a substantial rent must be reserved for such way-leave. These questions are directed to the propriety of clauses 7 and 9 of the agreement. Under section 17, sub-section 1, of the Act of 1882 there is power, I consider, to grant such a way-leave as is proposed, assuming that a proper rent is reserved; but it is objected that there is no stipulation for a cesser of the term or determination of the lease when all the coal is gotten, and the proposal for a nominal rent of 10s. would in fact be for an indefinite part of the term, during which undergettings might be made up and for a way-leave until quite the end of the term. It will be further observed that no separate rent is reserved in respect of the way-leave proposed to be granted, although no doubt it forms a substantial element in considering the rent actually payable under the lease. It appears to me that after the undergettings, if any, were made up, there would be a free way-leave for the rest of the term, payment for which would actually have been made in the rents paid during the earlier years of the term. I think that this cannot be justified, as I have no means of ascertaining what portions of the rent ought to be treated as in the nature of fine or prepayment for the free way-leave. If a separate and properly ascertained rent were reserved for the way-leave for the whole time during which it is to be enjoyed, there might be no objection, but suppose the tenant for life were to live until all the coal is exhausted, the remaindermen would for the residue of the term be subject to the burden of the way-leave without getting anything but a nominal payment for what might have been granted for a very substantial rent.

For these reasons I do not think that the lease proposed can be granted, nor do I think that I can sanction the lease under the special power conferred upon the court, although I think it is probable that, after what I have said, the parties may be able to reform or mould the agreement in such a way as to substantially carry out what is desired, while avoiding the objections to its present terms.

Jan. 15.—Some difficulty having arisen in drawing up the order, the case was mentioned to his lordship on this date; and the following order was made:—

This court doth declare (1) that the applicant as such tenant for life has no power to grant a lease as aforesaid reserving a minimum yearly rent not commencing until the second year of the said term and increasing year by year until the fifth year of the said term as proposed. (2) Assuming there is no other objection to the proposed lease, the applicant has power to insert in such lease a proviso for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as, in accordance with the provisions of the lease, are not to be worked or paid for, shall have been paid for under the terms of the lease; and a proviso permitting undergettings to be made up notwithstanding the determination of the term, but so that the term shall determine at the period of the cesser of the minimum rent. (3) That if the way-leave for foreign coal continues after the cesser of the minimum rent, a substantial and proper rent must be paid for such way-leave after such cesser.

Solicitors, *F. & C. L. Smith*, for *Ford & Warren*, Leeds.

Chan. Div.
Farwell, J. } Nov. 20, 21.

In re KENSINGTON (BARON).

LONGFORD (EARL OF) *v.* KENSINGTON (BARON). (*a.*)

Will—Administration—Beneficial and onerous property devised together—Aggregate gift—Onerous leaseholds settled to same uses as freeholds—Incidence of burden—Right to disclaim.

A testator devised freehold estate to his brother for life, with remainders over in strict settlement, and bequeathed his leaseholds to trustees to be settled to the same uses; his personal estate was insufficient to pay his legacies. Before his death he had contracted to purchase a freehold estate which proved to be worth less than the purchase-money remaining unpaid after his death. Among his leaseholds was a house which was sold after his death for a sum less than the sum charged on it by mortgage. On a summons to determine whether the excess of the purchase-money over the value of the one estate and the mortgage debt upon the other were chargeable upon the residue of the real estate or upon the personalty,

Held, that all the real estate and the leaseholds must be taken to be comprised in one gift, and the devisees could not reject the onerous part and accept the beneficial, and that both charges must therefore be paid out of the real estate.

Frewen *v.* Law Life Assurance Society, 44 *W. R.* 682, [1896] 2 *Ch.* 511, *followed.*

This was an adjourned summons under the will of the late Lord Kensington, who died on the 24th of June, 1900, in South Africa, of wounds received on active service, for the determination (*inter alia*) of questions which had arisen under the following circumstances.

Early in 1900 the testator had agreed to purchase for £60,000 the New St. Bride estate in Pembrokeshire, but he paid only £4,000 on account during his lifetime. In March, 1901, his executors completed

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

the purchase, it being agreed with the vendor that £35,000 should remain on mortgage. The balance of the purchase-money, £21,000, was paid out of the deceased's personal estate. It had subsequently appeared that the property was worth somewhat less than the price agreed to be paid, and the question for determination was how the £56,000, being the amount remaining unpaid at the date of the testator's death, should be borne as between the testator's real and personal estate.

The testator was also entitled at the date of his death to a leasehold house in Portland-place, subject to a mortgage for £10,350. His executors had sold this house for £8,750 and paid the balance of the mortgage money out of his general personal estate. Thus a similar question arose as to how this balance was to be borne.

By his will, dated the 5th of August, 1898, the testator gave his Pembrokeshire freeholds (including the New St. Bride estate) and all other his real estate upon certain uses in strict settlement. He also bequeathed his leaseholds to trustees on trust to pay the rents and hold the leaseholds on trusts corresponding to the freeholds, so far as the law allowed. He also left large legacies. His residuary personal estate was very small.

Austen Cartmell, for the trustees, stated the facts.

Butcher, K.C., and *C. Ashworth James*, for the present Lord Kensington, the first tenant for life. —The liability in respect of the onerous property is to be borne by the residuary personalty. The testator has not so aggregated the estates as to throw on the tenant for life the burden of paying the unpaid purchase-money in the one case and the mortgage debt in the other see: *Syer* v. *Gladstone*, 34 W. R. 565, 30 Ch. D. 614.

Jenkins, K.C., and *Gurdon*, for the residuary legatees. —The testator has aggregated the estates and shown an intention to have them kept together. The tenant for life is bound to keep the whole of the property together, and cannot accept the beneficial part and reject the onerous: *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573; *In re Hotchkys, Freke* v. *Calmady*, 34 W. R. 569, 32 Ch. D. 408; *Frewen* v. *Law Life Assurance Society*, 44 W. R. 682, [1896] 2 Ch. 511; *Green* v. *Britten*, 42 L. J. Ch. 187, 21 W. R. Dig. 273.

Bramwell Davies, K.C., and *E. Beaumont*, for the second tenant for life; and

Phipson Beale, K.C., and *J. D. Rogers*, for a portionist under the settlement, did not argue this question of the summons.

FARWELL, J.—Under Locke-King's Acts a devisee of land is not entitled to have a lien or mortgage on the property devised discharged out of the personalty, but the land is primarily liable, the mortgagee, of course, being unaffected by the Acts. In this case the testator gave his Pembrokeshire freeholds, and all other his real estate, to certain uses in strict settlement. He also bequeathed his leaseholds to trustees on trust to pay the rents and hold the leaseholds on trusts corresponding to the freeholds, so far as the law allowed. Now in order to decide whether the deficits on the New St. Bride estate and the Portland-place leasehold are to be borne by the residuary personalty or by the devisees of the freeholds, I must construe the will and see whether the estates are given as one aggregate or as separate gifts.

It is well settled that where the gifts are separate a donee may disclaim the onerous and accept the beneficial gift, but if they are given in one aggregate he cannot do so. The question, therefore, is whether the gifts are here aggregated. There is really no question as to the New St. Bride estate. It passes under the devise of the Pembrokeshire freeholds, and clearly forms part of an aggregate mass. Further, as the leaseholds are given on the same trusts, they are as far as possible aggregated with the freeholds. The separate bequest is a mere conveyancing device in order to aggregate the leaseholds with the freeholds as far as the law allows. It is impossible to hold that the gift of the leaseholds is a separate gift here unless I hold that leaseholds and freeholds can never be aggregated in one gift. This is a complete answer to Mr. Butcher's point that the freeholds and leaseholds may ultimately descend to different persons. Now, do the authorities prevent my holding that there is an aggregate gift in this case? In *In re Hotchkys* Cotton, L.J., says that it does not depend on the question whether the gift is contained in one or two sentences, nor do I consider it can depend on the fact that one property is freehold and the other leasehold. I have looked up many authorities since yesterday, and one of the strongest cases is *Talbot* v. *Lord Radnor* shortly reported in 3 My. & K. 252, but fully set out in *Fairtlough* v. *Johnstone*, 16 Ir. Ch. Rep., 442, the Irish Master of the Rolls (the Right Hon. Cusack Smith) having sent for the papers therein. In *In re Talbot* v. *Lord Radnor* the testator, whose will was dated before the Wills Act, gave a leasehold to his sister and devised his realty to trustees on certain uses in strict settlement, including an annuity of £200 to his sister. Wood, V.C., held that the sister could not accept the annuity and disclaim the leasehold. This is a strong authority that, though the gifts are in different parts of the will, and of such diverse nature as a leasehold and an annuity, the court can on construction find an intention to make an aggregate gift. In the Irish case there was a gift of all debts due to the testator and his personal estate to his wife absolutely, his freeholds being given to his wife for life, and she was in possession. The testator was the lessee of a house which was underlet at a lower rent at his death. The Irish Master of the Rolls held that the wife must keep down the head-rent out of the freeholds. It is true that he put his decision on the ground that the testator, through not specially mentioning the house, must have known it was an onerous lease, and thus might have been so. But he also inferred that the testator in *Talbot* v. *Lord Radnor* knew that the leasehold was let at an undervalue. After a careful study of *Talbot* v. *Lord Radnor*, I am unable to discover any ground for that inference. It was no doubt stated that the house was let at a lower rent at the testator's death, but that was not material as to the testator's intention at the date of his will. If the fact was material it must be shown that the testator knew at the date of his will that the house was let at a lower rent. There was no such finding in *Talbot* v. *Lord Radnor*, and the fact that it was underlet at a lower rent at his death was irrelevant. *Syer* v. *Gladstone* was simply a case of construction. Pearson, J., there construed the gift as two distinct gifts. One will case offers little assistance in another will case, but I can see possible grounds for Pearson, J.'s, decision. The testator gave a house, furniture, &c., to trustees on trust to permit his sisters, life tenants under his will, to have the use of the house and furniture or to receive the rents. Pearson, J., may well have considered that as the testator was giving a house subject to a mortgage, and furniture producing no income, he did not intend an aggregate gift so as to throw the liability on the furniture; and on construction he held it was two gifts. He further held that Locke-King's Acts imposed no personal liability on the donees to indemnify the personal estate against the mortgage debt. That is not material in this case as the gift is one aggregate. I may add that the reporter's note in 75 L. T. Rep. 21

bears out my view of *Syer* v. *Gladstone*. Then I come to *Frewen* v. *Law Life Assurance Society*. It is very much in point, and puts the whole matter on an intelligible basis. If there is an aggregate gift, the net beneficial interest of the donee is the net amount of the property. It can be ascertained by an account. The beneficial interest is the net balance. This is the result of *Frewen* v. *Law Life Assurance Society*. An aggregate gift is the exact opposite of a gift item by item. I have not got to consider whether Locke-King's Acts impose any personal liability on a devisee. That question does not arise, as in this case enough is given in the way of benefit to more than counterbalance any liability. There is an aggregate gift of unincumbered and incumbered property. Locke-King's Acts say that the incumbered property must bear its own incumbrances. It is really immaterial whether the incumbrance or lien exceeds the value of the property. The testator has chosen to give it with the burden, and the devisee takes it with the burden, whatever it is. Fortunately for the devisee the other property devised to him more than counterbalances the burden on the onerous property. Otherwise, of course, he would disclaim the whole. Short of that he must take the benefit and burden together. The same rule applies in the case of the Portland-place leasehold house, which is subject to a mortgage. The devisee of the aggregate must take it with its whole liability, and that liability must be brought into account in the one aggregate gift.

Solicitors, *Fladgate & Co.; Gadsden & Treherne.*

Chan. Div. Buckley, J. — Nov. 21, 22; Dec. 7.

In re DIXON.

PENFOLD *v.* DIXON. (*a.*)

Inland revenue—Estate duty—Incidence—Settled fund—Will—Exercise of general power of appointment over reversionary interest—Direction to pay testamentary expenses out of residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30).

Where a fund is held in trust for A. for life, and after his death for B. for life, and after B.'s death for A., either absolutely or by way of general power of appointment; on A.'s death estate duty becomes payable in respect, not of the reversionary interest, but of the whole settled fund; and inasmuch as this does not pass to A.'s executors, B. or the trustees of the fund, and not A.'s executors, are accountable for the duty, and it is payable out of the settled fund and not out of the residue.

The duty in these circumstances is not a testamentary expense.

Adjourned summons.

By a settlement dated the 30th of December, 1890, a fund which now amounted to £13,199 10s. 10d. was settled on a testator for life, after his death on his widow for life, and after her death, in the events which happened, as he should appoint.

By his will and codicils he appointed that the trustees of the settlement should, after his wife's death, hold the fund in trust for such persons as his wife should by will appoint, and in default of appointment upon trust to transfer the fund to the trustees of his will as part of his residuary estate. The will contained a direction for payment of his testamentary expenses out of his general estate.

The testator died in 1900, leaving his widow him surviving. The question raised by the present summons was whether the estate duty payable upon the death of the testator in respect of the £13,199 10s. 10d. ought to be paid out of that fund or out of the residuary estate.

Astbury, K.C., and *S. O. Buckmaster*, for the persons entitled to the residue.—If the duty is claimed in respect of the cessor of the life interest, under section 2 (1) (*b*), it is assessed on the whole capital value of the estate and would amount to the sum now in question; in that case the property would not pass to the executors as such, and the duty would be charged on the appointed fund under section 9 (1). If the duty is claimed under section 2 (1) (*a*), as property of which the deceased was competent to dispose, the only interest which can have passed to the executor as such is the reversion over which the testator had a power of appointment. The test of whether it did so pass is whether the executors, as executors, can recover. Prior to the passing of the Act 23 Vict. c. 15 property over which the deceased had a power of appointment was not subject to probate duty; the reason was that the mere exercise of the power by his will did not make the property his own: *Platt* v. *Routh*, 3 Beav. 257; *Drake* v. *Attorney-General*, 10 Cl. & F. 257. Neither 23 Vict. c. 15 nor the Finance Act have converted equitable assets into legal assets. The reason why creditors have a right as against the appointee to have the fund administered for their benefit is that the law presumes an intention by the testator that the appointee shall only take subject to the prior right of creditors. Property appointed, therefore, does not pass through the executor, but he has a right to intercept it if required for payment of debt. That is why he is able to give a receipt for it: *In re Boyd*, 45 W. R. 648, [1897] 2 Ch. 232. On this point we rely on *In re Treasure*, 48 W. R. 696, [1900] 2 Ch. 648; *In re Maddock*, *ante*, p. 54, [1901] 2 Ch. 372; *In re Power*, 49 W. R. 678, [1901] 2 Ch. 659. This duty is not a testamentary expense because the property never came into the executors' hands. The duty should, therefore, be borne by the appointed fund.

They also referred to *In re Clemow*, 48 W. R. 541, [1900] 2 Ch. 182; *Jenney* v. *Andrews*, 6 Madd. 264; and *Lord Townshend* v. *Windham*, 2 Ves. sen. 1, at p. 11.

H. Terrell, K.C., and *Horace White*, for the widow.—The *dicta* of old authorities are not the true criteria for construing a modern statute. The true view of section 9 (1) is that it is machinery for apportioning the duty among the various classes of people who are ultimately liable to pay it. Under section 6 (2) the executor is bound to pay the duty on property coming within section 2 (1) (*a*); section 9 (1) creates a charge in respect of property the duty on which the executor is not bound to pay. We say also that, on the authorities, property over which the deceased exercised by will a general power of appointment does pass to the executors as such: *Lord Townshend* v. *Windham*; *In re Philbrick's Settlement*, 13 W. R. 570, 34 L. J. Ch. 368; *Hayes* v. *Oatley*, L. R. 14 Eq. 1, 20 W. R. Ch. Dig. 4; *In re Hoskin's Trusts*, 25 W. R. 779, 6 Ch. D. 281. The reason why creditors can take the benefit of an appointed fund is that the exercise of the power renders the property part of the testator's assets. We rely on *In re Moore*, 49 W. R. 573, [1901] 1 Ch. 691.

They also cited *Attorney-General* v. *Hope* 2 Cl. & F. 84; *Wilday* v. *Barnett*, 16 W. R. 961, L. R. 6 Eq. 193; *In re Wilkinson*, 17 W. R. 839, L. R. 4 Ch. App. 587.

Buckmaster replied.

Cur. adv. vult.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

BUCKLEY, J., after stating the facts, continued: I am of opinion that the "estate duty" must be borne by the settled fund. To state the grounds for this decision I must state shortly some of the provisions of the Finance Act, 1894. Under that Act (section 1) estate duty is payable on the principal value of all property which passes on a death. Apart from any definitions contained in the Act, it is obvious that this necessarily includes as well property in which the deceased had an absolute interest, or an interest not determining with his own life—which necessarily must pass to someone else when he by reason of death can no longer enjoy it — as also property in which the deceased had no interest at all, but which stood limited in such manner as that upon his death it passed from one person to another. With the latter class of property his estate has no concern; but it bears duty none the less. The definitions contained in the Act expand this obvious view so as to include within "property passing on the death" not only property of the two classes above mentioned, but also property of which the deceased was at the time of his death competent to dispose. To make that which follows the more intelligible I will assume a concrete case and suppose a sum of £10,000 Consols held by trustees upon trust for A. for life, and after his death for B. for life, and after his death for C. absolutely. First, upon A.'s death his interest will determine, and there will be nothing passing so far as his estate is concerned. But within section 2 (1) (*b*) of the Act the £10,000 Consols will be property passing, and by virtue of section 7 (7) the value of the property so passing is the £10,000 Consols. Upon this sum of £10,000 Consols there will be payable estate duty at a rate to be determined under the scale in section 17—dependent, that is, upon the principal value of the estate aggregated for this purpose in manner provided by section 4. This £10,000 Consols does not pass to A.'s executor; his executor has nothing to do with it; all interest of A. ceased on his death. The persons accountable are, under section 8 (4), either B. as the person to whom the property passes for a beneficial interest in possession, or the trustees in whom the fund is vested. A.'s executor may, if so minded, and if requested by the person so accountable as aforesaid, pay the duty under the latter part of section 6 (2). Whether the persons accountable as above pay the duty or the executor pays the duty, they or he are, under section 9 (5) and (6), entitled to a charge upon the £10,000 Consols for the amount of the duty. The effect of this, of course, is that the *corpus* of the settled fund bears the duty, and each person interested in succession bears it according to his estate or interest. Secondly, suppose that C. dies. In this case that which passes is a reversionary interest in £10,000 Consols expectant upon the deaths of A. and B. This is property of C., and his executor under the earlier words of section 6 (2) is the person liable to pay the estate duty on delivering the Inland Revenue affidavit. The value, for the purposes of the duty, is what the reversionary interest would fetch if sold in open market: section 7 (5). But, thirdly, suppose that A. and C. are the same person, so that the trusts are for A. for life and after his death for B. for life, and after B.'s death for A. absolutely, and suppose that A. dies. Upon his death the £10,000 Consols is property passing under section 2 (1) (*b*) as in the instance first above given, and the reversionary interest of A. expectant upon B.'s death is property, part of A.'s estate, passing upon his death within the instance secondly above given. This reversionary interest is within the definition in section 22 (1) (*j*) an "interest in expectancy," and under section 7 (6) estate duty in respect of that interest may be paid at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate, or when the interest falls into possession. The case with which I have here to deal is one falling within the instance last or thirdly above given, except that A.'s interest in the reversion is by way of general power to appoint the reversion and not by way of property in the reversion itself. What is the duty of £924 with which I have to deal? The trustees of the settlement, upon a Form C 1, returned the property which is included in it at a value of £13,199 10s. 10d. The duty in question is 7 per cent upon that sum. The Inland Revenue affidavit contains in account No. 1 two items, of which one is "Personal property over which the deceased had and exercised an absolute power of appointment," and the other is "The deceased's interest expectant upon the death of A. B. under the will of, &c.," in property. The interest here in question is a power to appoint a reversion so that the interest would fall under a combination of these two heads. To the latter of them is appended, at p. 4, a marginal note as follows: "M. But where the deceased was entitled to the interest expectant upon his own death or upon the death of another person who survives him, and estate duty is payable upon the *corpus* of the property on the deceased's death, the interest in expectancy is not also chargeable with estate duty on the deceased's death as part of his free estate although as it is in fact part of his free estate its value must be looked at for the purposes of the Probate Court. The interest in expectancy should be brought into this affidavit and be taken out again in the summary on p. 7." The summary at p. 7 contains the following: "viii. Deduct value of interests in expectancy in the property on the *corpus* whereof estate duty is payable on the deceased's death under the earlier disposition, provided that the property is itself part of the aggregated one estate, but not otherwise." The duty, therefore, of £924 which is here in dispute is not the duty, and does not include the duty or any part of the duty in respect of the deceased's interest in the reversionary interest expectant upon his wife's death, but is the duty upon the settled fund of £13,199 10s. 10d. This duty is, in my opinion, for the reasons stated in the first instance above given, a duty for which the widow as tenant for life in possession, or the trustees of the settlement, and not the executor, is the person accountable, and is a duty for which the person who pays it, whether he be the party accountable or the executor at the request of the party accountable, will be entitled to a charge upon the fund. It follows that in my opinion this duty is to be borne by the settled fund and not by the residue. For the purpose of what precedes it it is immaterial that the reversionary interest of the testator was not a reversionary interest in property, but only a general power of appointment of a reversionary interest. If he had been entitled to the reversionary interest itself by way of property and not of power, the same result would have ensued, for the duty in dispute is not that in respect of the reversionary interest, but that in respect of the whole settled fund. In the view which I take of the case, therefore, the question does not arise as to the meaning of the words "executor as such" in section 9 (1), and it is unnecessary for me to express any further opinion upon a point on which an unfortunate difference of opinion has arisen. I may add, however, that, having had the advantage of reading the considered judgment of my brother Byrne in *In re Power*, I should, if I had to consider that question again, still be of opinion that it lies at the root of the matter to

ascertain whether the property included in the power becomes assets for payment of debts under or adversely to the beneficial disposition made by the donee of the power; in other words, whether fictionally the donee of the power is supposed to appoint first to his executor to such extent as is necessary for the payment of his debts in a due course of administration, and then to the appointees, or whether the appointment, as a beneficial disposition, is taken to be what it is on its face—viz., an appointment to certain appointees, and the executor's right is a right to recover, not as an appointee, but as executor adversely to the appointees by virtue of his right as executor to avoid *pro tanto* the beneficial disposition of the property which the appointor in fact makes. The latter seems to have been the view taken by Lord Hardwicke in *Lord Townshend* v. *Windham*, 2 Ves. sen., at p. 11. Lord Hardwicke, I see, refers to the case in 2 Rolles Reports 173 as showing the origin of the right to treat as general assets for payment of debts property included in a general power exercised by the donee. Further, it would, I think, be necessary to consider the decision of Lord Romilly in *Hayes* v. *Oatley*, which was a decision upon the point, on which James, L.J.'s, words in *In re Hoskins' Trusts* were but *dicta*. It is unnecessary for me in the present case to reconsider the point.

Being, then, of opinion that this duty is payable out of the settled fund and not out of residue, does the testator cast it upon residue by the provision in his will for payment of his testamentary expenses out of his general estate? I think not. For if I am right in thinking that the executor is not accountable for this duty and has no concern with it, then the amount is not a testamentary expense. I hold, therefore, that the £924 must be paid out of the settled fund.

Solicitors, *Merriman, White, & Thompson.*

Chan. Div. Joyce, J. } Oct. 25.

In re LEVERIDGE.
SPAIN *v.* LEJOINDRE. (*a.*)

Will—Construction—Direction to pay "estate duty" out of residue—Settlement estate duty.

A direction in a will to pay estate duty out of a particular fund will be taken to refer to settlement estate duty as well, unless a contrary intention is shown to exist.

Adjourned summons.

Catherine Hayes Leveridge by her will dated the 11th of January, 1899, *inter alia*, devised certain freehold property to her trustees upon trust to pay the annual rents and profits thereof to or permit the same to be received by the defendants Hilaire Raphael Lejoindre and Emma Carter Smith for and during the term of their natural lives in equal shares as tenants in common, and after the death of either of them to pay the whole of the rents and profits to the survivor for his or her natural life, and after the death of the survivor upon certain other trusts for the benefit of other persons. The residuary estate of the testatrix was bequeathed upon trust to pay her just debts and funeral and testamentary expenses and legacies, and also the estate duty upon the whole of the real and personal estate, as well as the legacy, succession and annuity duties, and to invest the residue and out of the income to pay the costs, charges, and expenses of the trustees and apply the remainder to such charitable purposes as the trustees should think fit.

The testatrix died on the 27th of December, 1899.

The summons, which was taken out by the trustees and executors of the will, asked for the determination of the question whether the settlement estate duty payable on the above-mentioned settled property ought to be paid out of her residuary personal estate or out of the settled property on which it was payable.

F. McMullan (*A. E. Balfour* with him), for the plaintiffs.

Austen Cartmell, for the defendants Lejoindre and Smith.—The only places in the Finance Act, 1894, in which settlement estate duty is expressly mentioned are sections 5, 17, and 21; in the parts of the Act which deal with the incidence and recovery of the duty the term "estate duty" includes settlement estate duty, as, for example, in sections 6, 8, 9, and this is so throughout the general parts of the Act. This view was taken by North, J., in *In re Webber*, 44 W. R. 489, [1896] 1 Ch. 914, and though the actual decision in that case was overruled by the Court of Appeal in *In re Maryon-Wilson*, 48 W. R. 338, [1900] 1 Ch. 565, there was nothing in the latter case which destroyed the force of the observations of North, J., in the former.

R. J. Parker, for the Attorney-General, on behalf of the charities.—Though for Inland Revenue purposes settlement estate duty is estate duty, yet the incidence of the two duties is different, and therefore this will should not be read as including settlement estate duty in the term "estate duty."

JOYCE, J.—This is a question of the intention of the testatrix as shown by her will. The question is whether the estate duty spoken of in the residuary gift includes settlement estate duty or not, as well as the estate duty simply so called. I have been referred to various sections of the Finance Act, 1894, in which it is clear that "estate duty" is a comprehensive term, including not only estate duty in the narrower sense, but also settlement estate duty. Counsel for the Attorney-General admits that this is so for revenue purposes; but he points out that there is a difference in the incidence and collection of the settlement estate duty. I do not agree with him that in ordinary parlance settlement estate duty is not spoken of as estate duty; the expression "estate duty" is usually used both of settlement estate duty and also of the ordinary estate duty. *Primâ facie* I see no reason why the testatrix in this will should make any difference between the duties. The settlement duty is estate duty for the purposes of the Act, and in my opinion it is estate duty for the purposes of this will, and therefore it must be paid out of the residuary personal estate.

Solicitors, *Mackrell, Maton, Godlee, & Quincey; Solicitor to the Treasury.*

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) } Nov. 8; Dec. 16.

KIRKHOUSE (*Appellant*) *v* BLAKEWAY, TOWN CLERK OF GLOUCESTER (*Respondent*). (*a.*)

Election law—Registration—Parliamentary franchise—Parochial relief—Medical relief—Maintenance of voter's wife as pauper lunatic—Disqualification—Representation of the People Act, 1832 (2 *Will.* 4, *c.* 45), *s.* 36—*Medical Relief Disqualification Removal Act*, 1885 (48 & 49 *Vict. c.* 46).

In all cases in which relief is given, partaking more or less of the nature both of medical relief and of ordinary relief, it is a question of fact for the revising barrister to decide what is the real character of the relief.

The appellant claimed to have his name inserted in Division I. of the occupiers list of voters; he was qualified in all respects except for the fact that his wife had, during the whole of the qualifying period, and for nine months previously to that period, been maintained out of the poor rates in the county lunatic asylum, the appellant contributing nothing towards her maintenance. The revising barrister, in these circumstances, held that the maintenance of the appellant's wife was not "medical assistance" within the meaning of that expression in the Medical Relief Disqualification Removal Act, 1885, *and that the appellant was disqualified by virtue of section* 36 *of the Representation of the People Act*, 1832.

The Court affirmed the barrister's decision.

Case stated.

This was an appeal from a decision of the revising barrister for the city of Gloucester rejecting the claim of the appellant to have his name inserted on the Occupiers' List (Division I.) for the parish of Gloucester.

The case stated by the revising barrister was as follows: "At a court held before me for revising the list of voters for the city of Gloucester the appellant claimed to have his name inserted on the Occupiers' List (Division I.) for the parish of Gloucester. He was qualified in all respects to be placed on the said list except for the fact that his wife had been during the whole of the qualifying period maintained out of the poor rate of the said parish as a pauper patient of the Gloucester County Lunatic Asylum. She was removed to the asylum in September, 1899, under a justice's order. The certificate was signed by a medical officer of the Gloucester Union. Nine shillings a week was paid to the county authority by the overseers of Gloucester out of the poor rate for her maintenance, and it must be taken that nothing had been contributed by the claimant towards her maintenance. It was contended on behalf of the claimant that the maintenance of the wife in the asylum was medical assistance within the meaning of the Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46), and that he was not thereby deprived of his right to be registered as a Parliamentary voter or as a burgess. I thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the said statute. I thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance."

The revising barrister accordingly disallowed the claim, and, on the application of the appellant, stated the above case for the opinion of the court.

H. Terrell, K.C. (*Percival Hughes* with him), for the appellant.—The disqualifying section is section 36 of the Representation of the People Act, 1832 (2 Will. 4, c. 45), as extended by the Representation Act, 1867 (30 & 31 Vict. c. 102), s. 40. The first-mentioned section enacts "that no person shall be entitled to be registered in any year as a voter . . . for any county, city, or borough who shall within twelve calendar months next previous to the last day of July" (now the 15th) "in such year have received parochial relief or other alms which by the law of Parliament now disqualify from voting. . . ." In this case there was no receipt of "relief" within the meaning of that section. A person is removed to a lunatic asylum for the safety of the public and not for the purpose of relieving a husband or other person from supporting the patient. There can be no distinction between temporary and permanent confinement. Parochial relief is relief received as alms. *Gray's case*, Wolferston's Election Reports, p. 174, is against the appellant's contention, but that case is not an authority. In the case of leprosy or small-pox a wife may be removed by the public authorities and kept in an isolation hospital, the husband still maintaining his home and children. The husband cannot be said to be receiving parochial relief. The wife is removed for the safety of the public just as much as in the case of lunacy. No distinction should be drawn between mental and physical disease for this purpose. Further, maintenance of a wife in a lunatic asylum is medical assistance within the meaning of the Medical Relief Disqualification Removal Act, 1885, and therefore the appellant is not disqualified. Medical treatment may in certain cases include maintenance: see Lawson's Notes of Decisions in Registration Cases, 1885-1893, at p. 256. The above statutes should receive a wide rather than a narrow treatment. The *onus* is on the part of the objector to prove that there has been a real relief so as to disqualify.

The respondent was not represented.

Cur. adv. vult.

Dec. 16.—CHANNELL, J., read the following judgment of the court: This is an appeal on a case stated by the revising barrister for the city of Gloucester, and the question we have to consider is whether the barrister was right in disallowing the claim of the voter on the ground of his having received "parochial relief or other alms which by the law of Parliament disqualify." The voter's wife had been maintained for a period of about two years in the county lunatic asylum, at the expense of the union, and he had not paid anything towards her maintenance and support. It was contended on behalf of the voter that this was medical relief within the meaning of the Medical Relief Disqualification Removal Act, 1885 (48 & 49 Vict. c. 46). The revising barrister stated that he thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the said statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance.

We think that this is a finding of fact and that there was evidence to support it, and that we cannot and ought not to disturb it. It seems to us that in all cases in which relief is given which is more or less of the nature both of medical relief and ordinary

(*a*) Reported by E. G. SHIELDS, Esq., Barrister-at-Law.

relief, a question of fact arises for the decision of the revising barrister. Where in consequence of illness (and insanity is undoubtedly illness) a voter or a member of his family whom he is bound to support is given medical relief, it is not the less medical relief within the statute because a certain amount of ordinary sustenance is given as well as medicine. And so, on the other hand, where a pauper in a workhouse is removed to the infirmary in consequence of his illness, he would whilst in the infirmary still be receiving relief other than medical relief within the meaning of the statute. It would be a question of fact for the revising barrister in all such cases what the real character of the relief was and which kind was merely incidental to the other. Where a member of a voter's family is attacked with insanity and is in consequence removed to an asylum at the expense of the union, we should have no doubt, and the revising barrister in this case seems to have had no doubt, that the case was, in the first instance, one of medical relief. But where the insane person (being a person for whose support the voter is liable) remains permanently in the asylum and no payment is made by the voter, we think a question of fact arises as to whether the relief has not become ordinary relief as distinguished from medical. Where any payment is made, even although it is not as great as the cost to the union of the maintenance of the lunatic in the asylum, the inference might fairly be drawn that there is no ordinary relief, but this is for the barrister. Where the maintenance has continued for a long time without any payment whatever, we cannot say that the barrister is wrong in coming to the conclusion that the voter is in receipt of relief other than medical relief. There appear to be no authorities in this country bearing on this question, but the view we have expressed appears to be that taken by the courts in Ireland: see *Holland* v. *Porter*, Lawson's Notes of Registration Cases, [1898] 220, and *Crossan* v. *Holland*, Lawson's Notes, [1899] 304.

The appeal must be dismissed, but as there is no appearance for the respondent there will be no costs.

Appeal dismissed; leave to appeal given.

Solicitors for appellants, *Ayrton, Biscoe, & Barclay.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 6.

LESTER (*Appellant*) *v.* QUESTED (*Respondent*). (*a.*)

Gaming—Betting slips—Horse-races—Wagering on a game of chance—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83) —*Vagrant Act Amendment Act*, 1873 (36 *&* 37 *Vict.* *c.* 38), *s.* 3.

The appellant was charged and convicted under the Vagrancy Acts of unlawful betting by way of wagering in a public place.

It was proved that several persons had on the day of the charge handed him sums of money and slips of paper with the names of the horses and the amount of their bets written thereon, and that the appellant accepted the money and placed the slips of paper in his pocket, and that he did not remain standing in one place in the recreation ground, but walked about within certain limits.

Held, quashing the conviction, that the slips of paper were not tokens of gaming within the statute, nor was the betting in respect of a game of chance.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Case stated upon an information charging the appellant under the Vagrancy Act, 1824, as amended by 36 & 37 Vict. c. 38, s. 3, with unlawfully betting by way of wagering in a certain place with tokens—to wit, certain pieces of paper—at a game of chance.

The appellant was a bookmaker living at Sheerness, and on the 17th of May, 1901, was seen by the respondent on the recreation ground at Sheerness, While the appellant was there several persons approached him, and were seen to hand him certain pieces of paper and sums of money. Only one person approached him at a time, and the appellant did not remain standing, but walked about within certain limits.

The respondent then arrested the appellant, and took him to the police station, and on searching him found slips of paper with different names of racehorses thereon, and with various amounts of money set opposite their respective names, and a sum of money —£10 13s. 3½d.—on him.

The appellant admitted that several persons separately approached him, and that he received such slips of paper from such persons. It was contended on behalf of the appellant that what the appellant had done was not an offence under the statute upon which the information was preferred; that the pieces of paper handed to the appellant by the persons were not tokens, and therefore not instruments of gaming within the meaning of the statute; that the transactions were not a game of chance within the statute; that it was essential for a conviction to prove that the betting was at some game or pretended game of chance; that horse-racing was not game of chance, and that there was no evidence before the court to prove that it was.

The appellant referred to the following cases in support of his contentions: *Tollett* v. *Thomas*, 19 W. R. 890, L. R. 6 Q. B. 514; *Hirst* v. *Molesbury*, 19 W. R. 246, 23 L. T. Rep. 555; and *Ridgeway* v. *Farndale*, 41 W. R. 128, [1892] 2 Q. B 309.

For the respondent *Tollett* v. *Thomas*; *Ridgeway* v. *Farndale*; *Bew* v. *Harston*, 26 W. R. 915, 3 Q B D. 454; *Jenks* v. *Turpin*, 13 Q. B. D 505, 32 W. R. Dig. 84; *Dyson* v. *Mason*, 22 Q. B. D. 351, 37 W. R. Dig. 108; and *Reg.* v. *Stoddard*, 49 W. R. 173, [1901] 1 Q. B. 177, were relied on.

The magistrate upheld the contention of the respondent, that the pieces of paper were tokens and instruments of gaming within the meaning of the statute, and that the wagering was at a game of chance, and holding that the facts and circumstances as above stated proved an offence within the meaning of the Acts, he convicted the appellant as a rogue and vagabond and sentenced him to fourteen days' imprisonment without the option of a fine.

Sentence was, however, suspended pending an appeal to this court.

Lincoln Reed, for the appellant.

H. Sutton and *G. S. Robertson*, for the respondent.

Lord ALVERSTONE, L.C.J.—I am sorry we cannot take the view of this bad practice come to by the stipendiary magistrate. The cases which have been cited to us and the statute show that mere betting on a horse-race is not intended to come within section 3 of the Vagrant Act Amendment Act, 1873. That section enacts that "every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall

be deemed a rogue and vagabond" within the meaning of the principal Act, and punished as therein enacted. Therefore to bring an offence within the true intent and meaning of the Act of 1824 there must be some game of chance or some instrument or token whereby a game of chance is being carried on. In this case all that the appellant did was to put down the bets on a piece of paper and put them in his pocket. Reprehensible, no doubt, as this mode of making bets is, I do not think the appellant can properly be convicted under these Acts. The conviction cannot, therefore, stand, and it must be quashed.

DARLING, J.—I entirely agree. It seems to me that the difficulty might be met in public places such as these recreation grounds to which the public have or are permitted to have access, by a bye-law.

CHANNELL, J., concurred.

Conviction quashed.

Solicitors, *Crossman, Prichard, & Co.; The Treasury Solicitor.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 6.

BOWDEN *v.* TOLL. (*a.*)

Vaccination—Order for vaccination of child—Notice—Proceedings under section 29 of the Vaccination Act, 1867—No further notice—Proceedings under section 31—Child over six months old.

In December, 1900, notice was served on the appellant to have his child vaccinated, and in February, 1901, he was summoned under section 29 of the Vaccination Act, 1867, for neglecting to cause the child to be vaccinated. This summons was dismissed. No further notice was served on the appellant. A summons was then issued under section 31 of the Act, and an order made for the child to be vaccinated. The child was then between the age of six and eighteen months. The public vaccinator had previously visited the appellant's house in accordance with section 1 (3) of the Vaccination Act, 1898, but had failed to serve notice of his intention so to do.

Held, that the order for vaccination was properly made.

Case stated by justices for the county of Herts sitting at Welwyn, who had made an order under section 31 of the Vaccination Act, 1867, directing the vaccination of the appellant's child.

The appellant was charged on the 13th of May, 1901, under section 31 of the Vaccination Act, 1867, that the respondent, being the vaccination officer duly appointed, having reason to believe that the appellant's child, being more than six months old, had not been successfully vaccinated, and that the respondent had given notice to the appellant, the parent, to procure its vaccination, disregarded such notice contrary to the Vaccination Acts, 1867 and 1898.

On the hearing it was proved and admitted that notice had been given to the appellant to procure the child to be vaccinated, and that the child was still living and was under the age of fourteen, and had not been vaccinated, nor had had the small-pox. The respondent admitted this notice was anterior to the issue of a summons under section 29, and that no subsequent notice had been given, and that no notice of intention to visit the home under section 1 (3) of the Vaccination Act, 1898, had been given since the child's birth, though such visit had been paid. It was alleged by the appellant, and not disputed by the respondent, that at petty sessions on the 18th of February, 1901, proceedings had been taken by the respondent against the appellant in respect of the same child under section 29 of the Act of 1867 and that the summons had been dismissed, and it was contended that it was not competent for the justices to deal with a complaint under section 31 in respect of the same child on the same facts. It was further contended by the appellant that whether or not they were competent to deal with the matter the fact of non-compliance with the requirements of section 1 (3) of the Act of 1898 in respect of the notice of the public vaccinator's visit precluded an order under section 31 of the Act of 1867 in regard to a child born since the passing of the Act of 1898; that proceedings in regard to children resident from birth in the district should be taken under section 29 and not under section 31 of the Act of 1867 unless the child is eighteen months and upwards.

The justices were of opinion that the remedies given by sections 29 and 31 of the Act of 1867 were independent of each other and that the dismissal of a summons under the former was no bar to proceedings under the latter, although no further notices were given between the summonses; that the fulfilment of the provisions of section 1 (3) of the Act of 1898 was not a condition precedent to proceedings under section 31, and that section 31 was not only applicable to children of the age of eighteen months and upwards. They accordingly made an order directing that the child should be vaccinated within twenty-eight days.

Schultess Young, for the appellant.

R. D. Muir, for the respondent.

Lord ALVERSTONE, L.C.J.—We do not think it necessary to hear counsel for the respondent in this case, because we think that the objections raised by the appellant against the order appealed from are ill-founded. We have really three points to consider. First it is said that the notice is not a good notice which was given in December because it was not given in contemplation of proceedings under section 31 of the Act of 1867, and was not therefore available as the foundation of such proceedings. I can see no reason why the notice was not good. It was given by the vaccination officer, it pointed out that the appellant was in default and stated that he was required to cause the child to be vaccinated within a given time. Then the appellant said the order was bad because proceedings under section 31 could not be taken in respect of a child in the case of whom a summons under section 29 had already been dismissed; and on that ground the magistrates could not entertain the proceedings. But section 29 is a section punishing the parent for not of his own motion getting the child vaccinated, and there was to be no penalty under that section if the parent had a reasonable excuse. Section 31, on the other hand, is a section providing that where, whether owing to neglect or otherwise, a child had not been vaccinated it could be ordered to be vaccinated. I can see no reason why an excuse which would afford a defence under section 29 should prevent the making of an order under section 31. Lastly, the appellant said that proceedings under section 31 could not be taken in respect of a child under the age of eighteen months, since in respect of such a child proceedings under section 29 were still open. He pleaded, moreover, that he had had no notice that the public vaccinator intended visiting his house. I fail to see how neglect on the part of a public vaccinator can

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

be used as a defence to proceedings under section 31. Such neglect might be an answer to proceedings under section 29, but there is nothing in the Act which prevents justices from ordering a child to be vaccinated because there has been a neglect on the part of the public vaccinator in the discharge of his duties under the Act of 1898. Then it was said that the child being between six months and eighteen months of age, section 31 did not apply. I think there is no substance in that contention. For these reasons the appeal fails.

Appeal dismissed.

DARLING and CHANNELL, JJ., concurred.

Solicitors, *H. T. Nicholson; A. E. Passingham*, Hitchin.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) } Dec. 11, 12, 20.

In re MARTEN.
SHAW *v.* MARTEN. (*a.*)

Power—Will—General power of appointment—Exercise by will—Residuary gift—Lapse—Blending of funds.

A testatrix having, under her marriage settlement, a general testamentary power over certain securities, appointed by her will that the trustees of the settlement should hold the securities for certain appointees. She empowered the trustees to appropriate any security or investment subject to her power of appointment or belonging to her at the time of her decease towards payment of legacies, and as to the residue of her real and personal property she devised, bequeathed, and appointed the same, subject to payment of debts, to H. S., one of the said appointees, absolutely. H. S. died in the lifetime of the testatrix.

Held (Vaughan Williams, L.J., *dissenting*), *that the testatrix intended to blend the settlement fund with her own property for all purposes, and that the lapsed share in the appointed fund passed under the gift of residue in her will.*

This was an appeal from a decision of Byrne, J.

By a settlement of October, 1880, made on the marriage of Martha Marten with her late husband, certain securities specified in the first schedule thereto and a sum of £5,000 in money were vested in or paid to the trustees of the settlement upon trust to invest and pay the income to the wife and husband for their respective lives and then upon trust for the children, and in default of children, which event happened, then as to the securities specified in the first schedule in trust for such persons as the said Martha Marten should appoint, and in default of appointment upon trust as to one-sixth for her executors, administrators, and assigns; and as to the remaining five-sixths for certain persons therein named absolutely; and as to the said sum of £5,000 in trust for such persons as the said Martha Marten should appoint, and in default of appointment upon trust for her executors, administrators, and assigns.

By her will dated the 1st of March, 1893, the said Martha Marten, after reciting the said settlement and her desire of making appointments of the funds comprised in the said first schedule to the settlement and of the said sum of £5,000, appointed that the trustees of the said settlement should stand possessed of the said sum of £5,000 and such part of the securities comprised in the first schedule of the said settlement as would, with the sum of £5,000, make up the sum of £9,000, in trust for certain appointees, and the testatrix directed the said trustees to stand possessed of the residue of the said scheduled securities in trust as to £1,000, part thereof for W. P. Shaw and as to the residue thereof in trust for Henry Shaw. The testatrix then bequeathed some pecuniary legacies, and empowered the trustees of the said settlement and her executors, at their discretion respectively with the consent of the respective appointees and legatees, to appropriate any security or investment subject to her powers of appointment or belonging to her at the time of her decease in or towards payment or satisfaction of the legacies thereinbefore appointed or bequeathed, and continued: "As to all the rest and residue of my real and personal estate I devise, bequeath, and appoint the same subject to the payment thereout of my debts and funeral and testamentary expenses" to the said Henry Shaw.

Both W. P. Shaw and Henry Shaw died in the lifetime of the testatrix.

The testatrix died in the year 1900 possessed of considerable real and personal property in her own right.

The trustees of the settlement took out an originating summons to determine whether the residue of the scheduled securities (after providing what was necessary for making up the £9,000) was validly appointed by the will or whether the same went as in default of appointment, and whether the said fund now belonged to the next-of-kin of the testatrix or to the persons who would take in default of appointment.

Byrne, J., held that the testatrix had not by her will sufficiently blended the settlement funds with her own property so as to make it her own for all purposes, and held that the residue of the scheduled securities belonged to the persons entitled in default of appointment under the settlement.

The next-of-kin appealed.

Renshaw, K.C., and *Buckmaster*, for the next-of-kin, referred to *In re Boyd, Kelly* v. *Boyd*, 45 W. R. 648, [1897] 2 Ch. 232.

Levett, K.C., and *Chester*, for the persons entitled in default of appointment.

J. M. Stone, for the trustees.

A. Underhill, for the executor of the testatrix.

Cur. adv. vult.

Dec. 20.—VAUGHAN WILLIAMS, L.J., who dissented from the judgment of the court, said: The question in this case is whether the residue of the securities appointed by the testatrix goes under the settlement as in default of appointment, or whether it passes under the gift of residue in her will. Byrne, J., held that the fund went as in default of appointment, and did not pass under the residuary gift, and I think the judgment of Byrne, J., ought to be affirmed. There was, in my opinion, no intention on the part of the testatrix to appoint the fund as residue, and I think the residuary clause in her will does not include settled property over which she had a power of appointment. The question in all these cases, as shown by *In re De Lusi's Trusts*, 3 L. R. Ir. 232, 27 W. R. Dig. 9, and *In re Pinède's Settlement*, 28 W. R. 178, 12 Ch. D. 667, is one of intention, and the meaning must be gathered from the terms of the will itself. The question is one of construction of the residuary clause. In my opinion there would be no doubt as to the construction of that clause if it did not contain the word "appoint." [His lordship then read the clause, and proceeded:] But I do not think much weight

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

ought to be given to the word "appoint." I see nothing in the will to show that the testatrix had any intention to include settled property. On the contrary, she did not appoint trustees of her own, and this alone, to my mind, *primâ facie* negatives any such intention. I find an indication in the will of an intention to keep her own property distinct, and none of an intention to mass the properties. The case of *Oke* v. *Heath*, 1 Ves. Sen. 135, does not compel me to come to a different conclusion. I think, therefore, the judgment of Byrne, J., ought to be affirmed.

ROMER, L.J., said: The question in this case is a difficult one, but I think the appellants' contention is right. The key to the difficulty is to be found in the residuary clause. Was the residuary gift a residuary appointment? I think it was. The testatrix used apt words to include everything—namely, "devise, bequeath, and appoint." I do not think there could be any doubt on the point if the residuary gift stood by itself. Now is there anything in the prior part of the will to cut down the residuary gift? I think not. It is reasonably clear that the prior appointment would not have that effect, because there might be, as indeed there was, a lapse. It is true that a testator does not usually contemplate a lapse, but the object of a residuary gift is to include all undisposed-of property. The fact that the previous appointments in the will were made in the form of directions to the trustees of the settlement instead of directly to the appointees was not sufficient to cut down the gift of residue. It was said that an intention to exclude was shown from the fact that Henry Shaw was both an appointee and residuary legatee. But the answer to that was that he was not appointee of the whole of the settlement fund and therefore there would still be a reason for the residuary gift. There was nothing in the present case to prevent the ordinary meaning being given to the residuary clause. The question also arose whether the testatrix had blended the settlement funds with her own property. I think the two properties were so blended. Both were massed together subject to the payment of debts and legacies. Both were made one for all purposes. The case of *In re Davies' Trust*, 20 W. R. 165, L. R. 13 Eq. 163, assuming that it was rightly decided, did not cover the present case. And in *In re De Luisi's Trusts* there was no such blending of the funds as there was here. The appeal ought, therefore to be allowed.

COZENS-HARDY, L.J. — The residuary gift in the present case was a true residuary clause and included all undisposed-of property. The appointed fund was blended with the testatrix's own property for all purposes. The decision of Stirling, J., in *Coxen* v. *Rowland*, 42 W. R. 568, [1894] 1 Ch. 406, was directly in point.

Appeal allowed.

Solicitors, *A. Toovey*, for *Bennett, Boycott, Orme, & Goodman*, Buxton; *J. & R. Gole*, for *Dixon & Syers*, Liverpool; *Ullithorne, Currey, & Jennings*, for *Neve, Cresswell, & Sparrow*, Wolverhampton.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) } Nov. 27.

ATTORNEY-GENERAL v. EARL OF SELBORNE. (a.)

Inland Revenue — Succession duty — Acceleration of succession—Power of appointment—Extinction of prior interest—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 18—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

By a settlement made in 1883 *the Blackmoor Estate was settled upon such trusts and with and subject to such powers as the then (first) Lord Selborne and Viscount Wolmer should by deed appoint, and in default of or until appointment to the use of Lord Selborne for life, and after his death to the use of Viscount Wolmer in fee simple, if he should survive Lord Selborne, and, if not, then to the use of the first son of Viscount Wolmer who should attain twenty-one, and in default of such son to the use of the first Lord Selborne in fee simple.*

In 1894 *the first Lord Selborne and Viscount Wolmer by deed appointed that from and after the date of the deed the Blackmore Estate should go and remain to the use of Viscount Wolmer in fee simple for his own absolute use and benefit.*

The first Lord Selborne died in 1895, *and the Crown claimed succession duty under the Succession Duty Act*, 1853, *on the principal value of the Blackmoor Estate.*

Held (*reversing the judgment of the* King's Bench Division). *that the title to the succession created by the settlement of* 1883 *was not accelerated "by the surrender or extinction" of the prior life estate by the exercise of the power of appointment in* 1894 *within the meaning of section* 15 *of the Succession Duty Act*, 1853, *and that succession duty was not payable.*

Appeal by the Earl of Selborne against a claim by the Crown for succession duty which had been upheld by the Divisional Court.

The claim was made under the following circumstances:

By a settlement executed on the 26th of October, 1883, the Blackmoor Estate was settled upon the then Earl of Selborne, his heirs and assigns, until the intended marriage of Viscount Wolmer with Lady Maud Cecil, and after the marriage upon such trusts and with and subject to such powers as the first Earl Selborne and Viscount Wolmer should by deed appoint, and in default of or until such appointment to the use of the said earl and his assigns for life, and upon his decease to the use of Viscount Wolmer in fee in case he should survive the earl, and, if Viscount Wolmer should die in the lifetime of the earl then to the use of the first son of Viscount Wolmer who should attain twenty-one and in default of such son then to the use of the first Earl Selborne in fee simple.

By an indenture dated the 29th of September, 1894, the then Earl of Selborne and Viscount Wolmer, with the consent of his wife Lady Maud Wolmer, jointly appointed that from and immediately after the date of the indenture the above-mentioned estate (with certain exceptions) should go and remain unto the use of Viscount Wolmer, his heirs and assigns, for his own absolute use and benefit

The first Earl of Selborne died in May, 1895.

In these circumstances the Crown claimed succession duty at the rate of 1½ per cent. under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888, and section 18 (1) of the Finance Act, 1894, and temporary estate duty under section 6 of the Customs and Inland Revenue Act, 1889, on the principal value of the Blackmoor Estate.

By section 2 of the Succession Duty Act, 1853, it is enacted that "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property . . . upon the death of any person . . . either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property . . . upon the death of any person . . . to any other person, in

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession"; and,

Section 15 provides that "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

The Attorney-General filed an information against Viscount Wolmer, who had become by the death of the first earl, the second Lord Selborne, claiming succession duty, and it was contended on behalf of the commissioners that the settlement of 1883 created a succession within the meaning of section 2 of the Act of 1853, which succession had been "accelerated" by the execution of the deed of 1894 within the meaning of section 15 of the Act.

It was argued that the Act must be construed broadly, and not limited to its strict technical meaning, and that so construed the title enjoyed by the defendant came within the purview of the statute.

For the defendant it was submitted that neither section 2 nor section 15 of the Act of 1853 applied to the present case at all, since no title had accrued to the defendant on the death of the late earl. The deed of 1894 revoked all the limitations under and destroyed the settlement of 1883, and a new title was given him by the deed of 1894. That disposition did not create a new succession; it did not accelerate the defendant's title; it gave him a new title and accelerated the possession. The old title under the deed of 1883 having gone, there was nothing to accelerate.

The question came before Kennedy and Phillimore, JJ., when their lordships differed, Kennedy, J., holding in favour of the Crown, while Phillimore, J. (who as the junior judge withdrew his judgment), thought the claim of the Crown could not be supported.

From the decision of Kennedy, J., the Earl of Selborne appealed to this court.

Butcher, K.C., C. G. O. Bridgeman, and *Austen Cartmell* appeared for the appellant.

Sir Robert Finlay, A.G., and *Vaughan Hawkins* appeared for the Crown.

In addition to the cases considered in the judgment the following were referred to during the argument: *Lord Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. Cas. 150; *Ex parte Sitwell*, 37 W. R. 238, 21 Q. B. D. 466; *Attorney-General* v. *Chapman*, 40 W. R. 79, [1891] 2 Q. B. 526; *Attorney-General* v. *Robertson*, 41 W. R. 241, [1893] 1 Q. B. 293.

COLLINS, M.R., read the following judgment: This case raises the question whether the present Earl of Selborne is liable to pay succession duty in respect of an estate called the Blackmoor Estate, comprised in a deed of the 26th of October, 1883, and afterwards dealt with by another indenture of the 29th of September, 1894, under the circumstances stated in the information. The learned judges in the court below differed in opinion, Kennedy, J., holding, in favour of the Crown, that the duty was payable. Phillimore, J., being of the contrary opinion. Phillimore, J., having withdrawn his judgment, the appeal is now brought by the present Lord Selborne. The question arises in this way. By an indenture, dated the 26th of October, 1883, and made in view of the marriage of the now Earl of Selborne, then Viscount Wolmer, with Lady Maud Cecil, the first Earl of Selborne conveyed to trustees an estate called the Blackmoor Estate to hold the same on such trusts as the first Earl of Selborne and Viscount Wolmer should jointly appoint, such appointment during the joint lives of Viscount Wolmer and Lady Maud Cecil to be subject to her consent in writing, and in default of or until such appointment to the use of the first Earl of Selborne for life, and after his decease to the use of Viscount Wolmer in fee simple in case he should survive the Earl of Selborne, and if the said Viscount Wolmer should die in the lifetime of the said Earl of Selborne and should leave a son or sons who should have attained or should attain the age of twenty-one years then to the use of the son of the said Viscount Wolmer who should first or alone attain that age; but if the said Viscount Wolmer should die in the lifetime of the said Earl of Selborne and leave no son who should have attained or should attain the age of twenty-one years then to the use of the said Earl of Selborne in fee simple. By indenture dated the 29th of September, 1894, in exercise of the above power of appointment, the Earl of Selborne and Viscount Wolmer, with the consent of Lady Maud Wolmer, jointly appointed the estate in question (except the capital mansion and certain other lands) to Viscount Wolmer in fee.

It is contended by the Crown under these circumstances that the present Earl of Selborne, then Viscount Wolmer, is liable to pay succession duty. They contend that under section 2 of the Succession Duty Act, 1853, a succession was created by the settlement of 1883 in Lord Wolmer upon the death of his father, the first Earl of Selborne, and that under section 15 of the same Act the title to that succession was accelerated "by the surrender or extinction of prior interests" as a result of the exercise of the power of appointment by the deed of 1894. It is incumbent on the Crown, therefore, to show that the effect of the execution of the power was to accelerate the succession in the manner described by the section—viz., by the surrender or extinction of the prior interest—*i.e.*, the life interest of the first Lord Selborne. Unless they can show this they fail. The law as to estates created by the execution of a power is beyond controversy, and is thus stated in Sugden on Powers (8th ed.), at pp. 470 and 479. At p. 470: "The estates created by the execution of a power take effect precisely in the same manner (with the exception which will shortly be noticed) as if created by the deed which raised the power. Thus, suppose a general power of appointment to be given to a man by deed, and he by virtue of his power limit the estate to A. for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed, and in exactly the same way as they would have done had they been limited in that deed by the grantor of the power, in lieu of the power of appointment by force of which they were created." And at p. 479: "Secondly, as to powers with estates limited in default of their being exercised. Immediately upon the execution of such a power the estates limited in default of appointment cease, and are defeated; and the estates limited under the power take effect from the time of the execution of the power, in the same manner as if they had been contained in the deed creating the power." The execution of the power, therefore, in 1894 was, in the words just quoted, that the estates limited by the settlement of 1883 in default of appointment "ceased and were defeated, and the estates limited under the power took effect from the time of the execution of the power in the same manner as if they had been contained in the deed creating the power." The execution of the power,

therefore, could not have the effect of accelerating the succession created by the settlement of 1883, since its effect was to annul and defeat that succession altogether, and substitute for it the estate created by the execution of the power. Lord Wolmer did not take the fee as upon an acceleration of the estate conferred by the settlement, but by a new title under the appointment. For the same reason there was no acceleration by virtue of the surrender or extinction of any prior interest. The execution of the power, no doubt, extinguished the life interest of the first Lord Selborne under the settlement. But it equally extinguished the succession under that disposition, and the estate given to Lord Wolmer by the execution of the power was not only an estate given by a different title—viz., under the power and not under the settlement in default of appointment, but was also in itself a different interest; for, whereas under the settlement Lord Wolmer took only a fee subject to defeasance on his predeceasing his father and with certain limitations over to his children in that event, he took under the appointment an absolute fee simple. It is clear, therefore, that the Crown failed to bring this case within the words of the Succession Duty Act. They contend, however, that the words must not be strictly construed, but that a popular and non-technical meaning must be given to them, and they say that there has in substance here been an acceleration of a succession inasmuch as before the execution of the power Lord Wolmer had only a remainder after a life interest, and upon the execution of the power became entitled to the fee. They argued further that a succession was created by the settlement, and that it was not competent for Lord Wolmer to defeat it, so as to avoid paying duty, by executing the power in favour of himself. On the question of the rule of construction to be applied to the statute I think the passage cited by Mr. Butcher from the judgment of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, at p. 122, 17 W. R. H. L. Dig. 1, is important. He there says: "I am not at all sure that, in a case of this kind — a fiscal case — form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this. If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." Therefore, if the Crown fail to bring the case within the words of the statute, interpreted according to their natural meaning, they must fail; and if there is a case which is not covered by the statute so interpreted it must be cured by legislation, and not by an attempt to construe it benevolently in favour of the Crown. As to Lord Wolmer being a party to destroying the succession by an appointment to himself, the learned counsel did not seriously dispute that if the power had been executed in favour of a stranger the succession would have been destroyed and no duty payable (see *In re Warner's Settled Estates*, 29 W. R. 726, 17 Ch. D. 711, per Jessel, M.R.), though they preferred not to admit it in view of certain observations of Lord Herschell in *Lord Wolverton's case*, nor were they able to point out anything in the wording of the statute which suggested that a different result must follow if the appointment was in favour of one of the appointors. Mr. Vaughan Hawkins indeed contended that the power was not an overriding power, but was really intended to be ancillary to the carrying into effect of the provisions of the settlement, and must, therefore, be construed, as far as I understand him, as bringing into operation at an earlier date the succession of the settlement rather than as substituting for it a new estate created by the execution of the power. But it seems to me that, having regard to the undisputed law as to estates created by the execution of powers, and to the conditions under which succession duty becomes payable by the terms of the 15th section, as upon an acceleration of title to a succession, his argument really amounts to an invitation to us to ignore the legal effect of what was actually done, or to strain the words of the statute to cover something that does not fall within them. With respect to the illustration put by the Attorney-General of an estate limited to such use as A. and B. should appoint, and in default of appointment to A. for life, remainder to B. in fee, and his contention thereon that it would be absurd to hold that though there would be a succession accelerated if A. surrendered his interest to B., yet that there would be no acceleration if they appointed the whole to B. under the power, I can only say that if this result follows logically from the wording of the section it is for the Legislature and not for us to alter it. But, however that may be where the estates that can be created under the power and those limited in default of appointment are co-extensive, that is not this case. No dealing with their interest in default of appointment under the settlement of 1883 by Lord Selborne and Lord Wolmer could have effected that which was brought into existence by the appointment under the power, with the consent of Lady Maud Wolmer, and in the case of *Charlton* v. *Attorney-General*, 27 W. R. 921, 4 App. Cas. 427, at pp. 444 and 447, Lord Selborne has himself emphasized this distinction. For these reasons I think this appeal must be allowed.

STIRLING and MATHEW, L.JJ., delivered judgments to the same effect.

Appeal allowed.

Solicitors, *Longbourne, Stevens, & Powell; Solicitor of Inland Revenue.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 14, 15.

FIELD v. LONGDEN & SON. (a.)

Master and servant—Employers' Liability—Accident—Compensation—Arbitration—Question as to liability to pay compensation or amount or duration thereof—Jurisdiction of arbitrator—Condition precedent to—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 3.

In an arbitration under the Workmen's Compensation Act, 1897, *it is a condition precedent to the jurisdiction of a county court judge to act as arbitrator under section* 1, *sub-section* 3, *of the Act, that a question should have arisen between the parties as to the liability to pay compensation under the Act or as to the amount or duration of such compensation.*

A workman having met with an accident arising out of and in the course of an employment within the scope of the Workmen's Compensation Act, 1897, *and being thereby incapacitated for work, was, from a fortnight*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

after the accident, regularly paid by his employers weekly sums of the full amount that could be recovered under the Act—viz, fifty per cent. of his average weekly earnings, and this they promised to continue to do during his incapacity.

Held, on the workman taking arbitration proceedings under the Act, that the county court judge had no jurisdiction to hear the case, as no question within the meaning of section 1, sub-section 3, had arisen between the parties.

This was an appeal from an award of the judge of the Sheffield County Court in an arbitration under the Workmen's Compensation Act, 1897.

On the 29th of October, 1900, the applicant, who was in the employment of the present appellants within the meaning of the Workmen's Compensation Act, 1897, sustained personal injury by an accident arising out of and in the course of such employment.

At the time of the accident the applicant's average weekly wages were thirty shillings. From a fortnight after the accident the employers made regular weekly payments to the applicant of fifteen shillings, being 50 per cent. of his average weekly earnings.

On the 10th of April, 1901, the employers received from a solicitor acting on behalf of the applicant a letter containing, *inter alia*, as follows: "My client is still unable to follow any employment, and I shall be glad to hear from you with regard to any offer of settlement of the matter. Please treat this letter as notice of my client's accident and claim to compensation under the Workmen's Compensation Act, 1897." To this letter the employers replied on the 12th of April, 1901, stating that they would be pleased if the claim could be finally disposed of, and that having regard to the payments already made they desired to know what would be accepted in lieu of further allowances and they would consider the same.

Further correspondence passed between the parties. On the 17th of April the applicant's solicitor wrote that the applicant would be willing to take £75 with £5 5s. for the solicitor's costs in settlement of the matter. On the 19th of April the employers replied that having regard to the allowances already made they could not agree to pay so large a sum, and that they would arrange for a medical examination and would continue weekly payments during incapacity.

On the 24th of April a request for arbitration was filed in the county court on the applicants' behalf, a copy of which was served on the employers. The amount claimed as compensation was fifteen shillings per week during incapacity.

At this time the employers were still paying the applicant fifteen shillings a week.

On the 25th of April the employers wrote to the applicant's solicitor as follows: "We have now received a medical report upon this man's condition, and learn that, while he has recovered from the effects of the fractured skull, his right leg is still weak. He will no doubt be ready for full work in three months' time. Up to the present nearly £20 allowances have been paid him, and we suggest that a further sum of £15, £5 5s. your costs, will fairly meet this case. This we are willing to pay provided that the matter can be ended forthwith."

On the 26th of April the applicant's solicitor replied that his client would not accept the offer, and he suggested that the employers should make an offer of £50, and £5 5s. costs. The employers replied that they were unable to offer so much.

On the 30th of April, 1901, the employers wrote expressing their surprise that having regard to the previous correspondence the reference should have been filed, and they stated that they were quite prepared to have a memorandum (see clause 8, Schedule II.) filed, but reminded the applicant's solicitor that an effective agreement to pay the applicant compensation under the terms and provisions of the Act was in force, and they suggested that the reference should be withdrawn.

On the 21st of May, 1901, the employers by their answer to the request for arbitration stated that the applicant was not entitled to an award upon the ground that at the date of the filing of the request for arbitration no question had arisen as to the liability to pay compensation under the Act or as to whether the employment was one to which the Act applied or as to the kind or duration of the compensation under the Act. In the alternative they stated that all questions between the parties had been settled by agreement prior to the date of the request for arbitration.

On the 29th of May, 1901, at the hearing before his Honour Judge Waddy, K.C., the applicant was the only witness called, and he said that there had been no agreement to settle the matter either by a lump sum or a weekly payment; that he had received from the employers a fortnight after the accident until the 9th of April fifteen shillings per week; and that they never either disputed or admitted liability.

On behalf of the employers it was submitted that there was no question to arbitrate upon inasmuch as the applicant had been regularly and fully paid ever since the accident.

The learned county court judge was of opinion that the applicant was entitled to an award, and to have the same recorded in his favour, and on the 6th day of June, 1891, after having considered the matter, he made his award by which the applicant was to receive fifteen shillings a week during incapacity.

From this decision the employers now appealed.

Manisty, K.C. (*H. W. W. Wilberforce* with him), for the appellants.—The judge had no jurisdiction to make the award as no question has arisen within the meaning of sub-section 3 of section 1 of the Workmen's Compensation Act, 1897. A county court judge has no jurisdiction under that provision to entertain an application for arbitration under the Act and to make an award thereon unless—firstly, a "question arises" as to, either, "the liability to pay compensation under this Act" or as to the amount or duration of compensation under this Act; or, secondly, unless the question is "not settled by agreement." In this case there was no such question. The judge was wrong in holding that any such question had arisen, and there was no evidence to support such finding. The employers never disputed their liability to pay compensation or as to the amount thereof or that it should be paid during the incapacity of the applicant. The employers ought not therefore to have these arbitration proceedings thrust upon them. Even if any "question" within the meaning of sub-section 3 ever arose between the parties it should be inferred upon the facts and the correspondence that such question was settled by agreement; there was no evidence upon which the judge could find that such question had not been settled. The employers offered to have a memorandum recorded under clause 8 of Schedule II. of the Act which would have been enforceable as a county court judgment and this would have fully secured the applicant and saved the employers all the expense of an arbitration.

Danckwerts, K.C. (*Arthur Sims* with him), for the respondent.—The judge had jurisdiction to make the award. As soon as the workman filed his request for arbitration there was a question arising within the meaning of section 1, sub-section 3, between the parties, and he was entitled to have his claim settled

by arbitration. It was necessary for his own protection that the applicant should take arbitration proceedings, because after the lapse of six months from the date of the accident the employers, although they had made the weekly payments, might say that a claim for compensation was out of time: *Rendell* v. *Hill's Dry Docks and Engineering Co.*, 48 W. R. 530, [1900] 2 Q. B. 245. There was no agreement between the parties, and so there was nothing of which a memorandum could be registered under section 8 of Schedule II. The employers were not prejudiced by the fact that the workman took arbitration proceedings, for they might have avoided further costs by filing a notice that they submitted to an award under rule 18 (1) of the Workmen's Compensation Rules, 1898, and there would have been an end of the question; but this was not done. The point that there was an agreement was never taken at the trial, and the appellants are not entitled now to raise it.

Manisty, K.C., was not called upon to reply.

COLLINS, M.R.—I am of opinion that this appeal should be allowed. In this case a workman sustained personal injury by an accident in the course of an employment to which the Workmen's Compensation Act, 1897, applies. Thereupon the workman's employers, a fortnight after the accident, began to pay him one-half his weekly wages—that is to say, the maximum amount he could possibly obtain under the statute by way of compensation in such circumstances. The employers continued to make these payments for a period of between five and six months, when a letter was written to them stating that the workman claimed compensation under the Act. Correspondence followed for some time, and then a request on behalf of the workman for arbitration was filed, and a copy was served upon the employers, and they filed an answer, and the matter in due course came before the county court judge, when the point was raised that there was no question between the parties for arbitration, and that, therefore, the county court judge had no jurisdiction to hear the case. The point raised arises under section 1, sub-section 3, of the Workmen's Compensation Act, 1897, which provides that "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall . . . be settled by arbitration in accordance with the second schedule to this Act."

It is thus, by the terms of this sub-section, made a condition precedent to the right to proceed to arbitration that, first of all, there must be a "question" arising, and secondly, the further condition that that "question" has not been "settled by agreement." If there be a "question," and if that "question" be "settled by agreement," then the jurisdiction of the county court judge under this provision is ousted. In the present case it was contended before the county court judge that there was no question arising between the parties, and therefore that there was no subject-matter for arbitration. I think that contention was well founded. It seems to me that, upon the admitted facts of the case, no "question" ever did arise between the parties, because on the workman sustaining the injury the employers paid him weekly all that he could possibly obtain by way of compensation under the Act. No question or dispute was raised on the part of the workman or of the employers. I think, therefore, that no point really arises for discussion as to whether the question had been settled by agreement to pay compensation, because there never was any question arising between the parties, though I think there was a clear agreement between the parties.

In clause 8 of Schedule II. to the Act there is a provision whereby the workman who is not content to rest upon the fact that there is no dispute between the employer and himself, but desires that there should be a memorandum of the position of affairs between them may have such a memorandum recorded in the county court. Having regard to the fact that the Act was designed to give to the injured workman, who falls within its scope, compensation with as little expense as possible the terms of this provision are important, let us consider what was the position of the parties, while the employers were paying to the workman 15s. a week, the maximum amount he could be entitled to, there being no question raised by them as to their liability, or as to the amount or duration of compensation. I will assume, for the purpose, that there was no binding agreement by the employers to pay compensation. Suppose the workman were to propose to send in a memorandum of an agreement to be recorded in the county court, and the employers were to refuse to agree to this, alleging that there was no agreement, then it appears to me there would have been a dispute, and a question would have arisen which the workman would have been entitled to have had settled by arbitration under the Act. On the other hand, if the parties were really treating the practice of making these weekly payments as an agreement to pay compensation, then the employers would, of course, have consented to the memorandum being recorded, which would have been done without any expense being incurred. That being so, was the workman justified in taking proceedings for arbitration? In my opinion he clearly was not. I think that to hold that he was justified would be in effect to invite the parties to incur unnecessary expenses which it was the policy of the Legislature to prevent. But apart from that I think that the workman had no right to go to arbitration, because there was no question arising or dispute existing between the parties at the time the request for arbitration was filed. The filing of the request for arbitration did not create a question or dispute, because, according to the terms of section 1, sub-section 3, of the Act, the question which is to be settled by arbitration must be a question either as to liability to pay compensation, or as to the amount or duration of the compensation. In this case no such question arose.

Alternatively it has been contended on behalf of the employers that if there were any question between the parties it was settled by agreement, and that the jurisdiction of the county court judge had been ousted, it being only in the event of the question not having been settled by agreement that recourse can be had to arbitration. I do not think it is necessary to decide that point. If it were necessary I should be of opinion, having regard to the correspondence and the conduct of the parties, particularly that of the employers in having a medical examination of the workman under Schedule I., s. 11, which amounts, as it seems to me, to a clear admission on their part of their liability, and the submission of the workman to that examination, that there was conclusive evidence of an agreement between the parties. But in the present case it is not necessary to decide whether there was an agreement or whether the county court judge was entitled to treat it as an open question. I rest my judgment in this case upon the ground that no question within the meaning of section 1, sub-section 3, of the Act had arisen between the parties, and that the existence of such a question is a condition precedent to the right to invoke the jurisdiction of the county court judge to arbitrate between the parties.

STIRLING, L.J.—I am of the same opinion. At the

hearing before the county court judge it was submitted on the part of the employers that there was no question for the judge to arbitrate upon, and the allegation that there was no question to arbitrate upon was not denied by counsel on behalf of the workman, but it was submitted on his behalf that he, nevertheless, was entitled to have a formal finding recorded in his favour. The question therefore arises whether the county court judge was right in proceeding to hear the case and make an award. It seems to me that, having regard to the words in section 1, sub-section 3, of the Act, it is a condition precedent to the jurisdiction of the county court judge to arbitrate that there should be such a question arising as is indicated by those words. I cannot agree with the contention that the moment a request for arbitration is made a "question" is necessarily raised. The words of sub-section 3 show that there may be proceedings without any question having arisen. Proceedings begin when notice of the accident and of a claim is given. It is, however, contended that the workman is entitled to go on and have resort to proceedings which were only intended as a mode of solving difficulties where a question arises during the proceedings either as to the lability to pay compensation or as to the amount or duration of compensation. The correspondence, in my opinion, clearly shows that the liability to pay compensation was admitted, and by the letter of the 19th of April the employers offered to continue payment weekly to the workman of half the amount of his wages during the period of his incapacity. Therefore all the points are covered which are involved in the sub-section. This being so, the county court judge ought, in my opinion, to have held that he had no jurisdiction.

I desire to add that the Workmen's Compensation Act was intended for the benefit of workmen, and not for that of the legal profession, and I do not think we ought, unless actually compelled by the language used, to put such a construction upon it as to convert it into a perennial source of litigation and needless expense.

MATHEW, L.J.—I am entirely of the same opinion, and particularly I agree with the last observations of my brother Stirling. The grounds on which I rest my judgment in this case are short and simple. Looking at section 1, sub-section 3, of the Act we ascertain the conditions under which the arbitrator's jurisdiction arises, and we have to ask ourselves whether those conditions existed in the present case. In my opinion it is clear that they did not exist, and that no such question as is mentioned in the sub-section arose. It seems to me impossible to say that there was no agreement here, and I think the county court judge clearly ought to have held, if necessary, that there was an agreement; but apart from that, it is quite sufficient for the purpose of deciding the case to say that the learned judge's jurisdiction was ousted, inasmuch as there was not before him any question such as is contemplated by sub-section 3. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *Steadman & Van Praagh*, for *Arthur Neal*, Sheffield.

Solicitors for the respondent, *Halse, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield.

High Court of Justice.

Chan. Div. (Buckley, J.) — Nov. 5.

In re JONES.
ELGOOD *v.* JONES.
In re JONES.
ELGOOD *v.* KINDERSLEY. (*a.*)

Administration—Costs of administration—Real and personal estate — Apportionment of costs — Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-section* 3.

The rule that the general costs of an administration action are borne by the personal estate, and that the costs are borne by the real estate only so far as they have been increased by the administration of the real estate, remains unaltered by the Land Transfer Act, 1897.

Further consideration.

The above-named testatrix died in March, 1899, intestate as regards her residuary estate, and the plaintiff in the above actions had obtained letters of administration with the will annexed to the estate.

The actions were for the administration of the real and personal estate, one being brought against one of the next-of-kin only, the other against that defendant and the co-heiresses of the testatrix also; and the two actions had been consolidated by order. His lordship treated them as one action.

A question arose upon the minutes as to how the costs, charges, and expenses of the plaintiff relating to the administration of the estate should be apportioned between the real and personal estate.

R. J. Parker, for the plaintiff.

Mitchell, for one of the co-heiresses.—The rule is settled that the personal estate bears the general costs of administration, and that the real estate bears them only as far as they have been increased by the administration of it: *Patching* v. *Barnett*, 51 L. J. Ch. 74, 30 W. R. Dig. 54; *In re Middleton, Thompson* v. *Harris*, 30 W. R. 293, 19 Ch. D. 552; *In re Roper*, 39 W. R. 101, 45 Ch. D. 126.

Edward Ford, for the other co-heiress, supported this view.

C. E. Bovill, for some of the next-of-kin.—The cases cited were before the Land Transfer Act, 1897. Since that Act the real estate vests in the administrator, and cannot be dealt with except by means of a grant of letters of administration (see sections 1 and 2), and now these costs should be borne by the real and personal estates according to their respective amounts.

BUCKLEY, J.—The rule laid down in the cases of *Patching* v. *Barnett* and *In re Middleton* was the established practice of the court up to the Land Transfer Act, 1897. It is said that the Act has made a difference in this practice, and that now the costs of an administration action should be borne by the realty and the personalty rateably. The case falls within section 2, sub-section 3, of the Act. But by the proviso of that sub-section it shall not "alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses," and consequently the above rule of practice remains as before. The personal estate will bear the general costs of the administration and the real estate only the costs so far as they have increased by it.

Solicitors, *Arkcoll, Cockell, & Chadwick; Blyth, Dutton, Hartley, & Blyth; Lawrence, Graham, & Co.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 18.

GEUTEL v. RAPPS. (a.)

Local government—Tramway—Bye-law—Validity.

A tramway company, in a town where the Town Police Clauses Act, 1847, *was in operation, made the following bye-law: "No person shall swear or use obscene or offensive language whilst in or upon any carriage."*

Held, that the bye-law was not invalid because it did not contain the words "to the annoyance of the passengers"; and that a local authority has the power of defining what shall be deemed a nuisance under particular circumstances, and can deal with such by means of a bye-law.

Kruse *v.* Johnson, 46 *W. R.* 630, [1898] 2 *Q. B.* 91, *followed.*

Strickland *v.* Hayes, 44 *W. R.* 398, [1896] 1 *Q. B.* 290, *distinguished.*

Special case.

This was an appeal from a decision of the justices of Bristol, who had dismissed an information charging the respondent with the breach of a bye-law made in pursuance of the Tramways Act, 1870.

The bye-laws were duly made, allowed, and published in 1877, and were proved and put in evidence before the justices.

No. 6 was as follows: "No person shall swear or use obscene or offensive language whilst in or upon any carriage, or commit any nuisance in or upon or against any carriage, or interfere with the comfort of any passenger."

It was proved by the conductor of the tramway company that on the 29th of July last, when his tramcar was near Ashton Gate, the respondent got on the carriage, and when asked for his fare uttered the words complained of. The uttering of the words was not disputed. The conductor also proved that there were two other passengers on the car on the front seat who did not hear the words, and who made no complaint.

The justices found as a fact (so far as it was a matter of fact) and as a matter of law (so far as it was a matter of law) that the words were obscene, and were actually "offensive language" considering to whom they were spoken. The justices came to the conclusion that they were bound by the decision in *Strickland* v. *Hayes*, 44 W. R. 398, [1896] 1 Q. B. 290, and as no such words as "to the annoyance of passengers" were embodied in the bye-law, it should for that reason be held *ultra vires*. Section 46 of the Tramways Act, 1870, enacts, *inter alia*, that bye-laws must not be repugnant to the general law, whereas this bye-law was repugnant to the Towns Police Clauses Act, 1847, s. 28, which was in operation in Bristol, and which forbids the use of obscene or profane language to the annoyance of fellow passengers. It was contended by the appellant that the statute of 1847 did not cover the same state of facts as the bye-law, and that the latter was, therefore, not repugnant to the former.

Macmorran, K.C., and *H. H. Gregory*, for the appellant.

F. P. M. Schiller, for the respondent.

Lord ALVERSTONE, L.C.J., in giving judgment, said: I think that the magistrates ought to have held the bye-law valid, and have convicted the respondent. If *Strickland* v. *Hayes* is to be read as deciding more than this—that a bye-law cannot make the same offence which has been dealt with by a public Act a different offence—I doubt if it is now law. Certainly *Kruse* v. *Johnson*, 46 W. R. 630, [1898] 2 Q. B. 91, which was decided before a specially-constituted Divisional Court, recognized the right of the authority to define what shall be a nuisance in particular circumstances. I think the argument of the appellant was right, that the Town Police Clauses Act, 1847, was not dealing with the case of a local authority making bye-laws, and therefore the bye-law we are now considering cannot be held repugnant to any enactment made under that statute.

For these reasons the case must go back to the magistrates to be reheard.

DARLING and CHANNELL, JJ., delivered judgment to a like effect.

Appeal allowed.

Solicitors for the appellant, *Thos. White & Sons*, for *Stanley, Wasbrough, & Doggett*, Bristol.

Solicitors for the respondent, *Hare & Co.*, for *E. J. Watson*, Bristol.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 9.

MAYHEW v. SUTTON. (a.)

Highway—Locomotive—Motor-car—Excessive speed—Driven "to the common danger of passengers"—Locomotives on Highways Act, 1896 (59 & 60 *Vict. c.* 36), *s.* 4—*Light Locomotives on Highways Order,* 1896, *Art. IV., s.* 1.

Article IV., s. 1, *of the Light Locomotives on Highways Order,* 1896, *provides that a person shall not drive a light locomotive on a highway at any greater speed than is reasonable and proper, having regard to the traffic on the highway.*

The appellant drove a motor-car at a high rate of speed through a village. The justices convicted the appellant under the above section of the order, on the ground that the speed was "to the common danger of the passengers" using the road, although there was no evidence that anybody was on the road at the time in question.

Held, that the justices were right in convicting the appellant.

Appeal by Mark Mayhew from a conviction by the justices sitting at Iver, Buckinghamshire.

The conviction was under the Light Locomotives on Highways Order, 1896, which was made by the Local Government Board under section 4 of the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), which provided that no light locomotive should be driven "to the common danger of passengers."

The appellant was summoned under this provision, and at the hearing of the charge it was proved that he was at seven o'clock on a Sunday morning driving a locomotive along the highway at a tremendous pace. It was also proved that he did not pull up within sixty yards. No evidence, however, was given that there were any passengers on the road at the time he was so driving.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The magistrates convicted the appellant, but stated a case in which they set out that the information charged that on the 28th of April last, the appellant, being a person driving a light locomotive on a highway in the parish of Denham, called the Oxford-road, unlawfully drove his motor-car to the common danger of passengers contrary to the Locomotives on Highways Act. Police-constable Payne stated at the hearing that he saw the motor-car coming down Red-hill at a terrific pace. He walked into the centre of the road and held up both arms and that although the driver could see him some 340 yards from where he stood he did not stop until he had passed him some 60 yards. No further evidence was given for the prosecution, and on behalf of the appellant it was contended that, in the absence of affirmative evidence that at the time in question there were passengers on the highway who were endangered by reason of the speed at which the motor-car was being driven the offence charged was not made out. The justices convicted the appellant, and fined him 10s. and 8s. 6d. costs.

Roger Wallace, K.C., and *Fleming*.—There can be no breach of the Order unless the motor-car was so driven as to be a danger to passengers. There could be no danger to passengers unless there were passengers on the highway at the time when the motor-car was driven along it. The prosecution to prove their case must show that there were passengers on the highway at the time, and that they were endangered. Here there was no evidence that there was anyone about this Sunday morning except the police-constable, and as he was not endangered the case for the prosecution fails.

They cited *Stinson* v. *Browning*, 14 W. R. 395, 35 L. J. M. C. 152; *Hill* v. *Somerset*, 51 J. P. 742; *Smith* v. *Boon*, 49 W. R. 480, 17 Times L. R. 472.

No one appeared for the respondent.

Lord ALVERSTONE, L.C.J.—It has been held in *Smith* v. *Boon* that under the first part of this regulation order of 1896, Art. IV., s. 1, it was not necessary to prove that any other vehicle was in motion at the moment, and that the justices could properly convict having regard to the traffic which used the highway, although there was no evidence before them that at the time any vehicle or person using the highway was interrupted, interfered with, incommoded, or affected by reason of the speed the defendant was driving his motor tricycle. In the argument which has been addressed to us it was attempted to be said that the same rule was not to apply to the words in the latter part of the same order—the words "to the common danger of passengers." We have nothing to do in this case with the reasonableness of the regulation, nor have we to pass an opinion whether these regulations should or should not be amended for the benefit of persons who drive motor-cars. The consideration of the rule really shows that, at any rate the justices, upon evidence before them of a high rate of speed, might say, as they did say, that such a high rate of speed was to the common danger of passengers, though no particular passenger was shown to have run out of the way, or to have fled for his life, or to have taken steps to have avoided being run down. On the uncontradicted evidence it was open for the justices to say that in this case the defendant had been guilty of driving to the common danger.

DARLING and CHANNELL, JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Frith & Co.*

Prob. Div. & Adm. Div. Divorce. } Nov. 12.

BOSWORTHICK v. BOSWORTHICK. (*a.*)

Divorce—Rape—Indecent assault—Conduct amounting to cruelty.

Where in a suit for dissolution of marriage on the ground of rape the respondent was proved to have been convicted at the quarter sessions of a series of indecent assaults upon children.

The Court granted the petitioner a decree nisi *on the ground of the respondent's having committed rape;*

And held further, that such conduct of the respondent, causing nervous shock to the petitioner, amounted to cruelty.

Thompson *v.* Thompson, 17 *Times L. R.* 572, *and* Coffey *v.* Coffey, [1898] *P.* 169, 46 *W. R. Dig.* 51, *followed.*

This was the petition of Catherine Bosworthick for a dissolution of her marriage with the respondent, Charles Henry Bosworthick, on the ground that he had committed rape, and she alternatively asked for a judicial separation on the ground of cruelty.

BARNES, J., upon the petition coming on for hearing, said: "Although the court has no power to try the case *in camerâ*, it is clearly one in which no one should remain in court except those engaged in the case."

The public then left the court.

It appeared from counsel's opening statement that the parties were married on the 12th of October, 1897, at the parish church of Atherton, Lancs, the respondent being in the merchant service.

There had been no children of the marriage.

It appeared that in September, 1898, two little girls came on a visit to the petitioner and the respondent at their house at Twickenham, and the children afterwards complained that while there the respondent indecently exposed himself to them. Their father on learning this taxed the respondent with it. He at first denied it, but subsequently admitted it. In consequence of this the petitioner and respondent separated and a deed was executed on the 28th of September, 1898, it being arranged that the respondent should go abroad for four years. However, the following year the petitioner forgave the respondent and lived with him again. They then went to live at Ivy Bridge, in Devonshire, and while there the respondent committed a series of indecent assaults on six female children whose ages varied from eight to twelve years. In October, 1900, he was prosecuted at the Exeter Quarter Sessions and was convicted of committing such indecent assaults and sentenced to twenty months' hard labour, he having already been in prison for four months awaiting trial. In consequence of this conduct on the respondent's part the petitioner's health greatly suffered, and both in September, 1898, and in October, 1900, she consulted her medical advisers, who would prove that she was an "absolute wreck" and suffered from sleeplessness, apparently caused by mental shock. Evidence substantiating counsel's opening was given, and two little girls aged twelve and ten years respectively gave evidence of indecent conduct committed on them by the respondent, and they repeated the evidence which they had deposed to prior to the trial at the quarter sessions. The elder child proved attempted penetration.

Inderwick, K.C., and *Harvey Murphy*, for the petitioner.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

The respondent was not represented.

BARNES, J., said that he thought that a case of rape had been sufficiently established, and though he had some difficulty in accepting the elder child's evidence [counsel had great difficulty in inducing the witness to say what occurred] the whole outline of the case was such that he thought the court might properly act as it had acted previously in the case of *Coffey* v. *Coffey*, [1898] P. 169, 46 W. R. Dig. 51. But if he could not have come to the decision that he had, he thought the case of cruelty was made out, and was covered by the case of *Thompson* v. *Thompson*, 17 Times L. R. 572. There would, therefore, be a decree *nisi* with costs.

Solicitor, *Woodcock Ryland.*

House of Lords.

From C. A. (England). Aug. 5, 1901.

WHITECHURCH (LIMITED) v. CAVANAGH. (*a.*)

Company — Estoppel — Certification — Transfer — Secretary — Director.

A company is not estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. Those who deal with a company must be cognizant of the company's memorandum and articles of association; and a managing or other director of a company cannot bind the company by estoppel or otherwise in contravention of the regulations in the memorandum or articles of association.

Where the secretary of a company falsely certified that certificates of shares had been deposited, and this was done for the purpose of enabling a fraud to be carried out,

Held, in an action for damages for refusing to place the name of the respondent on the register of a company, that the company were not estopped by the action of their secretary from setting up the true state of facts, and, as his conduct was unauthorized and outside the scope of his employment, the company were justified in not registering the respondent as transferee.

Grant v. Norway, 10 *C. B.* 665, *followed.*

Decision of the Court of Appeal *reversed.*

Appeal by George Whitechurch (Limited), from a judgment of the Court of Appeal (Smith, Collins, and Romer, L.JJ.), which affirmed that of Bigham, J.

The facts as given by Lord Brampton were as follows:

In May, 1899, the Innox Tannery Co., whose tanning works were at Longjumeau, near Paris, was indebted to the respondent Cavanagh, a hide merchant in Paris, in upwards of £14,000 for raw hides sold and delivered. This debt had been guaranteed by one Raymond, the managing director of the company, whose offices were in Tokenhouse-yard, London.

The leather manufactured by the Innox Co. was for the most part consigned to the appellant company, George Whitechurch (Limited), leather merchants at Gentilly, near Paris, for sale on commission, that company making advances to the Innox Co. on such goods to the amount of 80 per cent. of their invoiced value. The registered office of the Whitechurch Co. in London was in the same house as Raymond's, and a clerk of Raymond, named Wells, was on his recommendation appointed secretary.

Having become dissatisfied with the conduct of the Innox Co. respecting his debt, Cavanagh, on the 23rd of May, 1899, lodged against the goods and moneys of that company (as well those in their own possession as those in the possession of the Whitechurch Co. for sale) a French legal process called an *opposition*, which operated as an attachment, stopping so long as it existed all dealing with the property affected by it. Knowledge of this step was telegraphed by Mr. George Whitechurch to Raymond in London, and he, with a view of bringing about a withdrawal of it, had an interview with Cavanagh in Paris on the 27th of May, when he arranged the heads of a proposed agreement between Cavanagh, the Innox Co., and himself for the withdrawal of the *opposition* on terms that the Whitechurch Co. should pay over to Cavanagh from time to time, in part discharge of his debt, one-half of the 80 per cent. of the advances which, under their existing arrangements, were payable to the Innox Co., and that for ensuring to Cavanagh the remainder of his debt Raymond should deliver to him 10,350 shares in the appellant company. This arrangement, however, was made subject to the acquiescence of the Whitechurch Co., without which it was to be a nullity.

As regards the shares, it was stipulated that they should be represented by "a certified transfer" of 1,100 preference shares, described in the agreement by specific numbers, and "a certified transfer" of 9,250 ordinary shares, similarly described. A meeting was appointed in Paris on Wednesday, the 31st of May, to complete this agreement. It was further arranged with Raymond that the certificates for those shares should be forthcoming on that day. Cavanagh in his evidence stated that Raymond promised to send him the transfer for the shares with the certificates for them by that time, and Mr. C. Smith, Cavanagh's London solicitor, who attended the meeting on his behalf, deposed that before leaving London for Paris on the 29th he saw and arranged with Raymond that he should hand to him the "original certificates" in order that he might take them with him. Smith endeavoured to make it appear that by "original certificates" he meant the "original transfers," but he ultimately admitted that he appreciated the difference between a certified transfer and a certificate for shares, and that the latter were to be furnished to him so that he might be in a position to produce them in Paris, and that he never supposed that he would have to deal with certified transfers at all. Neither certified transfers nor share certificates, however, were furnished either to Cavanagh or Smith, but on calling on the morning of Tuesday, the 30th of May, at the office of Mr. Maugham, Raymond's solicitor in Paris, they learned from that gentleman that he had that morning received by post from Raymond certified transfers of the shares (which he produced) without any share certificates.

The certified transfers were two in number—the 1,100 preference shares were comprised in one, the 9,250 ordinary shares in the other. Each set of shares was described by specific numbers. Each transfer purported to be a transfer by Raymond to Cavanagh, and each was dated the 29th of May, 1899, and signed and sealed by Raymond and attested by Wells. In the margin of each transfer was the certificate in question. On that of the preference shares it was as follows:

Coupon for 1,100 preference shares in the company's office. George Whitechurch (Limited) [*affixed by rubber stamp*].—RICHARD G. WELLS, Secretary [*in Wells' handwriting*].

On that of the ordinary shares it was similar in words, with the substitution of "9,250 ordinary" instead of "1,100 preference."

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Later in the same day Cavanagh and Smith called on Mr. George Whitechurch and told him that they had seen the certified transfers, and that Maugham had expressed his opinion that they were in order.

Whitechurch said that he had heard from Raymond, and knew all about it, and as regarded the certified transfers, he said, "they would be all in order if he was satisfied that the signatures on them were the genuine signatures of the secretary." "Then," said Smith, "I put it to him expressly that if he required the original certificates or scrip to be annexed to the certificate, the appointment for the next day would have to go off." He replied, "I shall be quite satisfied if it is Wells' signature."

No transfers were shown to Whitechurch on that day, and the letter above referred to was not calculated to excite any suspicion in his mind.

On the following morning, the 31st of May, the meeting appointed for the execution of the agreement was held, when Mr. Whitechurch was present, but only for the purpose of giving his acquiescence, if, after seeing the certified transfers, he found that they were, on the face of them, in order. There was no question as to the willingness of Cavanagh to sign it. The great object was to get Whitechurch to sign his acquiescence, though he was not a party to the agreement.

Cavanagh's account of this meeting was as follows: Mr. Maugham produced the certified transfers; Mr. Whitechurch looked at them, and having done so said they were all right, and addressing him (Cavanagh), "and all you have to do is to give the certificates to me, and I shall send them to London, and you will get the fresh certificates." The agreement was then signed by the parties to it, and Whitechurch signed his acquiescence. Subsequently the transfers were signed by Cavanagh as transferee, and he took possession of them.

He then withdrew his *opposition* and sent the transfers to the office of the Whitechurch Co. in London for registration, and for the issue of new certificates. These were refused upon the ground that Raymond was not the registered owner of the shares, and that the old certificates had not been produced for cancellation as required by the articles of association of the company.

For this refusal this action was commenced. At the trial it was contended for the plaintiff, upon the authority of *Carr* v. *London and North-Western Railway Co.* 23 W. R. 747, L. R. 10 C. P. 307, that the defendant company was estopped by the certification of the transfers signed by Wells, the secretary, and by the language of Whitechurch, the managing director, from denying that Raymond was the registered holder of and entitled to transfer the shares.

Bigham, J., and the Court of Appeal adopted this contention.

The company appealed.

Lawson Walton, K.C., Swinfen Eady, K.C., and *W. Wills* appeared for the appellants.

Rufus Isaacs, K.C., and *L. Ryland*, for the respondent.

The Earl of HALSBURY, L.C.—I am about to read the judgment of Lord Macnaghten, in which I entirely concur, and I may add that Lord Shand, who has read it, concurs also.

Lord MACNAGHTEN (read by the Lord Chancellor).—This case has been argued very fully and very ably. Many interesting points have been discussed most of which, I am happy to think, are not at all necessary for the determination of the matter in hand. The real question may be stated very shortly. Has the appellant company, George Whitechurch (Limited), incurred any, and, if any, what, liability by reason of representations made by its secretary, Richard G. Wells, in London, and by its managing director, George Whitechurch, in Paris? The claim as originally presented was founded on alleged misrepresentation by the company. The action, however, was treated by the Court of Appeal and by the learned counsel for the respondent at your lordships' bar as an action to recover damages from the company for refusing to place the respondent Cavanagh on its register of shareholders. It was held by the Court of Appeal, and it was strenuously argued at the bar, that the appellant company was estopped by the representations of Wells and Whitechurch from denying Cavanagh's right to be placed on the register. I quite agree with Smith, L.J., in thinking that it is necessary to keep the two alleged estoppels distinct and to deal with them separately. Whatever difficulty there may be in ascertaining the precise scope and effect of the representations made by Whitechurch, there can be no doubt as to the scope and effect of the representations made by Wells. They are in writing and in a common form. There can be no question as to the meaning of the written words, except, perhaps, in regard to one point which in the view that I take of the case is not material. It seems that one Raymond had undertaken to transfer to Cavanagh, by way of security, a large number of shares in George Whitechurch (Limited), which were of considerable value. On the 29th of May, 1899, at Raymond's bidding, Wells, the secretary of the company, certified two transfers, one of 1,100 preference shares, and the other of 9,250 ordinary shares, in the company. The shares were each £1 shares, fully paid, and worth about 15s. a-piece. The transfers were executed by Raymond as transferor. They were intended to be executed by Cavanagh, who was named as transferee. The certification on the transfer of the preference shares was in these words; "Coupon for £1,100 preference shares in the company's office. George Whitechurch (Limited). — Richard G. Wells, Secretary." The certification on the transfer of the ordinary shares was in similar terms. It was common ground that the word "coupon" stood for "certificate" or "certificates," and it was not disputed that the certification was a representation that there had been lodged in the company's office certificates for the shares specified in the bodies of the transfers, such certificates being either in the name of Raymond himself, as registered owner, or in the names of registered owners who had executed in favour of Raymond transfers which had been lodged with the certificates. In the present case the jury found that the certification given by Wells imported that the shares in question were standing in Raymond's own name. It was contended that this finding was not supported by the language of the certification, or by anything in the evidence. In my opinion, the point is immaterial. It turned out that no certificates had been lodged in the company's office by Raymond, nor were any certificates ever forthcoming to answer the transfers which Raymond had executed. As far as Raymond was concerned, the whole thing was a fraud. Wells was Raymond's secretary and servant, as well as secretary to the company. He was Raymond's instrument in carrying out the fraud. He lied purposely for Raymond's benefit. The jury have found that Wells joined in the fraud for the benefit of the company as well as for the benefit of Raymond. There is not, however, a shadow of evidence to support this conclusion. The finding, so

far as the company is concerned, must be disregarded. It only shows how little the jury appreciated the facts of the case.

Then comes the question: Is the company bound by the representations of their secretary? That must depend upon what authority the secretary had or was held out as having. Now, the duties of a company's secretary are well understood. They are of a limited and of a somewhat humble character. "A secretary," said Lord Esher, M.R., "is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all": *Barnett* v. *South London Tramways Co.*, 35 W. R. 640, 18 Q. B. D. 815. In the present case the secretary was not even in the pay of the company, at least, not directly. The company, it seems, was provided with an office, and a secretary too, for £50 a year by another company, which appears to have been under Raymond's control and management. No doubt the practice of certifying transfers is a convenient one. It facilitates dealings in shares on the Stock Exchange, and so tends indirectly to increase the value of shares as a marketable commodity. But in permitting its secretary to certify transfers, it cannot be supposed that a company authorizes the secretary to do more than to give a receipt for certificates which are actually lodged in the office. I cannot think that a company is estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. If authority be wanted for this proposition, it seems to me that there is ample authority to be found in the case of *Grant* v. *Norway*, 10 C. B. 665. *Grant* v. *Norway* was a much stronger case than the present. There it was held that a shipowner is not bound by bills of lading signed by the master for goods not received on board. The court declared that it could not "discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that" the master "had authority to sign such bills whether the goods were on board or not." Having regard to the authority which the master undoubtedly possesses, and the important part which bills of lading play in the commerce of the country, there was much to be said in favour of an opposite view. It was argued in *Grant* v. *Norway* that the doctrine for which the shipowner was contending would go far to destroy the negotiability of bills of lading, and that as the master had an unlimited authority to sign bills for goods received, and was for some purposes regarded as the general agent of the owner, it was but just that the owner should be responsible if the master exceeded his authority or deceived third persons. But, for all that, the principle of the decision was accepted in *Coleman* v. *Riches*, 3 W. R. 453, 16 C. B. 104, and the decision itself has been recognized in this House as sound law in *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128, 19 W. R. H. L. Dig. 18; and the commerce of the country has not suffered, nor has the credit of bills of lading been impaired in consequence. There is a marked difference between a certificate and a certification. A certificate is under the seal of the company. By the Companies Act, 1862, a certificate is made *primâ facie* evidence of title. If faith were not given to the solemn assertions of a company under its common seal, "it would," as Lord Cairns, L.C., observed in *Burkinshaw* v. *Nicolls*, 26 W. R. 819, 3 App. Cas. 1004, "paralyze the whole of the dealings with shares in public companies." A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board. A certification, in fact, is only required for a temporary purpose, to meet the exigencies of business on the Stock Exchange, which has stated days and fixed periods for the different stages of a business transaction intended to be carried out under its rules. In dealings in shares not under the rules of the Stock Exchange certification is really out of place. In such dealings, in the case of a purchase, the price would only be paid in exchange for the transfer and share certificate—on the completion of the transaction and not before. Still less would a certification be required if the shares were merely intended to form a security. A good equitable charge may be created by the deposit of certificates, and if the certificates happened to include shares which were not intended to be the subject of the security, there would be no very great difficulty in defining the extent of the proposed charge in the memorandum of deposit. It seems to me that it would be most unreasonable in any case, whether the transaction takes place on the Stock Exchange or not, to hold a company estopped by the certification of its secretary if the secretary certifies a transfer without having received the certificates. The supposed estoppel, therefore, founded on Wells' certification, in my opinion, fails altogether, and for the same reason the case founded on alleged misrepresentation by the company fails also.

I now come to the estoppel founded on representations made by George Whitechurch. The position of the parties was this: Cavanagh dealt in raw hides; George Whitechurch (Limited) were leather merchants. There was an English company called the Innox Tannery (Limited), which had a tan-yard near Paris, not very far from the place of business of the Whitechurch Co. The Innox Co. was in the habit of buying hides from Cavanagh, and consigning them when tanned to George Whitechurch (Limited) for sale, receiving an advance of 80 per cent. on the invoice value. The Innox Co., which practically was Raymond under another name, became largely indebted both to Cavanagh and George Whitechurch (Limited). George Whitechurch (Limited) seems to have had some security; Cavanagh apparently had none. Cavanagh kept pressing for payment. In May, 1899, Raymond made an arrangement with Cavanagh for the liquidation of his debt by a series of bills for £500 each, accepted by the Innox Co., indorsed by Raymond, and falling due in weekly succession. The first two bills fell due and were dishonoured. The next step of importance was that Cavanagh, thinking that he was being tricked, obtained from the French courts a process known as an *opposition*, together with a "protective seizure." The effect of such a process is to lay an embargo on the debtor's business without, however, giving the creditor who obtains it any priority. Then Raymond undertook to carry out another arrangement which had been suggested or proposed when the two bills were dishonoured. He agreed to give Cavanagh as security shares in George Whitechurch (Limited) to the nominal value of £10,350, and it was part of the arrangement that George Whitechurch (Limited) should in future pay half of their advances on consignments from the Innox Co. to Cavanagh until his debt was liquidated. George Whitechurch, of course, was anxious to see the *opposition* removed, and was ready to fall in with the proposed arrangement if the matter was put on a satisfactory footing that promised continuance of the business. A formal deed was to be drawn up between the Innox Co., Raymond, and Cavanagh, and George Whitechurch was to add his signature in order to testify the

acquiescence of his company in the arrangement. That being the position of affairs, we now come to the two meetings on the 30th and 31st of May, 1899, at which representations are said to have been made by George Whitechurch, which created an estoppel against his company. The interviews took place between Cavanagh, his solicitor, Mr. Charles James Smith, and Mr. George Whitechurch. Other persons were present, but it is not necessary to mention them. Raymond was not present. He ought to have handed to Smith or brought over or sent over the certificates of the shares which he had promised to give in security. Instead of that he sent to Mr. Maugham, who was his solicitor in Paris, the two certified transfers to which I have already referred. Mr. Maugham received them by post on the morning of the 30th of May. He explained to Cavanagh and also to Smith, who probably knew quite as much about certified transfers as he did, that certified transfers were recognized on the Stock Exchange, and that by the rules of the Stock Exchange payment was made on the production of a certified transfer. Then the parties adjourned to the office of George Whitechurch (Limited). The certified transfers were not produced on that occasion. But they were mentioned, and Whitechurch said that he knew all about it, and that it was all right, and that he was satisfied. Whitechurch had that morning received a letter from Raymond, stating that he had sent to Maugham certified transfers of preference and ordinary shares which ought to make Cavanagh quite safe, and that he had to get them from his family and intimate friends, who held them. There was nothing in the letter calculated to excite suspicion in the mind of Whitechurch, and it seems to me that he was quite justified in saying what he did at the interview on the 30th on the strength of Raymond's letter. Smith says: "I put it to him expressly, if he required the original certificates to be annexed to the certificate"—meaning, I suppose, the transfers—"the appointment for the next day would have to go off. He said: 'I shall be quite satisfied if it is Wells' signature.'" The interview of the 31st is more important. It took place at the office of a gentleman who was Cavanagh's French counsel, and he read over the deed of arrangement which he had drawn up in the interval. Here the certified transfers were produced, and George Whitechurch looked at them. There is a dispute about what he said and what Smith said. Whitechurch and Smith contradict each other undoubtedly. Of the two I am disposed to think that Whitechurch was probably more accurate in his recollection. I do not think the contradiction at all material, because it seems to me that the respondent's case fails, whether you take the account that Smith gives, or the finding of the jury, or the interpretation which the Court of Appeal placed upon that finding. Smith says: "Mr. Whitechurch looked at the transfers and said, 'Yes, these transfers are in order. The secretary, I see, has certified them. Mr. Cavanagh will sign this, send them back to London, and fresh certificates will then be signed and sent to Mr. Cavanagh.' . . . I said, 'Mr. Whitechurch, if there is any doubt about it let this appointment go off, and we will have these certificates attached.'" That is Smith's statement. The jury found that George Whitechurch "allowed the plaintiff to think that it was all right in order to induce the plaintiff to withdraw 'the *opposition*.'" It is not very clear what the jury really meant. Smith, L.J., thinks that they meant to say that Whitechurch represented that "the certified transfers were as good as transfers *plus* certificates." Collins, L.J., held that "the jury meant that Whitechurch led Cavanagh to believe that nothing more was required by the company to entitle the plaintiff to receive a certificate giving him the right to be registered as the transferee of the shares." I must confess that I am utterly at a loss to see any ground upon which an estoppel can be raised against the company. To begin with, what authority had George Whitechurch to make any representation in regard to these certified transfers which could bind the company? He was no doubt the managing director. The commercial business of the company was intrusted to him. But nobody can suppose that this was commercial business. I put that aside. Then I have always understood that a representation to bind anybody as an estoppel must be a representation of an existing fact, or rather a representation as to some fact alleged to be in existence, and not to promises *de futuro*. What was it that Whitechurch represented as an existing fact? That Wells was the secretary of the company, and that the certification on the transfers was signed by him? Well, that was perfectly true. That Wells had actually received the necessary certificates? It is absurd to suppose that Whitechurch was asked to guarantee that. He had no reason to doubt Wells' honesty, and naturally took it for granted that Wells would not have given a receipt for that which he had not received. Smith, L.J., seems to think that the representation attributed to Whitechurch was a representation to the effect that the company or the board of directors would act on the certified transfer without requiring anything more. That seems to be the view of Collins, L.J., also. That is not a representation of an existing fact. If it is anything it is a promise *de futuro*, which cannot be an estoppel. The doctrine of estoppel by representation is a very old head of equity. It has been discussed not unfrequently in this House, notably in the case of *Jorden* v. *Money*, 5 H. L. Cas. 185, to which Lord Selborne was constantly in the habit of referring. It is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the case of *Carr* v. *London and North-Western Railway Co.* Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles. There are two points which seem to me to be material, and I think that the learned judges in the Court of Appeal have overlooked them. In the first place, it is obvious that the purpose of the interview which Cavanagh and Smith had with George Whitechurch was to find out whether he was satisfied in the then position of affairs to acquiesce in the proposed arrangement and to sign the proposed deed in testimony of that acquiescence. That was all that Whitechurch had to do with the matter. As Mr. Smith told Mr. Whitechurch, in a letter dated the 30th of June, only a month after this interview, it was not for him or his board, so far as creditors were concerned, to be informed of dealings and transactions taking place between shareholders in his company and their creditors. That is a pertinent remark if not a self-evident proposition, and there is a touch of humour about it, coming as it does from a man who now declares that in this very matter with which at the time he thought Whitechurch had no concern, he really and truly took Whitechurch into his confidence, and really and truly relied on his advice and assurances. In the next place, it is, in my opinion, most important to bear in mind that Cavanagh and his solicitor must be taken to have been cognizant of the articles of association of George Whitechurch (Limited), which deal with the transfer of shares in

that company. Cavanagh was, or had been, a shareholder in the company, and Smith only a few days before had asked for a print of the articles which Raymond had promised him, and I presume that he obtained it. But whether Cavanagh and Smith were in fact acquainted with the regulations of the company or not, they must be taken to have had notice of them. "Every joint stock company," said Lord Hatherley in this House in *Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869, 24 W. R. Dig. 10, "has its memorandum and articles of association . . . open to all who are minded to have any dealings whatsoever with the company, and those who do deal with them must be affected with notice of all that is contained in those two documents." To my mind it is absurd to suppose that Smith, a solicitor carrying on business in the City of London, a trained lawyer, as Smith, L.J., describes him, could have imagined that one director could set at nought the articles of his company and bind his company by estoppel or otherwise to act in contravention of its regulations. And I have some difficulty in believing that any man of business, whether a trained lawyer or not, could imagine that any board of directors would alter the register of their shareholders on the faith of a certified transfer without the production and cancellation of the old certificate. As regards the other points which have been discussed, I do not propose to add anything beyond saying that even if there were an estoppel, the respondent, in my opinion, would have some difficulty in proving damage. For the reasons I have given, I think that the appeal must be allowed, and the action dismissed with costs both here and below.

Lord JAMES OF HEREFORD.—I have entertained considerable doubt as to the judgment that should be given in this case, but after consideration I have come to the conclusion that the action cannot be maintained, and that therefore the appeal should be allowed. As it appears to me that Lord Macnaghten has very correctly and fully stated the facts of the case in his judgment, I do not repeat them. The action is based upon two alleged grounds of estoppel. As to one I have no doubt. It may be accepted that on the 30th and 31st of May, 1889, interviews took place in Paris between Mr. Cavanagh, his solicitor Mr. Smith, Mr. Maugham, and Mr. G. Whitechurch, the managing director of the defendant company. During these interviews Mr. Whitechurch was told by Cavanagh or Smith that certified transfers of certain shares proposed to be transferred to Cavanagh were in the hands of Mr. Maugham, who thought that they were in order. On hearing this Mr. Whitechurch observed that if the signature of the secretary was genuine they would be in order. It should be observed that no inquiry by Mr. Whitechurch appears to have been made in the interests or on behalf of Cavanagh. The discussion related to the question whether Mr. Whitechurch would require the original certificates to be produced—and it was rather in respect of his own interests that Mr. Whitechurch made the remark which is relied upon as an estoppel. I think that in fact there was no representation of a non-existent fact, at most only an opinion was expressed, and certainly there was no intention to deceive the plaintiff or to cause him to rely upon a supposed state of facts which did not exist. I also think that Mr. Whitechurch, when taking part in this conversation, was not acting as the agent of the company, so as to render it liable for misstatements of fact by him. It is true that he was managing director of the company and had very extensive powers conferred upon him as such by the articles of association, but these powers refer to the carrying on of the commercial business of the company and would not cover such a transaction as the transfer of shares. Under this head of the case I think that no estoppel is established. But the second alleged estoppel presents a question more difficult of solution than the one above dealt with. On the 29th of May, 1899, Wells, as secretary of the defendant company, gave two "certifications" of transfer—one "Coupon for £1,100 preference shares in the company's office. George Whitechurch (Limited). Richard G. Wells, Secretary." The second certification was in the same form and dealt with 9,250 ordinary shares. Both "certifications" were indorsed on transfers executed by Raymond. "Coupon" is identical in its meaning in the above documents with "certificate." At the time that Wells wrote such certifications he knew that they were false statements. Raymond possessed no such shares and no certificates had been lodged in the office of the company. Wells was acting fraudulently in collusion with Raymond and in no way for the benefit of the company. In determining the liability of the company it is necessary to determine the extent of Wells' agency. He was secretary of the company, and as such it would be his duty to give "certifications" of certificates of shares being deposited in his hands. So far he would be acting within his agency, but if he acknowledges the receipt of certificates which never were in his hands, he is doing that which his principals never intended or authorized him to do, and an act which is, I think, outside and beyond his agency either express or implied. I quite feel the force of the argument that the public who act upon these certifications have to deal with an agent appointed by a company to transact its business, and, within his duty to give certifications. It is said, how can persons receiving the certifications test the honesty of the agent or the truth of his statements? I do not think that they can, and it is a risk that must be run, for the apparently truthful statements may be false. But on the other hand, can it be reasonable that an agent who is empowered to acknowledge the receipt of certain documents is to bind his principal by fraudulently and criminally giving acknowledgments of documents never in his hands? There is on the one hand a risk cast on the members of the public who rely upon the honesty of the agents; but how far greater would be the risk of the principal if he were to be liable for the frauds of the agent which might be effected to an unlimited extent, ruinous to the principal. It appears to me to be impossible to hold the company bound by the act of Wells, without over-ruling the judgment in the case of *Grant* v. *Norway*. In that case the master of a vessel had authority from the shipowner to give bills of lading for goods received on board. The master fraudulently gave bills of lading for goods not received by him. It was held, and the judgment has since been acted on and approved of in your lordship's House, that the master, not having acted within his agency, the shipowner was not liable on the fictitious bills of lading. By this decision a great risk is thrown upon indorsees of bills of lading who may find their securities valueless through the fraud of the masters of vessels, and this inconvenience was pressed in the argument of the case but without avail, and apparently the commercial world has not found such inconvenience to be so great as was suggested in argument. I have only to add that the judgment now given must not be supposed to extend to certificates made evidence of title by the Act of 1862, which are passed under the seal of the company. I am of opinion that the appeal must prevail, and that the judgment of the courts below should be reversed with costs.

Lord ROBERTSON (read by Lord Davey).—The case of the respondent is one of estoppel, and it is an essential element in such cases (as is clearly expressed in the case of *Carr* v. *London and North-Western Railway Co.*) that the person to whom the representation was made has suffered loss by acting upon it; or, to put it in another way, has altered his position to his detriment by acting on the representation. In my opinion the respondent has completely failed in this essential matter. This is not, be it observed, merely a question of damages; there is no estoppel, unless the apellants now averring the truth about the shares in question would—to use the words of James, L.J., in *Ex parte Adamson*, 26 W. R. 890, 8 Ch. D. 807—"work some wrong" to the respondent. Now this question is on the facts by no means a complicated one, although it occurs in a very complicated case; and indeed its very simplicity seems to have led to its receiving less attention than its controversial importance demands. The respondent's case, put shortly, is that because the appellants told him that he was getting a good transfer, therefore he gave up the *opposition* and the *saisie*. His case is not, and could not possibly be, that because the appellants called the transfer good, whereas it was bad, therefore he lost the shares said to be transferred. The respondent lost the shares not because of anything the appellants said about them, but because his transferor had them not to transfer. What the respondent has to make out is that by dealing as he did with the *opposition* and the *saisie* he suffered prejudice. Now whether he did so or not depends on what good the *opposition* and the *saisie* were doing to him, which he lost by the way in which he was induced to deal with them. In the courts below, although the point was raised sharply before Bigham, J., it has got the go-by; as the case stands, there is, in my opinion, no evidence of prejudice; and on the contrary it is perfectly plain that the cessation of the Innox business was all that the *opposition* and the *saisie* were adapted to procure, and that this would have done the respondent harm and no good. Your lordships doubtless remember (and it is important to do so) that the *opposition* prevented those debtors of Innox who received notice from paying to them, while the *saisie* prevented Innox from disposing of the goods in their hands, an officer being put in possession. But by these precautions no preference was obtained over other creditors; and this is a very material point in the case. Now, when the shares were supposed to have been transferred, what was done was that the opposition was withdrawn *simpliciter*, but the *saisie* was only partially withdrawn, so as to allow the dealing by the appellants with such goods as the respondent sanctioned; and the man in possession remained there to enforce the *saisie* in other respects. The practical result was that, with his grip maintained on the operations of Innox, the respondent allowed them to trade to such an extent as he deemed fit. This being the simple state of the facts, it is not surprising that no one has sworn or said that the respondent by relaxing the *saisie* and giving up the *opposition* lost money which he would have got if he had retained them. This matter was so dealt with at the trial that Bigham, J., does not distinguish between the *saisie* and the *opposition*, or in any way estimate the utility of either or both to the respondent Yet this was the essence of the respondent's claim. As things stand, I think it has been proved that no loss was caused to the respondent by acting as he did, and that no wrong is now wrought him by the appellants averring the truth as to the shares. On this ground I am in favour of allowing the appeal, and as in this view the plaintiff's case has really no merits, I am indisposed to enter on the other questions which have been argued. As to these, I may say in a word that the case of representation by Whitechurch seems to me to entirely break down, but that as regards the representation by the secretary, I have grave doubts. It seems to me extremely doubtful whether *Grant* v. *Norway* can be held or has ever been held to represent the general law, or to do more than determine the law about shipmasters and bills of lading; and whether, assuming it to have the wider bearing, it is reconcilable with the doctrine of Lord Selborne in *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317. I find it extremely difficult on principle to hold that the scope of an agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it, when the question of liability to be decided is whether a loss is to be borne by the principal who placed him there, or by an innocent third party who had no voice in selecting him.

Lord BRAMPTON.—[After going through the facts as set out above, his lordship continued as follows:] I take it to be common knowledge of all intelligent men of business that there is a wide and well-recognized difference between a certificate of shares under the seal of the company, which by section 31 of the Companies Act, 1862, is made *primâ facie* evidence of the title of the person named in it to the shares therein specified (see *In re Bahia and San Francisco Railway Co.*, 16 W. R. 862, L. R. 3 Q. B. 584), and a transfer certification such as that which appears on the margin of the transfers in question; the latter is not recognized at all by the Companies Acts, nor is it even mentioned in the articles of association, and it is useless as evidence of the title of the transferor to the shares which he proposes to transfer. It is in fact merely a voucher under the hand of the secretary, in the name of the company, that certificates, or other documents, showing in his judgment a *primâ facie* title in the transferor to such shares, have been lodged in the office of the company; the object being to enable the transferor to give to the transferee a reasonable assurance that he has, or will have, the power to make a good title to the shares when the necessity for doing so arises. This necessity always arises when the company is called upon to register a transfer. When such a certification bears the genuine signature of the secretary it is commonly said to be "all right" or "in order," and the making of the contract for transfer proceeds, but always subject to this, that before the title of the transferee can be completed by placing his name as owner on the register, it is essential that the certificate of the transferor's ownership of the shares to be transferred shall be left at the office of the company with the transfer in order that it may be cancelled so far as relates to the transferred shares, and the register corrected by substituting the name of the transferee for that of the transferor; for until this is done the transferor is to be deemed to remain the holder of the shares. The case of *Bishop* v. *Balkis Consolidated Co.*, 39 W. R. 99, 25 Q. B. D. 512, if rightly decided, as I am satisfied it was, seems to me to dispose of this part of this part of the case, and to establish beyond all question that a transfer certification amounts to no warranty or representation of title. Of course every purchaser of shares is entitled, by himself, or his solicitor, before the final completion of his bargain to investigate, if he desires to do so, the title of his transferor, and he is entitled to search for himself the register of shareholders to see the share

certificates or other documents relied on, and to peruse the articles of association of the company, just as a purchaser of real property may require the vendor to certify his abstract of title; and if he omits to take any of the means at his command to satisfy himself of his transferor's title, he cannot reasonably complain that the company require proof of it before they alter their register or issue him new certificates. Were they not to do so, most serious frauds would be comparatively easy to commit. An inspection of the register of shares in this case or a request to see the coupon mentioned in the certification would have at once disclosed the fact that Raymond had no shares such as those specified to transfer. In the present case the appellant company dispute their liability so far as it is based upon Wells' conduct upon several grounds: (1) Upon the ground that the certifications were not made by him in the ordinary course of his duty to the company. (2) That he signed the certifications fraudulently and contrary to his duty. (3) Because even if it was so made as to constitute it the certificate of the company, it does not amount to such a representation as alleged in the claim. (4) That if it amounts to such a representation it is *ultra vires*. (5) That it is not a representation made to Cavanagh or his solicitor, nor with any intention to induce them to act in a particular way, but was simply made for Raymond to use as he pleased without knowledge of or inquiry as to the purposes for which he intended to use it. I entirely agree in the views expressed by Lord Macnaghten as to the limited authority of such a secretary as Wells. I do not intend to say that it was no part of the duty of Wells, on occasions when a certificated transfer was required for shares in the appellant company, to exercise an honest discretion to grant it, and to certify to the truth, as he knew or believed it to be, and if in framing such a certificate he by mere negligence made an erroneous statement causing injury to the person to whom it was handed that he might act upon the faith of it, I do not say that an action might not be sustained against the company, his employers, to recover such damages as might be occasioned by such negligence. But the charge made against Wells was in no sense one of negligence, but one of deliberate fraud, utterly unconnected with the course of his duty as secretary. He simply lent himself to Raymond, in whose service he still was as clerk, and became a mere tool in his hands. Raymond in arranging with Cavanagh to give him 10,350 shares, "to be represented by certificated transfers," knew that he did not possess one single share of those he intended to include in his transfer, and that he could only even colourably fulfil his agreement and get rid of the *opposition* by handing false transfer certificates to Cavanagh. These he could only obtain by the assistance of Wells, who made them, knowing that he was uttering deliberate falsehood, without even a semblance of excuse. Having done so, he allowed Raymond to take them away, not knowing or even inquiring for what purpose they were to be used. This jury, rightly as I think, found Wells' action to be fraudulent, but they found also that it was committed for the benefit of the company as well as for Raymond. How they could have arrived at such a conclusion passes my understanding; there was not, in my opinion, a scintilla of evidence to support it. They also found that it was in the ordinary course of Wells' business as secretary to give certificates of this character. That may have been so on occasions when he honestly believed the facts certified to be true, and when he was dealing with persons in the ordinary course of a business transaction; but this was no business transaction at all, nor was it intended to be; Wells was not even colourably discharging a duty. The facts which I have stated stamp both Wells and Raymond as having been a pair of fraudulent knaves, acting without authority and in disregard of duty. In my opinion the appellant company is not responsible for that fraud, and to argue that such certificates so prepared should operate to create estoppels against the company, preventing it from asserting and proving the truth, requires some courage. I am content to adopt in its integrity the judgment of Willes, J., in *Barwick* v. *English Joint Stock Banking Co.*, 15 W. R. 877, L. R. 2 Ex. 259, defining the liability of a master for the wrongful acts of his servant: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit, because although the master has not authorized the particular act, he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." This is very forcibly illustrated by *Limpus* v. *London General Omnibus Co.*, 11 W. R. 149, 1 H. & C. 526, where the driver was actually doing the work he was employed to do, but was doing it in a wrongful manner. The Court of Appeal in *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714, defines, I think accurately, when a master may repudiate the wrongful act of a servant fraudulently committed. Bowen, L.J., commences his considered judgment by saying that "except in the overruled case of *Swift* v. *Winterbotham*, 21 W. R. 562, L. R. 8 Q. B. 244, he is aware of no precedent for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed not for the general or special benefit of the principal, but for the servant's own private ends." I think for the reasons and upon the authorities I have cited, that if this case rested solely upon the transfer certificate, signed in the name of the company by Wells, the misconduct which I have discussed would afford the company a complete answer to the action so far as it is based on his actions.

But I have yet to deal with other matters beyond those arising out of Wells' misconduct. I think it will be convenient now to call your lordships' attention to the specific claim made against the appellant company as it is set forth in paragraph 6 of the "points of claim," to which I think the respondent should be strictly confined. This claim is thus stated:

"In consequence of the $\frac{\text{representations}}{\text{wilful misrepresentations}}$ of the defendant company to the plaintiff that the said Anthony Raymond was the registered holder of and entitled to transfer the shares in the defendant company specified in the writ, the plaintiff accepted from the said Anthony Raymond transfers, certificated by the company, of the said shares to himself . . . as security for the same debt and withdrew the *opposition*." I will assume for the moment that Wells was guilty of no such misconduct as is alleged against him, and even that he intended to act for the benefit of the company. This directly raises the question: What is the true construction of the language of the transfer certificate? for Wells said nothing and did nothing except issue it, and unless that amounted to such a representation as is relied on by the pleadings the whole case fails. As to this, it seems to me that it is only necessary to refer back to what I have already said as to the meaning and object of such certifications. If I am correct in what I then said, it follows that the certification did not amount to a positive representation or assertion of title in Raymond. Nothing short of that

would suffice to support the estoppel claimed. I think, therefore, that upon this ground also the appellant company is entitled to the judgment of this House. The third ground of defence is that even if, contrary to the view which I have taken, the certification could be held to amount to such a representation, it was made *ultra vires*; for neither Whitechurch, the manager, nor Wells, the secretary, had even a semblance of authority to issue a document of title equivalent to a share certificate. A certificate of shares is by the 31st section of the Companies Act, 1862, made *primâ facie* evidence of the title of the person named to such shares as are comprised within it, but such a certificate can only be made under the seal of the company, and the seal can only be affixed by order of a resolution of the board, and in the presence of a director and of the secretary, who are both to sign the instrument to which the seal is so affixed in their presence. It is impossible to suppose that a managing director or a secretary could by his own signature and the use, by means of a rubber stamp, of the company's name, dispense with the order of the board and the seal, and the requisite attestations, and create an instrument which practically should have the same effect, and should estop the company from disproving a title which did not exist, and they had no authority to create, by giving a new interpretation to the language of an instrument different from that which it had already acquired amongst men of business accustomed to deal with instruments of that class. Nor can it be that any secretary has power to give, or a manager to sanction, a certificate which could have the effect of abrogating the article of association requiring the transfer, accompanied by the certificates of shares to be transferred, to be left at the offices of the company. I may here observe that the great power given to the managing director is conferred only in relation to the commercial business of the company, and I am at a loss to see how the sale and purchase or the transfer and acceptance of shares can be treated as any part of the commercial business of a company established for carrying on the business of leather merchants.

I will now deal with that which Mr. Whitechurch did and said, touching the questions at issue. The sole object of the interviews between Cavanagh and his solicitor Smith and G. Whitechurch of the 30th and 31st of May was to procure his signature as managing director of his company to the few words of acquiescence in the agreement, so far as it affected his company. This acquiescence he was willing to give, if satisfied that the arrangement made was *bonâ fide* and the proceeding was in due order; but the company was under no obligation, and he might have refused to acquiesce if he had thought fit without assigning any reason at all. At the first of these interviews the certified transfers, being in Mr. Maugham's possession, were not shown to him, but he was told by Cavanagh or Smith that Maugham had two certified transfers of the shares proposed to be handed to Cavanagh, and had expressed an opinion that they were in order. On this Mr. Whitechurch, having no reason to suspect that anything was wrong, with perfect truth and honesty made the remark that they would be "in order" if he were satisfied that the signatures to them were the genuine signatures of the secretary. This seems to have been the opinion of Mr. Smith himself. The special question put to Mr. Whitechurch by Mr. Smith was whether he required the original certificates to be annexed, and this inquiry was accompanied by what appears to me to be a threat that if he required more the appointment for the next day would have to go off, obviously for the purpose of putting pressure upon him, by intimating that the responsibility of any postponement would rest upon him. There is no semblance of inquiry by Cavanagh or Smith of Mr. G. Whitechurch whether Cavanagh might safely or with prudence accept the transfers. Indeed Cavanagh had in fact got in such certified transfers all that he had bargained for in the agreement. The reply of Mr. G. Whitechurch before he had seen the documents, that he should be quite satisfied if the signature to the certification was Wells' signature, cannot fairly be construed to convey any more than this: that he would not, if satisfied on that point, be an obstacle to the completion on the following day as appointed. The same observations apply to his conduct and words on that day when he, having seen the certificates, and recognized the signature of Wells, expressed himself satisfied, and signed the acquiescence. His expression of satisfaction that the *opposition* was about to be removed, knowing how much it was desired, and how vitally important it was to the Innox Co. and Raymond, was a very natural one. Believing, as he undoubtedly did, that it was in order, and having no reason to suspect a fraud, his conduct and language were just what one would have expected from him. If, on the other hand, at that time Mr. Smith intended his question to convey, what it certainly did not express —namely, a doubt whether the certified transfers were in that case of equal value with certificates of shares—I can only say I marvel that he should have felt justified in inviting Mr. G. Whitechurch to express an opinion without telling him that Raymond had so recently as the afternoon of the 29th of May promised to give him the certificates of the 10,350 shares, that he might have them ready to produce at the meeting to execute the agreement, and that he had broken his promise and had neither handed over nor sent a certificate for a single share, knowing, as he admitted he did, the wide difference between share certificates and transfer certifications. If this had been told to Mr. G. Whitechurch he would have had good reason to suspect that something was wrong, and would no doubt have suggested further inquiry. But believing all to be right and in order he had no reason for interfering. The finding of the jury that Whitechurch allowed Cavanagh to think it was all right in order to induce him to withdraw the *opposition* was wholly unwarranted by the evidence if it meant more than that he did not interfere to prevent him from acting, as he was advised by his solicitor, because he saw no reason to do so. I do not find in all this evidence anything to support the claim to the estoppel contended for; far from it. To support an estoppel the evidence ought to be clear and unambiguous, as was stated by Lindley, L.J., in *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82, in which many previous cases on the subject were carefully reviewed. Bowen, L.J., said that "the language upon which an estoppel is founded must be precise and unambiguous." That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed; and in deciding the case before him against the then plaintiff, he said: "I think his (the defendant's) language would be reasonably understood as conveying an intimation of the state of his belief, without an assertion that the fact was so apart from the limitation of his own knowledge." To the same effect was the judgment of Kay, L.J. To this I would add that, in my judgment, no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something

which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel. Mr. Whitechurch had no reason to doubt, and therefore believed, the certificates to be genuine and true when he recognized Wells' signature. Beyond that he knew nothing, and suspected nothing. When, therefore, he said that they were in order or appeared in order, he ought not to be considered as pledging himself to anything beyond this: that according to ordinary usage and practice the certificate was in due form and order, and that he was satisfied and content to acquiesce as he did. In my opinion, it is clear that the failure of Raymond to produce or hand the certificates to Smith ought to have been quite sufficient to put that astute solicitor on his guard, and had he used the most ordinary precaution, either by searching the register or demanding an inspection of the coupon, or insisted upon Raymond showing him the certificates, the fraud must have been instantly discovered. I think this appeal ought to be allowed, and that the judgments of the Court of Appeal and Bigham, J., should be reversed, and judgment entered for the appellant with costs.

Order appealed from reversed. Respondent to pay to the appellants the costs both here and below.

Solicitors for the appellants, *S. M. & J. B. Benson.*

Solicitors for the respondent, *C. J. Smith & Hudson.*

Court of Appeal.

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Jan. 13.

DUNLOP PNEUMATIC TYRE CO. (LIMITED) *v.* ACTIEN GESELLSCHAFT FÜR MOTOR UND MOTOR FAHRZEUGBAU, VORM. CUDELL & CO. (*a.*)

Practice—Writ—Service—Foreign corporation carrying on business within the jurisdiction—Stand at an exhibition—"Head officer"—Ord. 9, r. 8.

A foreign corporation, who were manufacturers of motor-cars, rented for their exclusive use a stand at an exhibition in England for nine days for the purpose of exhibiting their goods, and sent over a person in their employment as their representative to look after the exhibits and to take orders for their goods.

Held, that the foreign corporation carried on business at the stand at the exhibition so as to be resident within the jurisdiction, and they could be sued in this country and the writ could be served on their head officer here.

Appeal by the defendants from the refusal of Channell, J., at chambers to set aside the writ of summons and the service thereof.

The defendants, who were manufacturers of motor-cars, were a foreign corporation registered under German law and carrying on business in Germany.

In November, 1901, they rented for their exclusive use a stand at the Crystal Palace during the National Cycle Show, which lasted nine days, where they exhibited, among other things, specimens of their motor-cars. The defendants' name was on the stand, and they sent over a Mr. Struck, who was in their employment, to be their representative at the stand, whose business it was to look after the exhibits and to take orders for and push the sale of the defendants' manufactures.

The plaintiffs alleged that the tyres which were on the wheels of one of the motor-cars were an infringement of their patent, and they issued a writ claiming an injunction, and served it on Struck at the stand at the Crystal Palace.

The defendants entered a conditional appearance, and applied to set aside the writ of summons and the service thereof on the ground that the defendants were a foreign corporation resident out of the jurisdiction.

Channell, J., refused the application, holding that the defendants were at the time of the issue of the writ and of the service carrying on business in this country.

The defendants appealed.

Danckwerts, K.C., and *R. B. D. Acland*, for the defendants.—The defendants are a foreign corporation and were not at the time of the service of the writ carrying on business in England so as to be resident here. A foreign corporation is not intended *primâ facie* be sued here. *Newby* v. *Von Oppen*, 20 W. R. 383, L. R. 7 Q. B. 293, was the first decision allowing such a corporation to be sued here. There the defendants had a place of business in England. Residence in this country is the test of the liability of a foreign corporation to be sued: *Haggin* v. *Comptoir d'Escompte de Paris*, 37 W. R. 703, 23 Q. B. D. 519; *Badcock* v. *Cumberland Gap Park Co*, 41 W. R. 204, [1893] 1 Ch. 362; *La Bourgogne*, [1899] P. 1, [1899] A. C. 431. The foreign corporation must have something in the nature of a domicil or something approaching a permanent home here. There must be an intention to permanently carry on business here. The mere taking of a stand at an exhibition for a few days is not sufficient. Further, part of their business was that of manufacturing motor-cars, and this was carried on entirely abroad. The mere fact that they took orders in England for their motor-cars at a stand which they only rented for nine days was not sufficient to make them resident here. The writ and service ought therefore to be set aside.

R. M. Bray, K.C., and *A. J. Walter*, for the plaintiffs, were not called upon.

COLLINS, M.R.—In my opinion this appeal should be dismissed. The defendants, who are a foreign corporation, hired certain premises at the Crystal Palace for the purpose of exhibiting their wares at a cycle show. The defendants are vendors of motor-cars, and they exhibited at the show a motor-car supplied with tyres which the plaintiffs alleged were an infringement of their patent. The plaintiffs accordingly issued a writ against the defendants for infringement of patent, and the question we have to determine is whether the defendants are amenable to the jurisdiction of the courts of this country. If the defendants are amenable to the courts here, in my opinion Struck was the proper person to serve under ord. 9, r. 8. He was sent over to this country by the defendants to do everything which they could have done with regard to the exhibition and sale of their goods. They hired a stand for the purpose of exhibiting their goods, and they employed Struck to conduct their business there, by taking orders for their goods and doing his best to push the sales. He was the "head officer" of the corporation here within the meaning of ord. 9, r. 8.

The important question is whether this foreign corporation can be served as resident in this country. There is no question about serving a foreign corporation residing out of the jurisdiction. The claim to serve the defendants is based upon the ground that at the time of service they were resident within the jurisdiction. If they were resident here they were in the same

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

position as an English corporation. It has been held over and over again that the real test in these cases is whether the defendants are carrying on their business here at some defined place. If that is so, then they are resident here. If a trading corporation carry on their business by an agent at a particular place in England, they reside here. The difficulty in some of the cases arises through the employment by the foreign corporation of an agent to conduct their business here, the agent in addition carrying on an independent business of his own. No such difficulty arises here. The defendants did not employ an agent here who carried on an independent business of his own. If they had done so, that would have given rise to a difficult question of fact similar to that which arose in the case of *La Bourgogne*. In that case the French company employed to conduct their business in this country an agent who was carrying on here an independent business of his own. In the present case the defendants had themselves rented the premises at the Crystal Palace for their own exclusive use, and had sent over their own servant to conduct their business at those premises. The only real difficulty was occasioned by the fact that the premises were rented for a period of nine days only, and it was argued that time is essential to constitute residence. I agree that we cannot exclude the element of time. It is clear that if the defendants had expressly announced their intention of carrying on their business here for a period of nine days, and had done so, that would have amounted to a residence in this country. Nine days is a substantial period of time. Those nine days were chosen during an exhibition, the purpose of which was to bring together people interested in the articles exhibited with the view of their giving orders for goods and making purchases, and it might well be that as much business would be transacted in those nine days as in nine months under ordinary circumstances. Therefore I cannot say that nine days constituted so short a period as to negative residence in this country, the defendants having fulfilled all the other requisites of residence. It was suggested that one element to show that the defendants could not be said to carry on business so as to reside in this country, was that they did not carry on all the branches of their business here. The defendants were said to be manufacturers of motor-cars. Assuming that to be so, they gave facilities for the sale of their motor-cars at their stand at the Crystal Palace, and orders were accepted here. They did everything here in the way of selling their goods which they could have done abroad. The mere fact that, in addition to being vendors, they were also manufacturers cannot alter the case. In my opinion the order of the learned judge was right.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *J. B. & F. Purchase.*

Solicitors for the defendants, *Cruesemann & Rouse.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Dec. 2, 3, 20.

HOME AND COLONIAL STORES (LIMITED) *v.* COLLS. (*a.*)

Easement—Light — Prescription — Extent of right — Light for ordinary purposes—Substantial interference —Substantial damage—Rule as to 45 degrees.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

If ancient lights are interfered with substantially and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief. "Substantial" does not indicate any particular percentage.

Without substantial interference there is no right of action, and in addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened. There is no standard or fixed amount of light to which alone a plaintiff is entitled.

There may be real damage to the owner or occupier of a building used for particular purposes or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes.

There is no rule of law that a man may always build up to an angle of 45 degrees.

This was an appeal from the decision of Joyce, J., of the 21st of December, 1900.

The plaintiffs were entitled for the residue of a term, having about seventeen years unexpired, to a considerable block of buildings situated on the east side of Paul-street, at the corner between that street and Worship-street, which runs westwards from Paul-street, so that the plaintiffs' building had a west front to Paul-street and a south front of about 150ft. in length to Worship-street. Worship-street is a tolerably broad thoroughfare, being 41ft. or thereabouts across.

Opposite a portion of the south front of the plaintiffs' premises in Worship-street was the site of some buildings recently removed, which was about 36ft. in width and numbered 44 in the street. The buildings which formerly stood on this site were 19ft. 6in. in height, and the defendant had entered into a building agreement to erect on this site a building which, if and when completed, would be 42ft. in height.

On the west of the defendant's premises and at the corner between the south side of Worship-street and the east side of Wilson-street there was a public-house 33ft. in height, and none of the buildings in Worship-street on the east of the defendant's premises exceeded that height.

His lordship thought it tolerably clear, and he found as a fact, that the defendant's building, if erected to the height of 42ft. as proposed, would not materially interfere with the access of light to any window on the first floor of the plaintiffs' premises, or with any light to which the plaintiffs were entitled in respect of their basement. The real and only question, in his lordship's opinion, was with respect to apprehended injury to the third and fourth floor windows—counting from Paul-street—on the ground floor of the plaintiffs' building. Those windows were of large size, but, although the top light was said to be the most valuable and important, the uppermost part of each of the windows was filled with coloured glass to a depth of 20in. from the top, and there were wire blinds fixed at the bottom of each window. The portion of the ground floor of the plaintiffs' building which was opposite the defendant's premises was used as an office. It consisted of a large room 11ft. 10in. high and of unusual depth, the back wall being upwards of 50ft from the Worship-street front, and it had no window nor source of natural light at the back. This room contained several desks used by about 90 clerks in the employment of the plaintiffs for the purpose of their business.

Joyce, J., held upon the evidence that the plaintiffs' premises would still, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business and that the action therefore failed. He also came to the conclusion, though after considerable

hesitation, that the decision of Wright, J., in *Warren* v. *Brown*, 49 W. R. 206, [1900] 2 Q. B. 722, if not reversed by the Court of Appeal, ought to govern the present case. The decision in *Warren* v. *Brown* has since been reversed as reported *ante*, p. 97.

Immediately after his lordship's judgment the plaintiffs gave notice of appeal, whereupon the defendant proceeded with the completion of his building.

Hughes, K.C., and *W. E. Vernon*, for the plaintiffs, relied on the judgment of the Court of Appeal in *Warren* v. *Brown*, *ante*, p. 97.

Bray, K.C., *O. Leigh Clare*, and *A. B. Nutter*, for the defendant, contended that the defendant's building caused no such substantial diminution of light to the plaintiffs' windows as entitled them to relief. They also relied on the 45 degrees rule as leaving sufficient light to the plaintiffs' premises, a rule which was found by architects and surveyors to be a good working rule.

Cur. adv. vult.

Dec. 20.—COZENS-HARDY, L.J., read the judgment of the court, which was as follows: This appeal raises a question as to the nature and amount of evidence required to entitle a plaintiff to relief by way of injunction for the protection of ancient lights. The action was tried by Joyce, J., in December, 1900. This is important because at that date it had been laid down by Wright, J., in *Warren* v. *Brown*, 49 W. R. 206, [1900] 2 Q. B. 722, that the owner or occupier of a house has no legal right of action so long as he has left to him as much light as is ordinarily required for habitation or business, even though he has been deprived of a substantial amount of light and has thereby suffered substantial damage. This view of the law was accepted by defendant's counsel in the cross-examination of the plaintiffs' witnesses and in the examination of the defendant's witnesses, and, as we read the judgment, was adopted by Joyce, J. The decision of Wright, J., has recently been reversed by this court, and the true rule of law with reference to the interference with ancient lights has been authoritatively laid down thus: "If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." In this sentence "substantial" does not indicate any particular percentage. In *Back* v. *Stacey*, 2 C. & P. 465, an issue was directed by the Lord Chancellor whether the ancient lights of the plaintiff in his dwelling-house had been illegally obstructed by the defendant's building. Evidence having been given that the quantity of light previously enjoyed had been diminished, it was contended that the plaintiff was entitled to a verdict; but Best, C.J., directed the jury, in language which has been often cited with approval, thus: "It was not sufficient to constitute an illegal obstruction that the plaintiff had, in fact, less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. And in *Parker* v. *Smith*, 5 C. & P. 438, Tindal, C.J., directed the jury as follows: "It is not every possible, every speculative exclusion of light which is the ground of an action, but that which the law recognizes is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business." Without substantial interference there is no right of action, and in addition, in order to obtain an injunction the plaintiff must establish substantial injury suffered or threatened. There is no standard or fixed amount of light to which alone a plaintiff is entitled. He must not be fanciful or fastidious. He must recognize the necessity of give and take in matters of this nature. But there may be real damage to the owner or occupier of a building used for particular purposes, or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes. The application of these principles is far more easy when the building which is complained of has been erected and damages only are claimed; but they have to be applied when the plaintiff comes for an injunction before the building has been erected. It is the duty of the court to arrive at the best conclusion it can upon the effect which the proposed building if erected would produce, and if the court is satisfied that in that event the plaintiff would have a good cause of action, the plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient light; or, in other words, to restrain the defendant from committing a wrongful act. The difficulty of applying the rule in a *quia timet* action may well induce the court to scan the plaintiff's evidence with severity, especially where an angle of 45 degrees is left. It is settled that there is no rule of law that a man may always build up to an angle of 45 degrees, but, in judging of the probable effect of a proposed building the court may not unreasonably regard the fact that an angle of 45 degrees will be left as *primâ facie* evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence. This seems to be the result of the authorities. It remains to apply these general principles to the present case. We propose to accept all the findings of fact by Joyce, J., where they are clear without demur, and only to refer to the evidence where there is no finding, or where, as it seems to us, there are inconsistent findings. The Lord Justice then proceeded to state the facts as found by Joyce, J., in his judgment, and, after reading the following passage from that judgment—"Various expert witnesses were examined, and as the result of their evidence I am of opinion that the proposed new building would not affect the selling or letting value of the plaintiffs' premises"—continued:] If that means that an ordinary purchaser or lessee would be content to get a building having the usual amount of light enjoyed by similar houses in this part of London we see no reason to doubt it; but it is not a relevant statement. The plaintiffs are neither vendors or lessees. They are occupiers; and their only desire is to use this room [the large room on the ground floor occupied by about ninety clerks] for the same purposes as heretofore and with the same advantages. And it seems to us impossible to hold that they will not suffer "real damage" if they have to consume and pay for more electric light than hitherto. Joyce, J., at the end of his judgment, refers to Wright, J.'s, decision in *Warren* v. *Brown*, and says: "After considerable hesitation I have come to the conclusion that this decision, if it remains unreversed by the Court of Appeal, ought to govern the present case; and I think, sitting as a judge of first instance, I must follow it. Assuming, therefore, that I am right in this, I am of opinion that the action fails and must be dismissed." As we read the judgment, it is a finding in favour of the plaintiffs that real damage would result, though

light enough would be left for ordinary purposes of occupancy as a place of business, and there is no finding that the interference is not substantial. Now there was, immediately opposite the windows in question, what I may call "a gap," in width 36ft. and in height 13ft. 6in. The direct light which passed through this gap penetrated to a considerable depth into the plaintiffs' room. The interference with this light is "substantial" within the meaning in which the word is used. There being some obscurity on this point, it seems right to examine the evidence. [His lordship then went through the evidence, and proceeded:] If we consider the judge's notes of the evidence, as we have done, the conclusion at which we have arrived from reading his judgment is confirmed. In our opinion, on the balance of evidence, substantial interference and "real damage" will result; and the proper judgment would have been to grant an injunction in the settled form known as the *Yates* v. *Jack* form. But immediately after the action was dismissed with costs the plaintiffs gave notice of their intention to appeal. Notwithstanding this, the defendant has proceeded with and completed the erection of his building. Under these circumstances there is only one course open to us. We must reverse Joyce, J.'s, judgment and give the plaintiffs the judgment to which, according to our view, they were entitled. And we must grant a mandatory injunction requiring the defendant to pull down anything erected in breach of the terms of our injunction. This point was really decided by the Court of Appeal in *Parker* v. *First Avenue Hotel Co.*, 32 W. R. 105, 24 Ch. D. 282. The defendant must pay the costs here and below.

VAUGHAN WILLIAMS, L.J.—The judgment which has just been read is the judgment of the court; but I wish to add, speaking for myself, that, so far as the rule of 45 degrees is concerned, I doubt very much whether that rule, as the law is now settled, can be regarded even as a rough measure of the right of the owner or occupier of ancient lights.

Appeal allowed.

Solicitors, *Slaughter & May; Hyde, Tandy, Mahon, & Sayer.*

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Dec. 20.

In re E. A. B. (*a*.)

Bankruptcy—Scheme of arrangement—Declaration of trust—Withdrawal of proofs—Debts provable—Conduct of debtor—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-section* 9.

"*Debts provable*" *under the Bankruptcy Act*, 1890, *s.* 3 (9), *means debts provable at the time when the scheme of arrangement comes before the court for approval, and not when the receiving order is made.*

Rash and hazardous speculation on the part of the debtor is not of itself necessarily a ground for refusing to sanction a scheme of arrangement.

Misconduct of a debtor does not make it against public policy to sanction a scheme unless the misconduct is of a gross character.

This was an appeal from the decision of Mr. Registrar Linklater, sanctioning a scheme of arrangement approved of by the creditors other than Mr. Seal.

(*a*.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

The scheme provided in effect for security being given for the payment of 7s. 6d. in the pound to the creditors not withdrawing or releasing their claims, and for the vesting of the debtor's estate (if any) in a trustee with a view to the payment (*inter alia*) of dividends in excess of 7s. 6d. in the pound, should the realization so permit.

The debtor's unsecured liabilities at the date of the receiving order, which was made on the 21st of May, 1901, were estimated by the official receiver at £69,967, and the assets, which consisted of the debtor's interest in certain concessions obtained from the Turkish Government, were estimated by the debtor to produce £27,500.

The trustee under the scheme was to be at liberty to join in a sale of these interests to a company in consideration of the allotment of shares, which shares he might transfer or cause to be allotted to the creditors in satisfaction of the unpaid balances of their claims. So far, however, as the official receiver could ascertain, the debtor had for valuable consideration parted with his interests in the concessions by two indentures dated respectively the 3rd of December, 1898, and the 10th of August, 1899.

Absolute and unconditional withdrawals under seal had been executed by the following creditors: Mr. Burdett-Coutts, £42,662; Mr. W. F. D. Smith and another, £5,900; the executors of C. H. Wainwright and another, £1,722; and the executors of T. Fielden (deceased), £2,783; making in all £53,068.

Sums of £5,000 and £1,800 had been deposited to secure the payment of 7s. 6d. in the pound to the creditors not withdrawing or releasing their claims, and these sums were reported to be sufficient for the purpose.

With regard to the releases of £2,783 and £1,722 mentioned above, it appeared that the debtor's brother had executed a declaration of trust under which the creditors having those claims might derive some pecuniary benefit from him.

Mr. Seal appealed from the registrar's decision on the grounds that the scheme was not reasonable and not calculated to benefit the general body of creditors within the Bankruptcy Act, 1890, s. 3 (9), that it did not provide for payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtor's estate, that the conduct of the debtor was not such as to justify the exercise of the registrar's discretion in his favour, he having got into difficulties through embarking on rash and hazardous speculations, and that the withdrawals of debts had been obtained by alleged secret promises of the debtor to pay the withdrawing creditors, or some of them, sums in excess of the composition payable to each creditor under the scheme.

Macaskie, K.C., and *Thorn Drury*, for the appellant.

Reed, K.C., and *Muir Mackenzie*, for the debtor.

G. F. Hart, for creditors opposing the appeal.

Sir E. Carson, S.G., and *Sutton*, for the official receiver.

VAUGHAN WILLIAMS, L.J., said: In this case the scheme was submitted to the creditors and the creditors approved of it. It then came before Mr. Registrar Linklater and he has approved of it. A good many points have been mentioned by Mr. Macaskie, but there were really only two which on the facts of this case require to be dealt with at all. The first, and indeed, to my mind, the only serious point which has been suggested in this case is that this scheme ought not to be approved because of the declaration of trust which was given to the two

creditors who withdrew their proofs—that is, released their debts. It is said that in effect to give this declaration of trust to these two creditors who were withdrawing their proofs was to place them in a better position than the other creditors because they suggested that really the realizable value of these two declarations of trust would have given in each case the creditor something more than 7s. 6d. in the £. It is said that for that reason we ought not to allow this scheme to be sanctioned. I will at once say that if upon the evidence one had to come to the conclusion that the debtor for the purpose of getting this scheme approved had in secret offered two creditors in consideration of their withdrawing their proofs better terms than were being submitted to the creditors, or terms which might be better than those which were submitted to the creditors, I should say that if those creditors accepted those terms and withdrew their proofs that was a very good reason indeed for refusing to sanction this scheme. But on the facts I am not satisfied that that is so at all. It is quite true, and one ought to mention it, that as soon as those creditors knew that exception was taken to what had been done, they gave up the benefit of the declaration of trust. I do not think that that would get rid of the objection based on this transaction if it once was an objectionable transaction and one which the debtor ought not to have entered into. But really in my judgment the point where this objection fails in this, that it would not be a good reason for refusing to sanction the scheme if that which was done in respect of these two creditors was in no sense a bargain made by the debtor. When I speak of a "bargain" I do not mean only a bargain which in form is a bargain with the debtor. If in substance an arrangement was made with the creditor with the knowledge and on behalf of the debtor, whereby a creditor or creditors were to get advantages over the other creditors, I should say that would be quite a sufficient reason for not sanctioning the scheme. But in this case I am not satisfied that this arrangement which was made through the debtor's brother was one which he had knowledge of at all. There was no question asked about it at the time when the application was made for the approval of this scheme and when the sanction was given. But the point having been raised, the public examination which had been closed was reopened for the very purpose of dealing with it. The matter does not seem to have been even then very fully gone into, but it was dealt with. The debtor was asked the question: "Had you been any party to the promise being given to them?" that is, to these two creditors, and the answer was: "No, I had nothing to do with it." The learned registrar, who saw the debtor, and had, no doubt, in the course of this matter opportunities of judging what his conduct and demeanour was, came to the conclusion that he might in this matter rely upon the evidence and statement made by the debtor, and under those circumstances it seems to me we ought not to review the decision of the learned registrar. That disposes of the really principal point and the only serious point to my mind in the matter. But another point was made under section 3 of the Bankruptcy Act, 1890. That section provides that "if any facts are proved on proof of which the court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate." Now, the facts in this case, making the earlier part of sub-section 9 apply—that is, such facts as are mentioned there which would require the application for a discharge to be dealt with as there mentioned, exist. Then we come to the latter part of the section: "Unless it provides reasonable security for the payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate." Now, on the official receiver's report, if you exclude these released debts, as they have been called, there is ample security for the payment of seven and sixpence in the pound. But it is said that we ought to read those words as meaning, not the liabilities and debts which are now provable, but to those which were provable at the moment of making the receiving order. I do not think so. I think that would be to put a very unnatural meaning on those words. I cannot leave out of consideration what the security is to be for. It is for the payment of this amount on all the unsecured debts provable against the debtor's estate. Nothing is payable in respect of those debts at all. They have been released and have gone, and I think it would be a very unnatural construction of the latter part of the section to say that it applies to any debts whatever except those which still continue provable at the moment when the scheme comes up for the sanction of the court. I only wish to deal with one other matter which is much more general. It was said by Mr. Macaskie that in this case we ought to refuse to sanction the scheme because of the debtor's conduct. I am far from saying that a debtor may not have been guilty of such misconduct, misconduct, it may be, leading to his failure and to the receiving order being made against him, and that it would be contrary to public policy to allow a scheme to be sanctioned even though particular creditors of the debtor guilty of the misconduct might be willing to do so. One does not wish to give unnecessary pain, but there have been cases in the past, cases of gross misconduct of that sort, but in my judgment no misconduct comes within the rule that I have been speaking of—that is, misconduct which would make it against public policy to sanction the scheme unless the misconduct is of a gross character. Now, what is the misconduct which is suggested here. In substance it is only that the debtor has been guilty of rash and hazardous speculations leading to his insolvency, but to say that that is a ground upon which the court should refuse to allow the scheme to be sanctioned would in effect be to say that in cases where that is reported by the official receiver there can be no scheme. That cannot be so, for the very terms of the sub-section show that in cases where the facts are such that the discharge might be suspended or refused, one of those cases being the report of the official receiver that the insolvency was brought about by rash and hazardous speculations, then the scheme is not to pass unless the condition is present that 7s. 6d. in the pound shall be secured on all the provable unsecured debts, but it does not say that there is to be no scheme sanctioned at all. To my mind though there might be a case where the rash and hazardous speculations were so continued or of such a character as to make it against public policy that a man who might be described as a confirmed gambler should get a scheme sanctioned at all, I think this is not a case of that sort at all. I think that the court should dismiss this appeal and that the learned registrar exercised a proper discretion in the matter.

ROMER, L.J.—I agree.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors, *Seal & Edgelow; Needham, Tyer, & Barrow; Watson & Watson; Solicitor to the Board of Trade.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 13, 14.

LISLE v. REEVE. (a.)

Mortgage—Redemption—Option to lender to enter into partnership with the mortgagor upon terms affecting the mortgaged property—Option to be exercised within time limited for redemption—Independent agreement.

Prior to July, 1898, *the plaintiffs advanced to the defendant* £5,000 *upon the security of a ship and other property, upon the terms of an agreement made between them on the* 23rd *of April,* 1896, *whereby the money was not to be called in or paid for two years, and the plaintiffs might at any time within the two years elect to enter into partnership with the defendant upon the terms of their releasing the mortgage debt, and the ship and other property becoming partnership assets.*

On the 27th *of June,* 1898, *the defendant mortgaged to the plaintiffs certain wharves at Norwich to secure* £2,000, *part of the* £5,000 *then owing. The mortgage deed gave time for payment of this sum of* £2,000 *until the* 27th *of December,* 1898.

On the 9th *of July,* 1898, *another agreement was entered into between the plaintiffs and the defendant. It recited the agreement of* 1896; *that the plaintiffs had not entered into partnership; that the plaintiffs had applied for and the defendant was unable to pay the* £5,000, *and had requested the plaintiffs to extend the term of two years for a further period of five years; and it was thereby agreed* (1) *that the plaintiffs might, within five years, elect to enter into partnership with the defendant;* (2) *that the plaintiffs should in that event release the defendant from the payment of the* £5,000, *and transfer the mortgaged property for the purposes of the partnership;* (3) *that the capital of the partnership property should belong to defendant and plaintiffs in equal shares.*

In February, 1900, *the plaintiffs exercised their option and communicated to the defendant their intention to enter into partnership with him. The defendant refused to comply, alleging that the effect of the agreement was to render the property irredeemable, and that it was an illegal clog on the equity of redemption.*

Held, that the agreement of the 9th *of July,* 1898, *was subsequent to and independent of the original mortgage bargain; and that there being nothing unconscionable or unfair in the agreement in itself, the fact that the parties to it stood at the time in the relation to each other of mortgagor and mortgagee, did not prevent the agreement being enforceable.*

Decision of Buckley, J. (49 *W. R.* 188), *affirmed on different grounds.*

This was an appeal from a decision of Buckley, J. (reported 49 W. R. 188).

The following statement of the facts is taken from the judgment of Buckley, J.: By an agreement dated the 23rd of April, 1896, and made between the plaintiffs, G. Lisle and others, trading as J. H. Bentham & Co., of the one part, and the defendant, H. Reeve, trading as Clarke & Reeve, of the other part, the plaintiffs agreed to lend the defendant £3,000 and such further sums, not exceeding £2,000, as the defendant should require, and these sums were to be a first mortgage on the defendant's steamship *The Norfolk*. The further advances to be made within two years from the 23rd of April, 1896. The £3,000 and further advances to be secured by the mortgage were to be made payable at six months from the date of the mortgage (which was, in fact, the 4th of July, 1896). The £3,000 was to bear interest at 5½ per cent. from that date. The further advances were to be free of interest. The plaintiffs were not to call in, and the defendant was not to compel the plaintiffs to receive, the principal moneys before the expiration of two years from the date of the mortgage, if interest was regularly paid. If at any time within two years from the making of the agreement (the 23rd of April, 1896) the plaintiffs should elect to enter into partnership with the defendant they were to be at liberty to do so upon the terms that, *inter alia*, the plaintiffs should relieve the defendant from the payment of the £3,000 and further advances, if made, and if the whole £2,000 had not been advanced should make up the £2,000 and the plaintiffs should transfer the ship, free from the mortgage, for the purposes of the partnership. The capital of the partnership was to be represented by *The Norfolk* and some other property described in the schedule to the agreement, and the ship and property were to belong to the defendant and the plaintiffs in equal shares. They were to share the profits and losses of the partnership equally, and the partnership was to continue until determined by six months' notice on either side.

On the 4th of July, 1896, the defendant executed to the plaintiffs a statutory mortgage of *The Norfolk* to secure an account current, the particulars of which were therein stated to be described in a receipt and agreement of even date. No date for payment was named in the mortgage. The receipt and agreement were introduced by reference. There was a receipt or memorandum not of even date, but dated the 16th of July, 1896, showing that £3,783 was the amount in fact then advanced and secured by the mortgage. The receipt bore internal evidence that although dated the 16th of July, 1896, it was the receipt stated in the mortgage of the 4th of July, 1896, to be of even date with the mortgage, for it spoke of the 4th of July, 1898, as being "two years from the date hereof." This was, therefore, apparently the receipt referred to in the statutory mortgage. It named the 4th of July, 1898, as the date for repayment. There was also a deed of the 4th of July, 1896, between the defendant of the one part and the plaintiffs of the other part, which, after a recital that the defendant, there called "the mortgagor," was the owner of *The Norfolk*, and that he had applied to the plaintiffs, there called "the mortgagees," for £5,000, to be secured on the ship and her freight and insurances, and that he had by a deed-poll of even date mortgaged the ship, it was witnessed that the mortgagor assigned to the mortgagees all charter-parties, bills of lading, and documents under which freight might be earned, and all policies of insurance of the ship by way of security, and he covenanted for payment of the £5,000 on demand.

On the 23rd of April, 1898, the two years within which the plaintiffs were under the agreement of the 23rd of April, 1896, entitled to elect to enter into partnership with the defendant expired. They had not elected to enter into partnership. The whole sum of £5,000 had been advanced, but no part of it had been repaid. Under these circumstances, in the opinion of Buckley, J., there clearly existed after the 23rd of April, 1898, the relation of mortgagor and mortgagees between the parties, so far as the transaction of 1896 was concerned. On the 4th of July, 1898, there existed a legal, and subsequently there was an equitable, right in the defendant to redeem the plaintiffs.

In this state of facts further transactions took place between the parties in 1898. There was executed on the 27th of June, 1898, an indenture between the defendant, therein called "the mortgagor," of the one part, and the plaintiffs, therein called "the mortgagees," of the other part, which contained a recital

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

that the mortgagees had advanced to the mortgagor £2,000, in consideration of which the mortgagor covenanted for payment of that sum on the 27th of December, 1898, with interest at 5 per cent., and conveyed to the mortgagees by way of security some wharves at Norwich and at Great Yarmouth, subject to a proviso for redemption on payment of the £2,000 on the 27th of December, 1898. This sum of £2,000 was part of the above-mentioned sum of £5,000. The last-mentioned deed was a further security for part of the above-mentioned debt of £5,000, and it gave time until the 27th of December, 1898, for payment of that sum of £2,000. On the same 27th of June, 1898, the defendant executed to the plaintiffs a mortgage of a policy of assurance for £3,000 by way of security to them against a guarantee which they had given to the defendant's bankers for a sum of £1,000, part of the defendant's overdraft.

It was in this state of things that the instrument was executed upon which the contention in the present case arose. It was an agreement dated the 9th of July, 1898, made between the plaintiffs of the one part, and the defendant of the other part. It recited the agreement of the 23rd of April, 1896, shortly, but although it stated that under that agreement the further advances were to be made within two years from April, 1896, and that the election to enter into partnership was to be made within the same time, it did not say that under that agreement the loan was for a period of two years from the 4th of July, 1896. It then stated that the plaintiffs had advanced to the defendant £5,000, which had been secured by the first mortgage on *The Norfolk*, and by a second mortgage on the wharves, dated the 27th of June, 1898 (a statement which was inaccurate), and by an assignment of the life policy for £3,000 (which was not, in fact, the case), and that the plaintiffs had not up to date entered into partnership with the defendant. It then proceeded as follows: "And whereas the said term of two years so fixed by the said agreement having on the 23rd of April last expired, and Bentham & Co. having made an application to Reeve for the repayment of the said sum of £5,000, with interest thereon, and Reeve not being in a position to comply therewith, has requested Bentham & Co. to extend the said term of two years for a further period of five years, which they the said Bentham & Co. have agreed to do upon Reeve entering into this agreement and paying interest upon the said sum of £5,000, or any further sums, at £5 per cent. per annum and upon the terms hereinafter appearing." And by the operative part it was agreed and declared as follows: "(i.) If at any time within the said further period of five years from the making of this agreement Bentham & Co. shall elect to enter into partnership with Reeve in the said business carried on by him under the style of Clarke & Reeve, as aforesaid, they shall be at liberty to do so, and the partnership shall be upon the terms hereinafter appearing; (ii.) Bentham & Co. shall release Reeve from the payment of the said sum of £5,000 and shall transfer the said ship, free from the said mortgage, for the purposes of the said partnership. And, in consideration of Bentham & Co. doing these things, Reeve shall undertake and satisfy all liabilities, mortgages, and otherwise in connection with the wharves and plant of the said business of Clarke & Reeve, and Reeve shall be entitled to all accounts and book debts of the said business outstanding at the time of such partnership being entered into, but all current contracts existing at that time shall be apportioned between Reeve and the new partnership; (iii.) the capital shall be represented by the ships and other property set out in the schedule hereunder written and at present used by Reeve in the said business of Clarke & Reeve, or other the ships and property used by him in the said business at the time of such election as aforesaid, and the said ships and property shall belong to Reeve and Bentham & Co. in equal shares; (iv.) the profits and losses of the new partnership shall be divided and borne between Reeve and Bentham & Co. in equal shares; (v.) the new partnership shall continue until determined by six calendar months' notice on either side or shall be for such term as the parties mutually agree upon . . . ; (viii.) Reeve shall not during the said period of five years from the date hereof in any way incumber or dispose of the said property used by him in the said business of Clarke & Reeve without the consent of Bentham & Co. in writing."

Notwithstanding the form of the recital as to the two years, the learned judge held that the agreement of the 9th of July, 1898, extended the period of the loan for a further five years, and that the second mortgage of the 27th of June, 1898 (which had given six months from that date for repayment of the £2,000), and this agreement of the 9th of July, 1898, which gave time for the whole £5,000 for five years—*i.e.*, until the 9th of July, 1903—and contained the terms of the new arrangement between the parties, formed in reality parts of one transaction.

On the 24th of February, 1900 (during the currency of the five years), the plaintiffs exercised the option reserved to them by the agreement of the 9th of July, 1898, and elected to enter into partnership with the defendant. He refused to enter into partnership.

The plaintiffs brought this action for the specific performance of the agreement of the 9th of July, 1898, or, alternatively, for damages for the breach of it, and in the latter case for payment also of the £5,000 and interest, and claiming in default of payment to enforce their securities by foreclosure or sale.

The defendant, by his defence, pleaded as follows: "The effect of the agreement of the 9th of July, 1898, taken with the other securities mentioned in the statement of claim, was to render the property comprised in the latter irredeemable, and was an illegal clog on the equity of redemption"; and by his counterclaim he asked for a declaration that the agreement of the 9th of July, 1898, was not binding on him, and that the same might be delivered up to be cancelled. And he also claimed to redeem the mortgage of the 4th of July, 1896, and the mortgage and assignment of the 27th of June, 1898, upon the footing that they stood as security only for £5,000 and interest at 5 per cent. from the 31st of December, 1899.

The sum of £5,125 was paid into court by the defendant in satisfaction.

Buckley, J., held that on the 24th of February, 1900, the plaintiffs became entitled to enter into partnership with the defendant upon the terms of the agreement of the 9th of July, 1898; and that the defendant had committed a breach of that agreement. And an order was made for the payment to the plaintiffs of the sum of £5,125 which the defendant had paid into court.

An inquiry as to damages for the breach of contract was directed, and it was ordered that the plaintiffs should reconvey to the defendant the properties comprised in the mortgage of the 4th of July, 1896, and in the mortgage of the 27th of June, 1898.

The defendant appealed.

Warmington, K.C., and *Martelli*, for the appellant.

Astbury, K.C., and *R. J. Parker*, for the respondents.

The arguments used and cases cited were similar to those in the court below, but, having regard to the grounds on which the court in the present instance based their decision, it is unnecessary to set them out at length.

VAUGHAN WILLIAMS, L.J.—This case, as I understand it, turns upon, I was going to say, a question of fact, but there is no question inasmuch as it turns upon a state of facts which, in substance, is not in dispute at all. It was not disputed that a mortgagee can enter into an agreement to purchase from the mortgagor the equity of redemption. Only such a transaction must not be part and parcel of the original loan or mortgage transaction. It must not be part and parcel of that bargain. The mortgagee cannot at the moment when he is lending money and taking security enter into an agreement which is in effect an agreement that the mortgagor shall have no equity of redemption; but there is nothing to prevent that being done if it is done by an agreement which in substance and in fact is subsequent to, and independent of, the original bargain.

Now in this particular case it certainly is found by Buckley, J., that the mortgage transaction of the 27th of June and the transaction of the 9th of July, which is the transaction under which the option to purchase the equity of redemption by coming into a partnership arrangement was contained, were one and the same transaction; but here it is common ground that there was no evidence excepting the documents themselves; and if one looks at the documents themselves there is nothing to show that the arrangement contained in the document of the 9th of July was contemplated by, or was part and parcel of the agreement of the 27th of June. Therefore I come to the conclusion that that finding of Buckley, J., cannot be supported. One has to observe that it does not seem that it was part of the case really presented by the defendant here that those two transactions of the 27th of June and the 9th of July were part and parcel of one transaction, because if one looks at the pleadings it is quite plain that it is not so alleged even upon the face of the pleadings. Taking it, then, that really those two transactions were not part and parcel of the same transaction, and taking it really I may say as an admitted fact (because in spite of a contention with which I will deal presently there is not in substance any dispute on the point) that the two transactions were separate, what is the objection which is made here to the agreement come to by the document on the 9th of July? It really cannot be urged that there is anything against it whatsoever if it is really to be treated as separate and independent from the agreement on the 27th of June. Under those circumstances it seems to me that really there is nothing to say against it. It is an agreement for the purchase of an option to come into partnership, and to buy in that way the equity of redemption by including the property the subject of the mortgage—namely, the property in the proposed partnership to be entered into by the mortgagor and mortgagees. There is one observation which I should like to make, and that is this, I do not myself quite understand the observations of Buckley, J., in his judgment about the time when an equity of redemption is first to be recognized. His lordship says at p. 191 of 49 W. R.: "Now an equity of redemption is a right upon equitable terms to redeem after the legal time for redemption has expired and after the estate has become absolute at law. An equity of redemption is an equity of a right additional to and superimposed upon the legal right to redeem. When the estate has become absolute at law equity intervenes and says that even then the estate which has become absolute at law is meant to be and ought to be treated as being a security only. If, however, there is no legal right of redemption there is no right which equity can extend. In other words, an equity of redemption can never exist unless there exists a legal right of redemption. To ascertain, therefore, whether there is an equity of redemption the first step is to ascertain whether, according to the contract, and having regard to all the terms of the contract, there is a legal right to redemption. If there is not, then the transaction is not a mortgage for the purpose of the maxim "once a mortgage always a mortgage." I can only say, speaking for myself, I do not accept that proposition. It is not necessary for the purpose of the present judgment to go further into the matter, but I thought right to say I do not agree with the proposition of law there laid down, and we have not in the course of these two long days had any authorities cited to support it.

ROMER, L.J.—I agree in thinking that in this case the appeal should be dismissed. The question turns entirely upon the agreement of the 9th of July, 1898. Now it is to be noticed it is not even alleged that that agreement is unconscionable or unfair in itself, and the sole question is whether there is any principle of law which prevents it being enforceable in this court. In my opinion, under the circumstances and looking at the provisions of the agreement, there is no rule which prevents it being enforceable here. I do not think that the cases which have been referred to, and the principles which have have been cited as to clogging the equity of redemption, or as to once a mortgage always a mortgage, really apply to this case. Now what is the agreement between the parties? It is true the parties occupy the position of mortgagor and mortgagee. That does not in itself of necessity render unfair or impeachable a contract *bonâ fide* made between them if in other respects unobjectionable. Here the agreement, as I understand its terms, amounts to this. It appears that the mortgagors carry on a business. As between the parties to this agreement, the mortgagee has had given to him an option of becoming a partner with the mortgagors within a period of five years from the date of the agreement. If the option is exercised within that period then the mortgagee is to pay a sum to the mortgagor as his part of the capital of the business, and that sum is fixed at £5,000, which is the amount due on the mortgage. The £5,000 so to be brought in, if it be brought in, and if the partnership is established, will be applied in discharging the mortgagor from his liability under the mortgage. The agreement then further provides that pending the completion of the partnership transaction, if the partnership transaction be entered into and carried out—that is, pending the option—the mortgagee will not call in the mortgage money. Now admitting that that is a *bonâ fide* transaction and is not merely a colourable transaction to prevent the mortgage debt being paid off and the mortgage property redeemed (and there is nothing in the facts to justify us in coming to any such conclusion) is there any rule of law to prevent the parties occupying such a position, from making such a contract as that? In my opinion there is nothing. Putting aside, of course, the provision as to the mortgagee not insisting upon being paid his mortgage debt for the fixed period, there would be nothing obviously on the face of the agreement as to which a word could be said in opposition to the agreement. Is an agreement like that made bad because the person occupying the position of the mort-

gagee contracts that pending the exercise of the option and the consideration whether the partnership transaction will be carried out, he, the mortgagee, will not call in his money, or that that forms part of the consideration upon which the partnership agreement was entered into? I think not, and having here to deal with a transaction which, as I have pointed out, is not impeached as being unconscionable in itself, or unfair, it seems to me impossible for us to say that there is a rule such as that which has been urged on behalf of the appellants which would enable us to say that this agreement, honestly come to, and fair on the face of it, should be invalidated. On this ground I think the appeal should be dismissed. I only desire to add for myself that it must not be understood that in affirming the decision I am to be taken as endorsing everything that has been said by the learned judge in the court below.

COZENS-HARDY, L.J.—I agree. I desire to adopt the language of Kindersley, V.C., in the case of *Gossip* v. *Wright*, 11 W. R. 632, 32 L. J. Ch. 648, where he says: "In that which is to be a mortgage transaction—that is, a security, the court will not allow the right of redemption to be crippled and hampered by an arrangement between the parties at the time. That is well established as a general rule. I need not say, like any other general rule, that even that broad rule is liable to some exception. For example there are one or two cases of this sort—one where the object of the transaction was not merely a loan of money, but one party meant to benefit the other. It was a sort of settlement between relations, and then the court, although it did cripple the right of redemption, upheld the transaction. However, there is no doubt that the broad rule is this. The court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security either by any contemporaneous instrument with the deed in question or by anything which this court would regard as a simultaneous arrangement or part of the same transaction. That the court will allow the parties by a subsequent agreement to enter into a transaction by which the mortgagor sells, or releases, or conveys, or gives up (call it what you will) his equity of redemption and makes the estate out and out the estate of the mortgagee is clear."

Now applying that principle, and in the absence of a particle of either allegation or evidence to show that the two deeds of June and July, 1898, were part of the same transaction, it seems to me to come simply to an arrangement made after a mortgage between a mortgagor and mortgagee, and, so far as I know there is no authority for saying that there is any disability in having a contract for an option made between mortgagor and mortgagee, not as part of the mortgage transaction, but at a subsequent period. That being so, I only desire to say for myself that I entirely adopt the expression of Vaughan Williams, L.J., and also that, subject to the effect of any further argument which Mr. Parker might have adduced if I had come to the conclusion that it was all part of one transaction, I should not be able to adopt the result at which Buckley, J., has arrived.

Solicitors, *Cattarns & De Vesian; Rowcliffes, Rawle, & Co.*, for *Appleby*, Newcastle-on-Tyne.

High Court of Justice.

Chan. Div. Byrne, J. — Jan. 17, 22.

In re W. KEY & SON (LIMITED). (a.)

Company—Memorandum upon register of members—Lien of company—Trustee in bankruptcy of shareholder—Form of certificate—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Table A, article* 13.

The trustee in bankruptcy of a shareholder in a company applied to be registered as owner of shares standing in the bankrupt's name. The company had, under their articles, a lien upon shares for debts due to them from their members. The company alleged that there were debts due to them from the bankrupt, and they registered the trustee as owner of the shares, but they put upon the register a memorandum of their claim to the lien, and claimed to put a note to the same effect upon the certificate of the shares.

Held, that the company were not entitled to put such a memorandum upon the register, and that it must be removed therefrom.

Semble, *that the certificate of the shares must be granted in accordance with the register, and the company were not entitled to place any such note or memorandum upon it.*

Motion.

This was a motion under the Companies Acts, 1862 to 1900, on behalf of A. E. Preston, the trustee in bankruptcy of one T. H. Norris, asking that the register of members of the above company might be rectified by entering thereon the name of Preston in respect of 4,000 ordinary shares in the place of Norris, in whose name the shares were standing.

Norris had become bankrupt in January, 1901, and the company alleged that he was at the time of his bankruptcy indebted to them for certain sums of money.

The articles of association of the company provided that the company should have a first and paramount lien upon all the shares registered in the name of each member for his debts, liabilities, and engagements to the company; that the directors might decline to register any transfer of the shares upon which the company had a lien, and that, save as provided by the articles, the regulations of Table A of the Companies Act, 1862, should apply to the company. There was no special article as to transmission of shares.

The company had commenced an action against Preston to establish and enforce their lien upon the shares for the above-mentioned sums of money. Preston was resisting the claim, and did not admit that the bankrupt was indebted to the company, or that the company were entitled to any lien upon the shares. Preston had applied to be registered in respect of the 4,000 shares. The company were willing to register him, but they claimed the right to enter upon the register a memorandum to the same effect as a note they proposed to put at the foot of the certificate granted for the shares. This note was "The shares comprised in this certificate are a portion of 10,000 shares numbered 1 to 10,000 inclusive, on all of which the company claim a lien under the company's articles of association for the debts, liabilities, and engagements of the said T. H. Norris to the company." The certificate, apart from the note, was in the ordinary form, certifying that the shares in the company were held "subject to the

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

memorandum and articles of association thereof." Preston refused to accept these conditions and claimed to have a "clean" certificate and to be registered without any qualification. Subsequently to the notice of motion, and before the motion, the company had in fact registered Preston, and had put the memorandum in question upon the register.

Levett, K.C., and *Frank Evans*, for the applicant.—The company are bound to place the applicant upon the register in respect of these shares. Their power to decline to register a transfer does not apply to a transmission of the title: *In re Bentham Spinning Mills Co.*, 28 W. R. 26, 11 Ch. D. 900. They have no right to put a memorandum on the register which will be detrimental to the title of the trustee. What they may put on the register is defined by section 25 of the Companies Act, 1862, and what they may put upon the certificate is defined by article 2 of Table A.

They also referred to *In re Sovereign Life Assurance Co.*, 14 W. R. 1, [1892] 3 Ch. 279.

J. F. Norton, K.C., and *Muir Mackenzie*, for the company.—The trustee in bankruptcy can only take subject to all equities: *per* Bacon, V.C., in *Ex parte Harrison*, 32 W. R. 1011, 26 Ch. D. 523, at p. 526; *per* Selborne, L.C., on appeal, 28 Ch. D. 363, at p. 368, 33 W. R. Dig. 43. Unless this memorandum is placed upon the certificate the company may be estopped from saying they have their lien upon the shares: see observations of Lord Fitzgerald in *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29, at p. 39.

Jan. 22.—BYRNE, J.—This application is made with reference to the register of members; but that involves the nature of the certificate to be granted, as I do not think that it will be disputed that the certificate ought to be in accordance with the register, and much argument has been addressed to me as to the effect of a certificate in the form proposed. As there is no special article as to the transmission of shares otherwise than by transfer, we are thrown upon Table A. Now, Norris was registered in respect of these 4,000 shares and held a certificate for them in the ordinary form—that is, "subject to the memorandum and articles of association, and the rules and regulations of the company." I think that primarily the right of a person taking by transmission is to be entered upon the register in the same way as his predecessor in title was entered, and to have the certificate in the same form as his predecessor had. It is said in effect that the company may put anything upon the register which is not absolutely mischievous to the shareholder, and which is put on in good faith. There is nothing in the Act to prevent their using the register for memoranda, but in this case, if they may put this memorandum upon it, I do not see how their claim to put it upon the certificate can be resisted. The memorandum does not seem to me to be necessary for the protection of the company. It is suggested that there might be new directors of the company, or a new secretary, who might forget that there was an accrued right, or claim to an accrued right, to a lien. That argument does not appeal to me. It would apply equally during the time that the bankrupt was upon the register. Nor is the memorandum upon the register justified for the sake of altering the form of the certificate of the shares, for it is not essential for the protection of the company that the certificate should be granted in that form. The company are entitled to a lien, if at all, under the memorandum and articles, and the certificate is only granted as "subject to the memorandum and articles of association." The only reason suggested for the certificate being in the form proposed is that, there now being a claim to a specific lien, the company might be estopped hereafter if they did not mention on the certificate that there was such a claim, and that the lien had ripened into an immediate charge for a sum of money. I should be sorry to say anything to suggest that they could be under any such liability. It appears to me that the proposed memorandum would be detrimental to the trustee in bankruptcy. Why should he be in a worse position in this matter than the bankrupt was? The certificate is evidence of the legal title, and the trustee is entitled to be registered as the legal owner of these shares, and to have a "clean" certificate, as it has been called. If there was any probability or prospect of a fraudulent or wrongful dealing by the applicant with the shares when he came into possession of the certificate the company could apply in the pending action for an injunction to restrain him from dealing with the certificate. If the proposed statement is put upon the certificate it might lead to serious inconvenience. It may turn out, if the action goes on, that the company have no lien on the shares, and yet the applicant will have a certificate stating that the shares are subject to a claim for one. And if he applies for a new certificate, he may be told he is only entitled to one if the old one is worn out or lost. I think that the company have no right to put on the certificate a memorandum which will make out the certificate to be subject to some special right which interferes with the legal title—for that is what the meaning of it would appear to be. I do not think that the company are entitled to put this memorandum upon the register, and I think that the register ought to be rectified by striking out any reference upon it to the specific claim of the company. That is all I have to do now, but I intimate that it seems to me that the form of certificate must follow the form of the register.

Application granted.

Solicitors, *Ward, Perks, & McKay*; *W. H. Court*, for *Albin, Hunt, & Fourmy*, Chesham and Berkhampstead.

Chan. Div.
Buckley, J. } Dec. 12.

In re JACKSON'S SETTLED ESTATE. (*a.*)

Settled land—Will—Future trust for sale—Trust arising after death of trustee—Trustee tenant for life—Trustees for the purposes of the Settled Land Acts, 1882 *to* 1890—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 16 (*ii.*).

Trustees for the time being of a "settlement" with a future trust for sale are trustees for the purposes of the Settled Land Acts, 1882 *to* 1890, *under section* 16, *sub-section* (*ii.*), *of the Act of* 1890, *and it is immaterial that one of them is a person who cannot in fact ever exercise the trust for sale by reason that he will necessarily be dead before the trust takes effect.*

One of two trustees of a "settlement" with a future trust for sale is a trustee for the purposes of the Settled Land Acts, notwithstanding that he is tenant for life of the "settlement."

A. and B. were trustees of settled land with a trust for sale to take effect after the death of A., who was the tenant for life.

Held, that, under section 16 (*ii.*) *of the Settled Land Act,* 1890, *A. and B. were trustees for the purposes of the Settled Land Acts,* 1882 *to* 1890.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Originating summons.

This was a summons for the purpose of determining whether the applicant, Mrs. Constance H. Jackson, together with her co-trustee, W. H. Adams, were trustees of a "settlement" for the purposes of the Settled Land Acts.

By his will in 1886 the testator, W. Jackson, devised his freehold estate called "Town Thoms," near Rugby, in the county of Warwick, to his wife, the plaintiff, and another person, upon trust to permit his wife to occupy the estate during her life and after her decease (in the events which happened) upon the same trusts as were thereinafter declared concerning his residuary estate. His residuary estate was devised and bequeathed to his trustees upon trust for sale and conversion. By a codicil in 1890 the testator declared that if his wife declined to occupy the house the trustees were to pay her the income thereof. He executed another codicil in 1891 which did not affect the will as stated.

The testator died in 1895. The second trustee disclaimed. In 1898 the widow appointed W. H. Adams to be a trustee of the will and codicils in the place of the disclaiming trustee, and conveyed and assigned the estates to herself and him. Subsequently Mrs. Jackson contracted to sell part of the Town Thoms estate to the London and North-Western Railway Co. The question was then raised whether she and Adams were trustees for the purposes of the Settled Land Acts, and Mrs. Jackson took out this summons against the company and Adams for the determination of the question.

W. E. Vernon, for the plaintiff (after referring to the cases mentioned in the judgment).—Mrs. Jackson and Adams are trustees for the time being of the will and codicils, with a future power of sale, and they come within the words of section 16, sub-section (ii.), of the Settled Land Act, 1890. It is said that they do not because Mrs. Jackson cannot exercise the trust for sale; that if so you must say that if a trust for sale were given to trustees to be exercised, say, after twenty years, and one of them was ninety years old, he would not be a trustee for the purposes of the Acts under section 16.

A. Underhill, for the London and North-Western Railway Co.—The general purpose of the Acts is that the trustees shall safeguard the interests of the remaindermen, and check and control the tenant for life: see judgment of Lindley, M.R., and Chitty, L.J., in *In re Mundy and Roper's Contract*, 47 W. R. 226, at p. 227, [1899] 1 Ch. 275, at p. 288. This is also shown by sections 35, 36, and 44 of the Act of 1882, and by sections 10 and 12 of the Act of 1890, and the trustees should be independent persons. Mr. Adams may die first, and then Mrs. Jackson will be sole trustee, and also tenant for life, with no one to check her. She is not "under a future trust for sale," for there is no trust for sale which can arise in her lifetime or be exercised by her. To bring the trustees within the section it must be shown that the testator has confided a trust for sale to their charge. This cannot be said with regard to Mrs. Jackson. It cannot be said that the testator has shown that he intended them to be trustees for the purposes of the Settled Land Acts by giving them a future trust for sale, because the will was made before the Act of 1890. The confirmation of the will by the codicil of 1891 would not alter this.

BUCKLEY, J.—The point to be determined here is one of very general importance. Mrs. Jackson is tenant for life under the will. She and Mr. Adams are trustees of the will. The will contains a trust for sale, but it is a trust for sale which does not take effect until after the decease of Mrs. Jackson—a future trust for sale. Section 16, sub-section (ii), of the Settled Land Act, 1890, provides that certain persons shall for the purposes of the Settled Land Act be trustees of the settlement—namely, reading the words relevant here—"the persons (if any) who are for the time being under the settlement trustees under a future trust for sale of the land to be sold." It is argued, on the one side, that Mrs. Jackson and Mr. Adams are not such trustees, because the trust takes effect only after Mrs. Jackson is dead, so that she can never be a person to carry the trust into effect. It is argued, on the other side, that as Mrs. Jackson and Mr. Adams are for the time being trustees of this settlement, and as it contains a future trust for sale they are therefore trustees for the purposes of the Settled Land Acts. I think the latter contention is correct. The words of the sub-section are "the persons (if any) who are for the time being under the settlement trustees." There is no difficulty so far. These two persons are "for the time being"—that is, at present—"under the settlement trustees." Then what is meant by "under a future trust for sale." I think it must be read as meaning either "subject to" or "bound by" a future trust for sale, or "trustees of a settlement which contains a future trust for sale." I do not find it says that the persons must be those who would execute the trust for sale. Such a reading of the sub-section would render it utterly unworkable. A trustee may die any day. He may die before the future trust for sale becomes exercisable, and he will never exercise it. The age of the trustee may be such, and the date at which the future trust for sale is to take effect may be such, that a particular person in all human probability will not be alive when it comes to be executed. You would be introducing a series of difficulties unless you looked simply at this question, who are now the trustees, and does the settlement contain a trust for sale? It appears to me those are the only two things you have to look at. It has been pointed out forcibly and truly that the object of having trustees for the purposes of the Settled Land Act is to check and control the tenant for life. Ought I to give effect to that object by saying that the tenant for life cannot be trustee for the purposes of the Settled Land Act? Plainly not. The testator certainly could have said that his widow and somebody else should be trustees for the purposes of the Settled Land Act. It is a mere question of expediency. It is also pointed out that Mr. Adams may die, and Mrs. Jackson may be sole surviving trustee, and may have to check herself. The answer to that, I think, is that if that state of things should arise, then it will be necessary and right that there should be appointed some other person to act with her. For instance, under section 45, sub-section 2, of the Act of 1882 there must be two trustees at the date when the notice starting the proceedings is given; and in any case it would be competent to the remainderman to apply to the court upon the ground that the tenant for life was so placed as that she ought to be controlled by the action of others to act with her. I cannot find anything in that possibility sufficient to control the construction of the simple language of sub-section (ii.). The state of the decisions upon this section is rather singular. There appear to have been three cases in chambers, none of which were reported, but for such knowledge as we have of them we are indebted to the gentlemen who make communications to the legal newspapers. In one case, *In re Cox and Seadon's Contract*, commented upon in 91 Law Times 241, Chitty, J., apparently decided in chambers as I am now deciding. Subsequently, in 1892, it would appear that the same learned judge arrived at a

conclusion which is said to be the contrary of his previous decision. That case is the subject of articles in 37 SOLICITORS' JOURNAL, p. 109, and 43 SOLICITORS' JOURNAL, p. 326, where the name of it, *In re Nieuwenhuys*, is given, the reference to the record being 1892—N.—1788. The order is set out in the latter article, and I am not at all clear that that was a decision to the contrary of what the learned judge had previously decided, but there is some doubt about it. The third case is *In re Earp*, before Stirling, J., apparently in chambers in 1899. It is stated in Wolstenholme's Conveyancing and S. L. Acts (8th ed.), p. 423, and the decision was in the same direction as that in which I am now deciding. Therefore it appears to me so far as authority is to be found or traced at all, it is in favour of the view which I take. I hold that under section 16, sub-section (ii.), of the Act of 1890 the persons who are for the time being trustees of a settlement which contains a future trust for sale are within the definition of that sub-section, and that it is immaterial that some or one of them are persons who in all human probability will not, or in fact cannot, ever exercise the trust, as for instance that one of them is a person who necessarily will be dead before the trust takes effect. I think, therefore, that Mrs. Jackson and Mr. Adams are trustees for the purposes of the Settled Land Acts.

Solicitors for the applicants, *Ashurst, Morris, Crisp, & Co.*

Solicitor for the London and North-Western Railway Co., *C. H. Mason.*

Chan. Div. Joyce, J. } Oct. 30.

In re FREAKE'S SETTLEMENT. LORD KINNAIRD *v.* FREAKE. (*a.*)

Settled land—Capital money—Improvements in leasehold houses with a view of letting—Electric light installation—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (*ii.*).

An electric light installation may, under special circumstances, be so necessary to enable a house to be let as to be payable out of capital moneys under the Settled Land Acts.

This was an adjourned summons under the Settled Land Acts, which was taken out by the trustees for the purposes of the Acts of a settlement made on the marriage of Sir Thomas Freake in 1868.

By the settlement certain property, which included the leasehold houses, No. 6, Cranley-place, No. 9, Sumner-place, and No. 36, Onslow-gardens, to which the summons related, were vested for the residues of long terms of years in the trustees upon trust for sale. The trusts of the property were for Sir Thomas Freake during his life, or until he should assign, charge, or incumber the same, and subject thereto for the benefit of his wife during her life or widowhood, and subject thereto for the benefit of the issue of the marriage.

The houses were old-fashioned and had been unlet for some time, and the evidence showed that a considerable sum of money would require to be expended on each house in order to meet the requirements of intending tenants of houses in that part of London.

The summons asked, *inter alia*, for the determination of the question whether the costs of a proposed new system of electric lighting (the houses having at present only an imperfect gas service) would be properly payable out of capital.

Hughes, K.C., and *A. L. Ellis*, for the trustees, stated the facts.

G. R. Northcote, for the tenant for life in possession.—The proposed installation is an "addition" to the houses "reasonably necessary or proper to enable the same to be let" within section 13 (ii.) of the Settled Land Act, 1890.

B. Farrer, for the remaindermen.—The substitution of the electric light for an old system of gas lighting is rather of the nature of repairs, and therefore, like the heating apparatus in *In re Gaskell's Estates*, 42 W. R 219, [1894] 1 Ch. 485, should not be paid for out of capital money.

R. Feetham, for the second tenant for life.

JOYCE, J.—The heating apparatus in the case cited was not necessary, but some system of lighting is necessary. The proposed electric light installation will in fact be a new system of lighting the house, and I therefore think it will be an "addition to the building" within the meaning of the Act cited. I shall therefore sanction payment out of capital moneys of the expense of the wiring and of so much of the installation as is not usually supplied by the tenant.

Solicitors, *Pears, Ellis, & Co.*

Chan. Div. Joyce, J. } July 2, 3, 4, 27, 1901.

TURNER *v.* MOON. (*a.*)

Vendor and purchaser—Covenant for title—Implied covenant—Breach—Measure of damages—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7.

If a vendor purport to convey land to a purchaser free from a right of way belonging to a third person, which in fact still exists and is not extinguished, this existence of the right of way is a breach of the covenant for good right to convey implied by the use of the words "as beneficial owner."

The proper measure of damages in such a case is the difference between the purchase price and the value of the land as the vendor had power to convey it.

Witness action.

One of the questions at issue—to which alone this report relates—had reference to the proper measure of damages for the breach of an implied covenant for title. The covenant was implied by the use of the words "as beneficial owner" in the conveyance (dated the 9th of December, 1891) by the defendant to the plaintiff of a portion of the Westbrook estate at Godalming. The portion of the estate conveyed to the plaintiff included a strip of land forming part of the Westbrook-road, and this strip was expressed to be subject to rights of way previously granted by the defendant to persons called Cooper, Fleming, and Parry. The plaintiff subsequently discovered that a right of way over the strip had also been granted to the Countess of Meath, who had previously purchased a portion of the estate, including the house called Westbrook House, to be used as a home for epileptic women and girls.

Thereupon the plaintiff brought this action, alleging that the right of way possessed by the countess

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

would seriously affect the value of the residence which he had built upon the portion of the estate purchased by him, by destroying its privacy and amenity, and claiming damages for breach of the implied covenant for good right to convey by the concealment of the right of way. The defendant denied liability, but paid £50 into court.

Younger, K.C., and *G. Cave*, for the plaintiff.—In considering the proper measure of damages, it is right to take into account the fact that the land has been built upon. Damages arising after action brought can also be given, if they are the natural and necessary consequences of the breach of the covenant.

Hughes, K.C., and *Manby*, for the defendant.—In the case of damages which arise after action brought a distinction must be made between the case of a breach of the covenant for quiet enjoyment and that of a breach of the covenant for title. The true measure of damages is the difference between the value of the property as it purports to be conveyed and its value as it actually passes.

Cave replied.

Cur. adv. vult.

July 27.—JOYCE, J., after stating the facts, and referring to section 7 of the Conveyancing Act, 1881, proceeded as follows: By an unfortunate accident the right of way was omitted to be mentioned in the conveyance to the plaintiff, though no fraud or deceit on the part of the vendor is suggested. Undoubtedly, however, there was a breach of that part of the implied covenant for title whereby the vendor covenants that the estate is to be "freed, and discharged from, or otherwise by the person who so conveys sufficiently indemnified against all such estates, claims, incumbrances, and demands other than those subject to which the conveyance is expressly made." There has been no breach of any other part of the implied covenant, for the plaintiff has not been evicted or disturbed in any way—in fact, the plaintiff has not sustained any actual damage at all. There is no evidence that the Countess of Meath, or any occupier or inmate of her institution, has ever sought to exercise the right of way which was granted to the countess by the deed of 1891. In other words, there has been no actual interference with the enjoyment of what the deed of the 9th of December, 1898, purported to convey to the plaintiff. Such breach as there has been of the part of the covenant for good right to convey, in my opinion, occurred and was complete upon the execution of the conveyance of the 9th of December, 1898. It was single, entire, and perfect in the first instance. From the moment of the delivery of the conveyance the Statute of Limitations in respect of this breach commenced to run: see Preston's edition of Sheppard's Touchstone, p. 170, and especially the judgment of Lord Bramwell in *Spoor* v. *Green*, 22 W. R. 547, L. R. 9 Ex. 99, in which he said (see p. 110), "Assuming the breach to be correctly stated and proved, I am of opinion that the Statute of Limitations is a bar to it. It was completed, if it ever existed, at the time the deed was executed. If Jamieson had recovered on it, or released it, no further action on it could have been maintained by him, nor, consequently, by his assignee. It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken indeed, but broken once for all. In the case of a covenant to repair the breach is continuing, because the covenant is broken afresh every day the premises are out of repair, and when an action is brought for breach of such a covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues. Nothing like that exists as to this covenant. If the words of the breach are looked at, it will be seen that they are, that neither the defendant nor Pearson had good title, but on the contrary (and this is the breach) Smith and Sharp at the time of making the deed, and thence continually, had good title, &c. It is true that the court in *Kingdon* v. *Nottle*, 4 M. & Sel. 53, speak of the breach as a continuing breach. Oddly enough the breach thus assigned is express, that the defendant at the time of the indenture was not seised, &c. But the court, having in the previous case of *Kingdon* v. *Nottle*, 1 M. & Sel. 355, held that the executor could not maintain an action on the covenant, now held that the real representative could, and it is in reference to this that they use the language I mention."

With this judgment of Lord Bramwell I desire respectfully to express my entire concurrence. The concluding sentence of the passage I have read supplies the key to the true explanation of the judgment of Lord Ellenborough in *Kingdon* v. *Nottle*, which has been a good deal discussed in this country, and has been vigorously assailed on the other side of the Atlantic: see Rawle on Covenants for Title, pp. 324, 599 (4th ed.). Fortunately the plaintiff, Mr. Turner, is still living, and we have not to consider who could have sued, or how the case would have stood, in the event of his decease before action brought or pending the action: see Williams on Executors (9th ed.), pp. 599, 712. In my opinion the proper measure of damages in the present case is the difference between the purchase-money or price paid upon the purchase of the 9th of December, 1898, and the value of the premises as conveyed, such difference being caused by the defect in the title to the strip of road in question, or, in other words, to the existence of the Countess of Meath's right of way over that strip—that is to say, the difference between the value of the property as purported to be conveyed and that which the vendor had power to convey: see *Gray* v. *Briscoe*, Noy. 142; and Dart V. & P. (6th ed.), pp. 599, 892. In *Bunny* v. *Hopkinson*, 27 Beav. 565, 8 W. R. Ch. Dig. 90, there had been eviction and a breach, not only of the covenant for title, but also of the covenant for quiet enjoyment, and the claim made and adjudicated upon in that case was upon the covenants for title generally, including the covenant for quiet enjoyment.

Solicitors, *G. R. Fletcher; Crowders, Vizard, & Oldham*, for *R. H. Mellersh*, Godalming.

K. B. Div. (Mathew, J.) — June 12, 13, 17, 1901.

MARITIME INSURANCE CO. (LIMITED) v. STEARNS. (a.)

Insurance (Marine)—Reinsurance—Delay in commencement of voyage—Alteration of risk.

The plaintiffs, by an open cover, insured all shipments of a firm of merchants for twelve months from the 11th of May at premiums varying with the date of sailing and the port of destination. On the 30th of July a declaration of a proposed shipment from the Tyne to Lulea was made under the cover, the premium for which was 12s. 9d. if the ship sailed in August and 15s. in September. The plaintiffs effected a reinsurance with the defendant at

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Lloyd's by a slip dated the 2nd of August, the premium payable to the defendant being 6s. 8d. The vessel was named in the slip, which contained also the reinsurance and deviation clauses. The vessel did not sail till the 25th of September, and, with her cargo, was totally lost on the 2nd of October. The plaintiffs' original policy under the cover was issued on the 25th of September, and the reinsurance policy was signed by the defendant on the 5th of October.

Held, that the delay in the commencement of the voyage constituted a material alteration in the risk, and that the defendant was not liable on the reinsurance policy.

Action in the commercial list tried by Mathew, J., without a jury.

The plaintiffs claimed to recover under a policy of reinsurance subscribed by the defendant, who was an underwriter at Lloyd's. The facts were as follows:

On the 11th of May, 1900, the plaintiffs issued an open cover to Pyman & Co. to cover for twelve months all shipments of coal at and from east coast ports to, amongst other ports, Lulea. The premium varied according to the date of shipment, the premium for Lulea from the 1st of April to the 31st of August being 12s. 9d., and from the 1st of September to the 30th of September, 15s.

It was also provided that risks were to be reported provisionally by Pyman & Co. to the plaintiffs' agent as soon as possible after the chartering of each vessel and the insurance was to be closed by them immediately on the receipt of the shipping documents.

On the 28th of July, 1900, Pyman & Co. chartered the steamship *Brenttor* to carry a cargo of coals from Blyth to Lulea, and on the 30th of July provisional notice of this engagement was given under the cover to the plaintiffs.

On the 1st of August the plaintiffs sent instructions to a firm of insurance brokers in London to effect a reinsurance for £1,500 upon coals by *The Brenttor* from Blyth to Lulea at 6s. 8d. per cent.

The brokers prepared a slip giving these particulars, and containing also the reinsurance and deviation clauses, which was submitted to an underwriter at Lloyd's, the representative of the defendant. He ascertained that the ship was then on the east coast, and initialled the slip on the 2nd of August.

On the 11th of August, *The Brenttor* sailed from Blyth to Cronstadt, and proceeded thence to Lulea, but this voyage was not made under Pyman & Co.'s charter-party.

The vessel arrived back at Blyth on the 20th of September, and then proceeded to load a cargo of coal under Pyman & Co.'s charter-party. The bills of lading were signed, and the vessel sailed for Lulea, on the 25th of September, on which day Pyman & Co. gave the plaintiffs closing instructions for the insurance of £2,600 so valued upon their cover.

On the 26th of September the plaintiffs issued to Pyman & Co. two policies for £2,600 upon coals so valued by *The Brenttor* from Blyth to Lulea at a premium of 15s. These policies contained a clause: "Warranted to sail on or before the 30th of September, or held covered at a rate to be arranged."

On the 2nd of October the plaintiffs instructed their broker to put forward policies for the reinsurance for £1,500 effected on the 2nd of August, and a policy was prepared accordingly. The policy was for £1,270 (the balance of the £1,500 having been underwritten by a company) upon coals "valued as per original policy or policies." The premium was at the rate of 6s. 8d. per cent., and the policy contained the following clauses: "Being a reinsurance policy or policies of the Maritime Insurance Co., and subject to the same terms, conditions, and clauses as the original policy or policies, and to pay as may be paid thereon." "In the event of any deviations or change of voyage it is hereby agreed to hold the assured covered at a premium to be arranged." This policy, which was the one sued upon, was signed by the defendant's representative on the 5th of October, who, at the time of signing, had ascertained the fact that *The Brenttor* had sailed from Blyth on the 11th of August and had arrived at Lulea on the 29th of August.

On the 2nd of October *The Brenttor* had gone ashore, and subsequently, with her cargo, became a total loss.

The plaintiffs paid Pyman & Co. as for a total loss upon their policies, and claimed in this action to recover a total loss from the defendant.

The defence to the action was that the policy of the 5th of October was issued by the defendant in fulfilment of the engagement entered into by the slip of the 2nd of August; that it was an implied condition of the contract that the insured voyage should begin within a reasonable time after the 2nd of August; that the delay in sailing until the 25th of September was a material alteration in the risk, and that in consequence the policy had never attached. Alternatively, it was alleged that there had been a concealment upon the 2nd of August of a material fact—viz., that the voyage insured was not to begin or might not begin until the 25th of September.

Joseph Walton, K.C., and *Simey*, for the plaintiffs.

J. A. Hamilton, K.C., and *F. D. MacKinnon*, for the defendants.

The following cases were cited: *Joyce* v. *Realm Marine Insurance Co.*, L. R. 7 Q. B. 580, 20 W. R. C. L. Dig. 86; *Charlesworth* v. *Faber*, 5 Com. Cas. 408; *De Wolf* v. *Archangel Maritime Bank and Insurance Co.*, 22 W. R. 801 L. R. 9 Q. B. 451; *Hull* v. *Cooper*, 14 East, 479; *Simon Israel & Co.* v. *Sedgwick*, 41 W. R. 163, [1893] 1 Q. B. 303.

Cur. adv. vult.

June 17.—MATHEW, J.—This was an action against an underwriter at Lloyds on a policy of reinsurance. The original insurance was by a cover note issued by the plaintiffs to a firm of Pyman & Co. which was intended to provide for the period of one year for the insurance of shipments of coal and coke from ports on the east coast of Great Britain to ports in Sweden, Norway, Denmark, and/or Baltic ports of Germany. The cover note provided that the risks were to be reported provisionally to the plaintiffs' agent as soon as possible after the chartering of each vessel, and that the definite insurance should be closed immediately on receipt of shipping documents. Annexed to this cover note there was a scale of premiums varying according to the date of sailing and the port of destination. In the case of Lulea the premium was net 12s. 9d. per cent from the 1st of April to the 31st of August, and 15s. per cent. from the 1st of September to the 30th of September. On the 30th of July, 1900, a declaration was made to the plaintiffs under the cover note of a cargo of coals from the Tyne or Blyth to Lulea per steamship *Brenttor*. On receipt of that declaration the plaintiffs gave instructions to reinsure, and accordingly a slip was prepared and was submitted to the underwriters at Lloyd's. The slip (which was not produced at the trial, having been lost) was in the ordinary form describing the voyage and containing the usual particulars in respect of a specific insurance for £1,500 on a cargo of coal on *The Brenttor* for the voyage mentioned. The underwriters ascertained that the ship was at the time in the neighbourhood

of the Tyne. The premium offered was 6s. 8d., which is the very lowest price for a summer risk. Upon that slip the underwriters were induced to place their initials believing that the ship was then about to load for Lulea. A few days afterwards the ship having loaded a cargo sailed not for Lulea but for Cronstadt, and not on the voyage intended to be insured by this slip. It was a voyage with a cargo of coals for another shipper. She went to Cronstadt, then to Lulea, and arrived back in the Tyne late in September. The cargo intended to be insured by this ship was then loaded, and the ship sailed for Lulea on the 25th of September, the slip being dated the 2nd of August. The ship was lost early in October. Then in the usual way a reinsurance policy was put forward, and demand was made on the underwriters for payment of the loss. In the first instance the underwriters said they were not on the risk, that the vessel had made the voyage which they had reinsured, and that the voyage on which the loss occurred was an altogether different risk. It was pointed out to the underwriters that the first voyage was in the interest of another shipper and was not intended to be covered by the defendant's policy. The underwriters then took up the position that, having signed the slip on the 2nd of August, they did not suppose they were insuring a voyage which would not commence till the 25th of September, by which date the premium would have been much higher. Now, only one witness was called for the plaintiffs, and that was Mr. Sumner, their underwriter. He explained the course of business under this open cover. He said that the plaintiffs had a standing reinsurance of all risks above a certain amount—viz., £1,500, but that in the present case they reinsured the whole amount because in Mr. Sumner's opinion Lulea was a dangerous port and objectionable all the year round. He was further asked about the premium, and what impression he, as an experienced underwriter, thought was likely to be produced on an underwriter at Lloyd's who was asked early in August to sign a slip to Lulea at 6s. 8d. The witness confessed his inability to answer that question, but he said that the underwriters ought to have known as much about it as he did, that he (Mr. Sumner) was rather surprised that the premium of 6s. 8d. was accepted, but that if the underwriters had wanted a higher premium they should have asked for it. When it was pointed out that this insurance was unreasonably delayed from a summer to an autumn or winter risk, Mr. Sumner attempted to show that the slip must have informed the underwriters that the reinsurance was provisional only, because the slip would bear on its face the word "open," which ought to have conveyed the information to the underwriters that the shipment was to be closed at a later date, which might be as late as September. That point wholly failed. I am satisfied that the slip did not contain the word "open"; nor is there any evidence that if the slip had contained the word "open" it would have conveyed to the mind of the underwriter anything different from what was in the slip as it stood, and as it stood it was on the face of it a specific insurance of £1,500 on the cargo of the vessel mentioned. That being the evidence on the part of the plaintiffs, a number of gentlemen from Lloyd's gave evidence on behalf of the defendant. They explained that in September the risk in the case of an insurance such as this was different from that in August, and that the premium was higher in September than it was in August; and in the end it was not seriously contended that their evidence ought not to be acted upon or that this risk was the risk which the underwriter would assume to have been contemplated when the slip was laid before him. It was contended by Mr. Walton that this being a reinsurance on the terms of the original policy, which could only be gathered from the cover note, the underwriters ought to have asked to see the cover note, from which they would have gathered that the cover was one for a year, and that the shipment might take place in any month. It was pointed out that the defendant's premium was 6s. 8d., and that the premiums as provided by the cover note increased as the season went on. In answer to that it was said that the defendant's premium might be proportionately increased, that all the documents must be construed as one document, and that the liability of the defendant was thus established. I cannot yield to this argument. The underwriters were not entitled to see the cover note. The cover note would have shown what the rate of premium was which was being charged by the plaintiffs, and which was nearly double the amount offered to the underwriters; all that the underwriters would look for would be a policy of insurance in the ordinary form covering the risk which they were reinsuring. The policy was in fact issued in the ordinary course after the loss had taken place, and would have given the underwriters no information whatever as to the contents of the cover note. This point, in my opinion, fails the defendant. The next point taken was that the original policy contained a clause providing that in the event of the vessel making any deviation or change of voyage, such deviation or change should be held covered at a premium to be arranged. It was argued that in the circumstances of this case there had been a deviation, and that subject to an arrangement as to premium the defendant was liable. I am clearly of opinion that the clause in question has no such operation. The deviation contemplated by the clause is a deviation in the course of the voyage. What is the meaning of the word "change"? Inasmuch as the port of loading and departure is fixed it means alteration in the port of arrival. In such a case it might be that the clause would apply, but it has no operation here because there was no change of voyage. The voyage was the same, but it was postponed for an unreasonable time. Mr. Walton had to admit that according to his argument the ship need not have sailed till December or January, and that the risk might then be treated as attaching, subject only to a trifling alteration in the amount of the premium. On this point also the plaintiffs' case fails, and judgment will therefore be for the defendant.

Judgment for the defendant.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

Solicitors for the defendant, *Thomas Cooper & Co.*

Privy Council.

(*From the Court of Appeal for Ontario.*)

Nov. 9

BURLAND AND OTHERS *v.* EARLE AND OTHERS. (*a.*)

Company—Directors—Resale by director to company—Distribution of profits—Investment of funds—"Staff."

There is no obligation on a joint stock company to distribute, whilst it continues as a going concern, the whole of its profits amongst its shareholders. What sum shall be retained, what carried to the credit of a reserve fund, or appropriated to any other use of the company are matters of internal management, which the shareholders must decide for themselves, subject to the regulations of their articles of association or bye-laws. The investment of the reserve fund may be made in such securities as the directors, subject to the powers of a general meeting, may think fit, provided they do not by speculation or otherwise abuse the authority for this purpose intrusted to them.

Should a director purchase property solely on his own behalf and afterwards sell the same to the company at an increased price, he will not be liable in damages, where it is not shown that he did not make a full disclosure, or that the price was an unfair one.

Cross-appeals from the Court of Appeal for Ontario, which were consolidated.

The facts are very fully set out in their lordships' judgment.

Blake, K.C., and *R. C. Smith, K.C.*, for appellants.

Haldane, K.C., and *Chrysler, K.C*, for respondents.

The judgment of their lordships (Lords HOBHOUSE, DAVEY, and ROBERTSON, and Sir RICHARD COUCH) was delivered by

Lord DAVEY.—The appellants and respondents in these two appeals, which have been consolidated, are alike shareholders in a joint stock company called the British American Bank Note Co. In this judgment the term "appellants" will mean the appellants in the first and principal appeal who are defendants in the action, and "respondents" will mean the respondents in the same appeal and plaintiffs in the action. The company was incorporated by letters patent dated the 16th of June, 1866, under the provisions of an Act (27 & 28 Vict. c. 23) of the old province of Canada. The objects for which the company was formed were "to engrave and print banknotes, debentures, bonds, postage and bill stamps, and bills of exchange, and to carry on all other branches incidental thereto." The capital of the company was originally 100,000 dols. divided into shares of 100 dols. each, but was subsequently increased to 200,000 dols., of which 170,000 dols. only has been issued. By section 1 of the Act provision is made for the incorporation by letters patent of joint stock companies, for the purpose (*inter alia*) of carrying on any kind of manufacturing business, and by section 5 it was declared that every company incorporated under the authority of the Act should be subject to the general provisions set out in sub-sections 1 to 34 thereof. Sub-section 7 so far as material is as follows: "7. The directors of the company shall have full power in all things to administer the affairs of the company, and may make or cause to be made for the company any description of contract which the company may by law enter into; and may from time to time make bye-laws not contrary to law, to regulate (*inter alia*) the declaration and payment of dividends, the number of directors, their term of service, the amount of their stock qualification, the appointment, functions, duties and removal of all agents, officers, and servants of the company, the security to be given by them to the company, their remuneration and that (if any) of the directors, the time at which and the place or places where the annual meetings of the company shall be conducted." The Act contains no express provisions as to the formation of a reserve fund, or as to the investment or application of the undivided profits of the company. Shortly after the formation of the company the shareholders made a number of bye-laws, of which the following are material for the purpose of this litigation: "9. The shareholders of the company may, at any general meeting of the company, vote and award to the directors of the company such compensation as they may think proper. 10. At all meetings of the company every shareholder shall be entitled to as many votes as he may own shares in the company, and may vote by proxy; but no shareholder shall be entitled to vote unless he has paid all calls in respect of his shares. 11. The directors shall have the management of the affairs of the company, the appointment, control, and removal of all the officers and employees of the company, and shall, from time to time, regulate their several duties and remuneration. 12. At every annual general meeting the directors shall present a report and abstract of the accounts of the company, a concise statement of their affairs, and a true and succinct statement of their assets and liabilities; and, if they deem fit, shall recommend the declaration of a dividend of so much per cent. on the stock out of the earned profits of the company; and in the interval between the annual general meetings of the company the directors may, at any regular meeting, declare a dividend, whenever an actual cash balance in the hands of the secretary-treasurer from the earned profits of the company shall, in their judgment, warrant the payment of such dividend. 13. The directors may set apart any portion of the profits for a reserve fund, subject to the approval of a general meeting, or to the appropriation of such sum by such meeting to any other purpose. 14. The number of directors shall never be less than three, nor more than six. Every new board of directors, as soon as elected, shall elect a president and a vice-president; they shall also elect the president or vice-president, or any director, to be at the same time manager, and if any of the places of these officers become vacant, they may be filled by the board electing others in their place. 16. At every board meeting three directors shall constitute a quorum. The president shall preside, in his absence the vice-president, and, failing both, any director. The president or chairman, as a director, shall have one vote." The company was formed by the union of two groups, one represented by the appellant George B. Burland (who is hereafter referred to as Burland), and the other by a Mr. Smillie and the respondent Earle. Mr. Smillie was the first president, and Burland and the respondent Earle were first directors. Mr. Smillie retired from the company in 1881, and sold his shares. Burland from time to time increased his holding, and at the date of the commencement of the action he held 1,077 shares. He was also the president and manager of the company. The plaintiffs and respondents hold between them 433 shares. The respondent Earle continued on the board of directors (with two short intervals) until the year 1890, when he resigned. The respondent Mrs. Cunningham sues as the administratrix of James Cunningham, deceased, who was

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

at one time the auditor, and from 1887 until his death in 1892 was a director of the company. The respondent Thomas J. Gillelan was from 1892, and at the commencement of the action, a director of the company. The company's business has been extraordinarily successful. In some years it has paid to its shareholders a dividend exceeding 100 per cent., and the average of the dividends paid during the thirty years of its existence prior to the commencement of the action is said to exceed 40 per cent. per annum. In addition to the dividends so paid the company has accumulated undivided profits to the amount at the commencement of the action of 264,167 dols. This sum was not formally carried to the credit of a rest or reserve fund, but stood to the credit of the profit and loss account of the company. Shortly before the commencement of the action the company lost a valuable contract with the Dominion Government. The result was a serious diminution of the profits of its business. The action was commenced by the respondents on the 7th of December, 1897. By their amended statement of claim they prayed for a declaration that the accumulation by the defendants of a surplus or reserve fund was *ultra vires*, and for an immediate division and distribution amongst the shareholders of all sums of money accumulated and retained as a reserve fund over and above the authorized capital stock of the company and various other items of relief.

Their lordships will confine their attention to the points which have been discussed on these appeals. These are (1) the formation of the rest or reserve fund; (2) the investment of it; (3) a claim by the respondents to treat Burland as a trustee of the plant and material of a certain insolvent company, called the Burland Lithographic Co, which he purchased at a sale by auction and resold at an enhanced price to this company, and to make him account to the company accordingly for the profit made by the resale; (4) a question as to certain sums drawn as salaries by Burland and the appellant J. H. Burland. It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, the action should *primâ facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle*, 2 Hare, 461, and *Mozley* v. *Alston*, 1 Ph. 790, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character, or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works*, 22 W. R. 396, L. R. 9 Ch. App. 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act, when done regularly, would be within the powers of the company, and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish, L.J., in *Macdougall* v. *Gardiner*, 28 W. R. 118, 1 Ch. D. 13. There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote. This is shown by the case before this board of the *North-West Transportation Co. (Limited)* v. *Beatty*, 36 W. R. 647, 12 App. Cas. 589. In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained. If these elementary considerations are borne in mind the solution of the principal questions arising in these appeals will not present any real difficulty. It was originally maintained by the plaintiffs that article 13 of the bye-laws was beyond the powers of the company or (in other words) that a company formed by letters patent under the Act 27 & 28 Vict. c. 23 was bound to divide all its profits on each occasion and could not by law reserve any portion thereof either to meet contingencies, or for future division, or for any other purpose of a reserve fund. The Chief Justice who tried the action held that the company had no implied power to create a reserve fund, or, "least of all," to invest a reserve fund upon securities; but he thought the question immaterial, as the company had not, in his opinion, set apart or appropriated a reserve fund, and he held that the whole of the sum to the credit of profit and loss ought to be distributed amongst the shareholders. But, in his formal judgment or decree, he allowed the company to deduct and retain "a reasonable sum for contingencies, the amount, in case the parties differed, to be settled by the Chief Justice." In the Court of Appeal it was held that it was within the powers of the company to set apart "a fair and reasonable sum" out of the profits as a reserve fund, and it was the duty of the directors to invest it in a proper manner. But the learned judges seem to have thought that the company had not exercised the power except as to a sum of 44,022 dols., and they held that the balance in question, after deducting that amount, was distributable amongst the shareholders. In their formal judgment the court inserted a saving for the right of the directors and shareholders to appropriate out of future profits "such further reserve fund as the needs of the company may properly require."

Their lordships are not aware of any principle which compels a joint stock company, while a going concern, to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion should be divided and what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the court has no jurisdiction to control or review their decision, or to say what is a "fair" or "reasonable" sum to retain undivided, or what reserve fund may be "properly" required. And it makes no difference

whether the undivided balance is retained to the credit of profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company. These are questions for the shareholders to decide subject to any restrictions or directions contained in the articles of association or bye-laws of the company. If the company may form a reserve fund, or retain a balance of undivided profits, it must (it would seem) have power to invest the moneys so retained. The junior counsel for the respondents contended that the company, in the absence of express power to invest, could employ the money only in its own business. This contention has no support either in principle or authority, and if it were sound the objects for which a reserve fund is needed would in many cases be defeated. The business of this company affords a cogent instance. In order to obtain a Government contract, it may be called upon to make a large deposit or purchase new and expensive plant. It has no power to borrow, and if it had no rest or reserve fund it would have no funds out of which to make the necessary expenditure. Upon what securities, then, may the company invest its undivided profits or reserve fund? It is conceded at the bar that the company is not confined to such investments as trustees are authorized to make. The answer, therefore, can only be that the reserve fund may lawfully be invested on such securities as the directors may select subject to the control of a general meeting. The annual accounts of the company from 1873 onwards are in evidence. They consist of a profit and loss account and a balance-sheet. These accounts were regularly placed before the general meeting. The balance-sheets show under a separate heading the investments from time to time held by the company, consisting for the most part of bank shares and mortgages. It is not for their lordships to judge of the propriety or sufficiency of these investments. It may have been expedient for business reasons for the company to hold an interest in the various Canadian banks. The investments when made reappear in subsequent balance-sheets and seem to have been of a permanent character. There is, therefore, no ground for the suggestion that the directors were using the reserve fund for the purpose of trafficking or speculation in stocks and shares. The investments were wholly or for the most part made in the name of Burland alone. This was, for obvious reasons, unwise and imprudent, but it must have been within the knowledge of the respondent Earle, the late Mr. Cunningham, and the respondent Gillelan, and no complaint or remonstrance seems to have been made until the institution of the present suit. Burland is, of course, bound to account for all the moneys of the company which have come to his hands. Very full accounts are directed by the judgment of the Court of Appeal. There is no appeal from this portion of the judgment, and the accounts and inquiries will be prosecuted accordingly. Mr. Haldane asked for some injunction with respect to these matters, but did not make clear to their lordships the form or extent of the injunction to which he considered that his clients were entitled. The Court of Appeal granted an injunction to restrain the appellants and the company from employing the net profits and earnings of the company already or which may hereafter be earned in the purchase of shares of the capital stocks of banks or other companies, and from using any portion of the net earnings and profits for the purpose of making loans to persons or corporations, and also an injunction to restrain the appellant Burland from investing in his own name, or "personally controlling," any portion of the earnings or moneys of the company, or from dealing with the same otherwise than in accordance with the judgment. For the reasons which have already been given, it is clear that so sweeping an injunction against the directors and the company cannot be maintained. And it is equally clear that the injunction against Burland cannot be maintained. It is not *ultra vires* for the company, if it think fit to do so, to invest in the name of a sole trustee, however imprudent and undesirable such a course may be. Nor can Burland, as shareholder, manager, and president of the company, be restrained from exercising any personal control over any portion of the company's earnings, in which indeed he has the largest interest. If it appeared that under the guise of investing undivided profits or the reserve fund, the directors were, in fact, embarking the moneys of the company in speculative transactions, or otherwise abusing the powers invested in them for the management of the company's business, different considerations would of course arise. But it does not appear to their lordships that the investments of the surplus profits in bank shares or bonds of trading companies really bears that character or was intended to be or was otherwise than a *bonâ fide* exercise of the powers of the company and the directors.

The next matter to which the appeal relates is the sale to the company by Burland of the lithographic plant, &c., of the Burland Lithographic Co. It appears that that company had been carrying on business in Montreal, and, having become insolvent, was wound up under the provisions of the Winding-up Act. Burland was interested in the company as a stockholder and a creditor. At the public sale by the liquidator on the 10th of May, 1892, Burland bid for and purchased all the assets of the company in four lots. The price paid by him for Lot 1 was 21,564 dols., and he shortly afterwards sold the property comprised in that lot to the appellant company for 60,000 dols. The property, together with some other plant purchased from another company, was subsequently sold to a company formed for the purpose at an enhanced price, payable in shares which were distributed as a bonus amongst the shareholders of the company. In these circumstances Burland has been ordered to pay to the company the sum of 38,436 dols., being the amount of the profit realized by him on the resale. Both courts have held that the resale was by Burland's advice and influence, and was made without disclosing to the company the price at which he had purchased. It was also held in the Court of Appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. It appears from the evidence of the respondent Earle, who was then the next largest shareholder to Burland and a director, that he was present at the sale and knew all about the transaction, and from the evidence of Gillelan that he knew what Burland had paid "very shortly after." There was evidence of two witnesses, Reinhold and Monk, that the price to the company was not unfair. But their lordships do not think it necessary to pursue these topics because they are of opinion that the relief prayed by the amended statement of claim and granted in the courts below is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention in his own mind to resell it to the company, but it was an intention which he was at liberty to carry out or abandon at his own will. It may be also that a person of a more refined self-respect and a more generous regard for the company of which he was president would have been disposed to give

the company the benefit of his purchase. But their lordships have not to decide questions of that character. The sole question is whether he was under any legal obligation to do so. Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit The case seems to their lordships to be exactly that put by Lord Cairns, L.C., in *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218. In that case the bill prayed for rescission or, alternatively, for the profit made by Erlanger and his syndicate on the resale to the company. Lord Cairns said: "It may well be that the prevailing idea in their mind was not to retain or work the island but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made perfectly free to do with the island whatever they liked, to use it as they liked, and to sell it how and to whom and for what price they liked. The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the resale of the property to the respondents on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the judges in the courts below." Reference may also be made to the judgments of Pearson, J., 32 W. R. 853, 26 Ch. D. 221, and Cotton and Fry, L.JJ., in *In re Cape Breton Co.*, 33 W. R. 788, 29 Ch. D. 795; affirmed *sub. nom. Cavendish Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652, on the ground that there was no evidence that the director had not disclosed his interest or that the purchase price was above value. To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing.

The question of salaries stands in this wise. Burland's salary as manager was fixed in the year 1879 at 5,000 dols. per annum. This was increased from time to time to 12,000 dols. It was not disputed that he is entitled to draw a salary of that amount, and both courts have so held. But in addition to this fixed salary he has since 1888 drawn a further sum of large amount to which he claims to be entitled under the terms of a resolution of the board of directors of the 24th of April, 1888. The Chief Justice held that the title to this increment as well as to the fixed salary was a question of internal management, and dismissed this part of the respondents' claim. The Court of Appeal thought that the question turned on the true construction of the resolution referred to, and, holding that Burland was not entitled to the increment under the terms of the resolution, ordered him to repay the amount thereof drawn by him since the date of the resolution. The amount which he is directed to repay on this account is 53,000 dols. or thereabouts. Their lordships agree with the Court of Appeal that Burland's right to retain this sum depends on the construction of the resolution, and it was so put by his counsel, Mr. Blake. The resolution is in the following terms: "The manager read letters from Mr. Goodeve and Mr. Ross with reference to their salaries and removal to Ottawa, and, having made explanation of the difficulties arising out of necessity for removal to Ottawa, it was resolved that the manager be requested to make the best arrangement he can with reference to the assistance given the employees, and that an increase of salary be given the staff equal to 5 per cent. on the capital stock held by each of them to meet all difficulties incurred owing to such removal." The first observation which arises on this resolution is that *primâ facie* the amount of stock held by the members of the "staff" bears no relation to the value of their services. But it was not contended that the resolution was *ultra vires*, and Mr. Blake was perhaps right in saying that it must be looked at in the concrete, and that the directors who passed it probably knew the holding of the members of the "staff" and how it would work. But what is the effect and construction of the resolution? Who are the "employers"? Who are the "staff"? Are they the same or a different set of people? And is the manager a member of the "staff" within the meaning of the resolution? This question is one of considerable difficulty. Some, but having regard to Burland's position in the company, not much weight is to be given to the company having acted on this construction for ten years or more. On the whole their lordships are not prepared to differ from the Court of Appeal on this point. In the circumstances, they think that Burland cannot have been intended to be included in the "staff." At best the resolution is ambiguous, and, considering Burland's position, it is not unfair to invoke against him the rule of construction *contra proferentem*. He was the leading man in these transactions, and it rested on him to make it clear that a resolution under which he claims a much larger benefit than anybody else should carry that meaning on the face of it. The same question arises with regard to the appellant J. H. Burland, though in his case the sum in question is not so large. The last-named appellant was, at the date of the resolution, secretary of the company, and there does not seem to be any valid reason why he should not be included in the "staff." There is, however, a further point with regard to J. H. Burland. It appears that he ceased to hold the office of secretary in 1895, when he was appointed vice-president, but, in the resolution appointing him to the latter office, there is no mention of salary. Therefore, say the respondents, he is not entitled as vice-president to any salary or to the increment under the resolution of the 24th of April, 1888. There is evidence that there was a change in the distribution of offices in 1895, and that J. H. Burland continued to do the same class of work as he had done as secretary, that office having been united with that of treasurer. He was allowed by the directors to continue to draw his former salary without any observation until the commencement of the present action, and their lordships think that the inference may fairly be drawn from all the circumstances of the case that he was intended to retain his salary, although there was a shifting of the offices.

The disposal of the costs of the action involves some complication and difficulty of adjustment. By the decree of the Chief Justice, the defendants were ordered to pay to the paintiffs their costs of the action. This decree, however, was superseded by the Court of Appeal. The defendants have now succeeded on all questions relating to the accumulated fund and as to the sale of lithographic plant. On the other hand they have failed as to Burland's salary, and succeeded as to J. H. Burland's salary. It would be almost impossible to do justice by a strict apportionment of the costs of the action up to trial, and to endeavour to do so would lead to certain inconvenience and consequent expense in taxation. On the consideration of all the circumstances, their lordships think that justice will be met by (1) discharging all orders as to costs made in the courts below; (2) directing the plaintiffs to pay to

the defendants two-thirds of their costs of the action up to and including the trial; (3) directing the defendants to pay to the plaintiffs two-thirds of the costs of the plaintiffs' appeal to the Court of Appeal, which rightly succeeded as to Burland, but ought to have failed as to J. H. Burland, and the plaintiffs to pay the defendants two-thirds of the costs of the defendants' appeal to the Court of Appeal, which ought to have succeeded except as to the directions for Burland accounting. The order of the Court of Appeal as to subsequent costs will stand. Their lordships will humbly advise his Majesty that the order of the Court of Appeal be varied in the manner above stated as to substance and costs. The respondents in the principal appeal will pay to the appellants two-thirds of their costs of that appeal, and the appellants will pay to the respondents one-third of their costs of the same appeal. The costs of the cross-appeal will be paid by the appellants therein. In the court below the greater part of the plaintiffs' costs up to trial and the costs of the defendants' appeal were ordered to be paid out of the accumulated fund. If the parties agree, their lordships think it would be a proper case in which to make that order as to all the costs in the courts below, and of the principal appeal to this board.

Solicitors for the appellants, *Ingle, Holmes, & Sons.*

Solicitors for the respondents, *Harrison & Powell.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Jan. 23.

In re SCHMARR. (*a.*)

Practice—Costs—Land compulsorily acquired—Payment into court—Default of vendor—Petition for payment out—Jurisdiction of court—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Supreme Court of Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s* 5.

The mere absence of jurisdiction in the court to confer costs under a particular statute does not amount to an express prohibition by the Legislature so as to deprive the court of the discretion as to costs conferred by section 5 of the Supreme Court of Judicature Act, 1890. *The Lands Clauses Consolidation Act,* 1845, *s.* 80, *provides that the costs of all proceedings for the payment out of court of the purchase-money of lands compulsorily acquired shall be borne by the promoters of the undertaking, except where the payment into court has been rendered necessary by the wilful default of the vendor.*

Held, that the court has jurisdiction to order the costs of a petition for payment out presented by the incumbrancers of a vendor, who had neglected to make a good title, to be paid by the promoters of the undertaking.

This was an appeal by the London County Council against an order of Byrne, J.

Heinrich Schmarr was the owner of certain leasehold houses in Boxiers-court, Tottenham-court-road, which were required by the London County Council for improvements under their statutory powers.

In July, 1899, the council served on Schmarr notice to treat, and the sum of £1,000 was assessed as compensation for the houses. The council paid the money into court under the provisions of section 76 of the Lands Clauses Consolidation Act, 1845, on the ground of the wilful neglect of Schmarr to make out a title to the property. There were certain incumbrances on the interest of Schmarr in the property and on the compensation money. One of the incumbrancers presented a petition for payment of the money out of court and other incumbrancers were made respondents.

Byrne, J., made the order for payment out, and directed the council to pay the costs of the petitioner and of the respondents.

The council appealed.

Section 80 of the Lands Clauses Consolidation Act provides: "In all cases of moneys deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the court to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking, (that is to say) the costs of . . . obtaining the proper orders for . . . the payment out of court of the principal of such moneys . . . and of all proceedings relating thereto."

F. Thompson, for the London County Council.

Sheldon, Combe, Edward Ford, and *Sills,* for the incumbrancers.

VAUGHAN WILLIAMS, L.J.—The appellant has not been able to get over the difficulty based upon section 5 of the Judicature Act of 1890. That section says: "Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Now, it was not, and it could not properly have been, argued but that these costs are covered by that section, unless they are excluded by the words "subject to the express provisions of any statute." In order to make anything of that point, it is really necessary to say that the effect of section 80 is that costs in circumstances like those in the present case—that is, circumstances covered by the exception in section 80—shall not be paid. It does not seem to me that that section does anything of the sort. It is true that under section 80 costs were only given in cases other than those which were excepted by that section. Now comes this Act of Parliament which places those excepted costs, in my mind, in the discretion of the court or judge. We should have no power to interfere with the discretion of Byrne, J., here, and even if we had the power I do not see the slightest reason why we should do so.

STIRLING, L.J.—I am of the same opinion. In this case I assume that the purchase-money has been paid into court by the London County Council under clause 76 of the Lands Clauses Act, by reason of the wilful neglect of Schmarr, the owner and vendor of the property represented by the money, to make out a good title to the lands. The question does not here arise as to any costs payable to Schmarr. What has happened is this, that he, having incumbered the purchase money, and, to some extent, also, the land,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

a petition has been presented by one of those incumbrancers for payment out of the fund which is now in court, and it is said that there is no jurisdiction in the court to make an order with reference to the costs of the petition. Now it was contended that such a case does not fall within section 80 of the Lands Clauses Act, and not having heard the full argument to the contrary, as at present advised I agree with that argument. Section 80 applies to all cases of moneys deposited in the bank where such moneys have been so deposited, amongst other reasons, by reason of the wilful neglect of any party to make a good title to the land acquired, which is this case. I therefore assume that the court has no jurisdiction under section 80 to make an order dealing with the costs of this petition. But then by the Judicature Act of 1890, s. 5, it is enacted that "subject to the Supreme Court of Judicature Acts and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge," and it has been held in *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 450, that this section applies to the costs of a petition presented under any of those old statutes which contain no provision as to payment of costs, in which case it has been held by a long series of decisions in the Court of Chancery that costs could not be awarded by the court to the petitioners. Now in order to escape from that decision it is said that there is an express provision in the Lands Clauses Act which deals with this matter, and that section 80, upon the true construction of it, not only excepts from the operation of that section the case which has occurred here but prohibits the court from giving costs in a case like this. I fail to see that that is so. It seems to me that all that was done by section 80 was to abstain from conferring any jurisdiction in a case of this sort, but it does not amount to a legislative prohibition that in no circumstances are any costs whatever to be given. As regards this particular case it does seem to me that it would occasion very great hardship indeed if the court had no jurisdiction to deal with the costs of such a petition as this, because it is obvious—and this was the view taken by the learned judge in the court below, as I understand—that owing to the state of the title to the purchase-money it would have been necessary for the protection of the London County Council that those funds should come into court. Now although the vendor has been in default, yet there has been no default on the part of any of the incumbrancers that we have heard of. The money cannot be got out of court without the presentation of a petition, and it does seem to me that if the court had no jurisdiction to make an order with respect to such a case as this there was a defect in the authority of the court. I think that section 5 of the Judicature Act, 1890, was meant to apply a remedy to such a defect, and that this case falls entirely within the scope of it, and therefore that Byrne, J., had jurisdiction to make this order with reference to the costs, and we have no power to disturb his order.

COZENS-HARDY, L.J.—I agree. I adopt for the present purpose—although it would not be right finally to decide that—Mr. Thompson's argument that section 80 has no application to this case. Section 80, of course, deals with much more than the costs of the proceedings in court, it includes the costs of the conveyance, the costs of the purchase, and contains a number of other things beyond and outside altogether the costs of the proceedings in court. I assume that he is right, and that the London County Council is not liable to pay anything under and by virtue of section 80, but still, is there or is there not any express provision which prevents the court from possessing the discretion which is in terms given to it by section 5 of the Act of 1890. I think not. I think that the language in the Court of Appeal in *In re Fisher* clearly shows that in a case like this, which is outside section 80 *ex hypothesi*, the court, although it could not give the costs of the reinvestment in land, has full power to give the costs of any proceedings in court, and the only order as to costs which Byrne, J., has made is as to the costs of the proceedings in court, and he does not profess to have given any other. I think even if we had power to interfere with his discretion I should not feel disposed to do it.

Appeal dismissed.

Solicitors, *W. A. Blaxland; Stileman & Neale; G. Coote; Walter Thompson.*

From P. D. & A. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Dec. 16.

THE WINKFIELD (*a*.)

Bailment—Loss of chattel owing to negligence of stranger—Action by bailee—Bailee not liable to bailor.

The bailee of a chattel, who is under no liability in respect thereof to the bailor, can maintain an action against a stranger by whose negligence the chattel has been lost or injured, and he is entitled to recover the full value of the chattel in the one case, or the whole amount of the damage in the other.

The bailee, having recovered the full amount of the damages, must account to the bailor for his proportion thereof; and the wrongdoer, having paid those damages to the bailee, has an answer to any action by the bailor.

Claridge *v.* South Staffordshire Tramway Co., [1892] 1 *Q. B.* 422, 40 *W. R. Dig.* 11, *overruled.*

Appeal from the judgment of the President of the Probate, Divorce, and Admiralty Division (Sir Francis Jeune).

The claim was by the Postmaster-General to recover the value of registered letters and parcels, which were lost while being carried on the steamship *Mexican* from South Africa to England. While on the voyage *The Mexican* came into collision with the steamship *Winkfield*, and was sunk, and her mails were lost. The owners of *The Winkfield* admitted that their vessel was partly to blame for the collision, and obtained a decree limiting their liability on payment into court of £32,514 17s. 10d. The Postmaster-General claimed on the fund on behalf of himself and the Postmasters-General of Cape Colony and Natal for the value of registered letters and parcels carried on board *The Mexican*. This claim, so far as it represented claims made by the owners of the registered letters and parcels, was allowed by the registrar, but it was rejected so far as no such claim by the owners had been made.

Sir Francis Jeune, following the decision in *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 40 W. R. Dig. 11, held that the Postmaster-General could not recover on the ground that he, as bailee, was not liable over to his bailors.

The Postmaster-General appealed.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-Law.

Sir Robert Finlay, A.G., and *R. B. D. Acland*, for the Postmaster-General.—In *Claridge* v. *South Staffordshire Tramway Co.*, it was held that the bailee of a chattel, being under no liability to his bailor for injury to the chattel bailed, could not recover against the person by whose negligence the chattel was injured. That decision was wrong, and ought to be overruled. In *Meux* v. *Great Eastern Railway Co.*, 43 W. R. 680, [1895] 2 Q. B. 387, A. L. Smith, L.J., said that that case might at some future time require further consideration. The present case is really an appeal against the decision in *Claridge's case*. As against a wrongdoer the person in possession of a chattel has a right to recover either the chattel itself or damages for its loss. A bailee in possession owes a duty to the bailor to preserve the chattel bailed, and it is his duty to take proceedings to recover it. Why should he not also have an action to recover the value of the chattel lost or damages for injury to it? Legal proceedings are merely a mode of regaining possession of the chattel or recovering its value. The doctrine that a bailee can only recover if he is chargeable over to his bailor is unsound in principle. As between bailor and bailee the party suing can only recover the value of his interest. As against a stranger the bailee can recover the chattel or its full value, possession giving him the right to sue. This rule avoids multiplicity of actions. *Claridge's case* was founded upon a misconception of what was said in *Heydon and Smith's case*, 13 Rep. 67, at p. 69. The words used there, "because that he is chargeable over," do not mean that the bailee can only sue when he is liable over to his bailor. They mean that the bailee was the only person who could sue, and that when he recovered he was liable to account to the bailor. The wrongdoer, having paid full damages, was not liable to the bailor.

They referred to Holmes' Lectures on the Common Law, pp. 166, 168, 178, 180; Pollock and Maitland's History of the Common Law, vol. 2, pp. 169. 170; *Sutton* v. *Buck*, 2 Taunt. 302; *Martini* v. *Coles*, 1 M. & S. 140; *Lyle* v. *Barker*, 5 Binn. U. S. Rep. 457; *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Burton* v. *Hughes*, 2 Bing. 173; *Moore* v. *Robinson* 2 B. & Ad. 817; *Nicolls* v. *Bastard*, 2 Cr. M. & R. 659; *White* v. *Webb*, 15 Conn. Rep. 302; *Brierly* v. *Kendall*, 17 Q. B. 937; *Jeffries* v. *Great Western Railway Co.*, 4 W. R. 201, 5 E. & B. 802; *Waters* v. *Monarch Life Assurance Co.*, 4 W. R. 245, 5 E. & B. 870; *London and North-Western Railway Co.* v. *Glyn*, 7 W. R. 238, 1 E. & E. 652; *Turner* v. *Hardcastle*, 11 C. B. N. S. 683, 10 W. R. C. L. Dig. 8; *Swire* v. *Leach*, 13 W. R. 385, 18 C. B. N. S. 479.

Pickford, K.C., and *Lauriston Batten*, for other claimants on the fund.—The Postmaster was not in possession of the letters and parcels, and therefore cannot claim. They were in the possession of the owners of *The Mexican* at the time of the loss. The Postmaster-General was merely a forwarding agent. He cannot therefore claim. Secondly, the liability of the bailee to the bailor is the test of the right of the bailee to recover against a wrongdoer. There are many statements in the Year Books which put the foundation of the right of action on the liability of the bailee to account to the bailor for the chattel bailed—that is, to return the chattel to the bailor: see 11 Hen. 4, pp. 23, 24, pl. 46; 9 Edw. 4, p. 34, pl. 9; 3 Hen. 7, p. 4, pl. 16; 20 Hen. 7, p. 1, pl. 1; 21 Hen. 7, p. 15, pl. 23; see also per Lord Ellenborough in *Rooth* v. *Wilson*. In an action of trespass the measure of damages is the bailee's loss. It might be that in cases of conversion, where the wrongdoer has taken the chattel out of the possession of the bailee, the latter may recover the full value. There are *dicta* in the cases to that effect. That does not apply to the case of an injury to a chattel in the possession of the bailee. In such a case there is no authority to show that a bailee can recover damages for a loss which he has not sustained. None of the cases cited are authorities to that effect. Payment of the full amount of the damages to the bailee would be no answer to an action by the bailor against the wrongdoer. The wrongdoer may set up the *jus tertii*, or give in evidence the interest of the bailor, in mitigation of damages: *Dockwray* v. *Dickenson*, Skin. 640; *Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279; Mayne on Damages (5th ed.), p. 395. The decision in *Claridge's case* was therefore right.

Sir Robert Finlay, A.G., replied.

Scrutton, K.C., for the owners of *The Mexican* and *C. Head*, for the owners of *The Winkfield*, took no part in the argument.

Cur. adv. vult.

Dec. 16.—COLLINS, M.R., read the following judgment: This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of *The Winkfield*. The question arises out of a collision which occurred on the 5th of April, 1900, between the steamship *Mexican* and the steamship *Winkfield*, and which resulted in the loss of the former with a portion of the mails which she was carrying at the time. The owners of *The Winkfield* under a decree limiting liability to £32,514 17s. 10d. paid that amount into court, and the claim in question was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal to recover out of that sum the value of letters, parcels, &c., in his custody as bailee and lost on board *The Mexican*. The case was dealt with by all parties in the court below as a claim by a bailee who was under no liability to his bailor for the loss in question, as to which it was admitted that the authority of *Claridge* v. *South Staffordshire Tramway Co.* was conclusive, and the President accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's case* was well decided. I emphasize this because it disposes of a point which was faintly suggested by the respondents, and which, if good, would distinguish *Claridge's case*—namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt on the motion—namely, that it is covered by *Claridge's case*. I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state I am of opinion that *Claridge's case* was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall show presently, a long series of authorities establishes this

in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor. I think this position is well established in our law, although it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and, further, I think it can be shown that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases—namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory* v. *Delamirie*, 1 Stra. 504, not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries* v. *Great Western Railway Co.*, 5 E. & B. 802, at p. 806, "that the person who has possession has the property." In the same case he says (at p. 805): "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is a title. The law is so stated by the very learned annotator in his note to *Wilbraham* v. *Snow*, 2 Wms. Saund. 87." Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature of limitation of the possessor's right, and unless it is competent for him to do so the question of the possessor's relations to, or liability towards, the true owner cannot come into the discussion at all; and therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a *jus tertii* under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter. I think this view is borne out by authority; for instance, in *Burton* v. *Hughes*, 2 Bing. 173, the plaintiff, who had borrowed furniture from Kitchen, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it without giving in evidence the written agreement under which he held it. The point made for the defendant was that "the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped." The argument on the other side was that "the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." Best, C.J., in delivering judgment, says: "If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to (*Sutton* v. *Buck*) confirms what I had esteemed to be the law upon the subject—namely, that a simple bailee has a sufficient interest to sue in trover." By holding, therefore, that the agreement defining the conditions of the plaintiff's interest was immaterial the court in effect decided that the right of the bailee in possession to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton* v. *Buck*, on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for non-compliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir James Mansfield, C.J., had non-suited the plaintiff, on the ground that the transfer was defective without registration. On motion the non-suit was set aside, Sir James Mansfield being a member of the court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that Chambre, J., reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did, a contention which was rejected by the court. In *Swire* v. *Leach*, a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong court, consisting of Erle, C.J., and Williams and Keating, JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognized as well established: see also *Turner* v. *Hardcastle*, a considered judgment of the Court of Common Pleas, which included Willes, J., who had not been a party to *Swire* v. *Leach*, and where the bailee's right to recover full damages and his obligation to account to the bailor is again affirmed. The ground of the decision in *Claridge's case* was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think this position is untenable, it is necessary to follow it out a little further.

There is no doubt that the reason given in *Heydon and Smith's case*, 13 Rep., at p. 69—and itself drawn from the Year Books—has been repeated in many subsequent cases. The words are these: "Clearly, the bailee, or he who hath a special property, shall

have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over." It is now established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other. Holmes, in his admirable Lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167: "We read in Beaumanoir (A.D. 1283) that, if a hired thing is stolen, the suit belongs to the bailee, because he is answerable to the person from whom he hired. At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner." And again at p. 170: "The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue." This inversion, as he points out, is traceable through the Year Books, and has survived into modern times, though, as he shows, it has not been acted upon. Pollock and Maitland's History of English Law, vol. 2, p. 170, puts the position thus: "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable, and was liable because he had the action." It may be that in early times the obligation of the bailee to the bailor was absolute—that is to say, he was an insurer. But long after the decision of *Coggs* v. *Bernard*, 2 Ld. Raym. 909, which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the Year Books may be explained, as Holmes, explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our courts. Upon this, before the decision in *Claridge's case*, there was a strong body of opinion in text-books, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: see Mayne on Damages (4th ed.), p. 381, and cases there cited; Sedgwick on Damages (7th ed.), vol. 1, p. 61, note (*a*); Story on Bailments (9th ed.), s. 352; Kent's Commentaries (12th ed.), vol. 2, p. 568, note (*e*); Pollock on Torts (6th ed.), pp. 354, 355; Addison on Torts (5th ed.), p. 482; and as I have already pointed out, Williams, J., the editor of Williams' Saunders, was a party to the decision of *Swire* v. *Leach*. The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted: see them referred to in the passages cited, and in particular see *Ullman* v. *Barnard*, 73 Mass. Rep. 554; *Parish* v. *Wheeler*, 22 New York App. 494; and *White* v. *Webb*. The case of *Rooth* v. *Wilson*, is a clear authority that the right of the bailee in possession to recover against a wrong-doer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough, C.J., and Bayley, Abbott, and Holroyd, JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. Abbott, J., says shortly: "I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action"; and Bayley, J., points out that case is a possessory action. But Lord Ellenborough undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt was his personal view, but it was not the decision of the court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shown by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor: see Com. Dig., Trespass B 4, citing 2 Rolle's Abr. 551, l. 31, 569, l. 22; Story on Bailments (9th ed.), s. 352, and the numerous authorities there cited. The liability of the bailee to account is also well established—see the passage from Lord Coke, and the cases cited in the earlier part of this judgment—and therefore it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's case*. I am aware that in two able text-books—Beven's Negligence in Law (2nd ed.), pp. 885-887, and Clerk & Lindsell on Torts (2nd ed.), p. 237—the decision in *Claridge's case* is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are

the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's case* was treated as open to question by the late Master of the Rolls in *Meux* v. *Great Eastern Railway Co.*, and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence. I think the appeal must be allowed.

STIRLING and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors, *Sir Robert Hunter; Ballantyne & Son; Botterell & Roche; Thomas Cooper & Co.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Dec. 4.

In re GRIFFIN.
GRIFFIN *v.* GRIFFIN. (*a.*)

Friendly society—Policy—Assignment—Policy under £50—Nomination—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 15 (3).

There is nothing in the Friendly Societies Act, 1875, *to prevent a policy issued by a society constituted under the Friendly Societies Acts*, 1875 *to* 1895, *having the ordinary incidents of property, including assignability; and a legal assignment of such a policy can be made otherwise than by nominating some person to receive the money payable under it as provided by the Act.*

Where, therefore, no nomination has been made under the Act, the assignee of a deceased member is entitled to receive the policy moneys as against the legal personal representative.

In re Redman, *ante* p. 19, [1901] 2 *Ch.* 471, *and* Caddick *v.* Highton, 47 *W. R.* 668, *overruled.*

This was an appeal from a decision of Joyce, J.

The question raised is one of great importance to friendly societies and their members—viz., whether a policy of assurance effected by a member on his own life is legally assignable by him in any other manner than by a "nomination," under the provisions of the Friendly Societies Acts.

Joyce, J., without expressing any opinion of his own, but following the previous decision of Kekewich, J., in *In re Redman. ante* p. 19, [1901] 2 Ch. 471, in which that learned judge followed a prior decision of Phillimore, J., in *Caddick* v. *Highton*, 47 W. R. 668, held that such a policy is not assignable otherwise than by means of nomination.

In the present case a deceased member of the Royal Liver Friendly Society, which is governed by the Friendly Societies Act of 1875, had in his lifetime assigned his policy, which insured the sum of £30, to the plaintiff, who claimed payment of the amount, which was also claimed by the widow of the deceased, who is his administratrix. The deceased had not made any "nomination" under the Act.

The plaintiff applied for the appointment of a receiver of the policy money.

Joyce, J., refused the application, on the ground already stated.

The plaintiff appealed.

By section 15 of the Friendly Societies Act, 1875: "(3) A member of a society (other than a benevolent society or working men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society, to whom any moneys payable by the society on the death of such member, not exceeding £50, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." "(4) If any member of a society, entitled from the funds thereof to a sum not exceeding £50, dies intestate and without having made any nomination under this Act which remains unrevoked at his death, such sum shall be payable, without letters of administration, to the person who appears to a majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same."

P. O. Lawrence, K.C., and *Austen Cartmell*, for the appellant.—*Primâ facie* this policy is part of the property of the deceased member. It, therefore, is subject to the ordinary incidents of property, such as assignability, and there is nothing either express or implied either in the statute or in the rules of the society to deprive it of those incidents.

They referred to *In re Redman*; *Caddick* v. *Highton*; *Bennett* v. *Slater*. 47 W. R. 82, [1899] 1 Q. B. 45; and *In re Turcan*, 37 W. R. 70, 40 Ch. D. 5.

Hughes, K.C., and *Gover*, for the administratrix.—This policy is not property in the fullest sense of the term, and it appears from the statute that the Legislature intended that it should only be capable of being dealt with in a particular way.

Younger, K.C., and *Romer*, for the friendly society.

VAUGHAN WILLIAMS, L.J.—In this case the question really raised is whether a policy issued by a friendly society governed by the Act of 1875 is or is not assignable. I have come to the conclusion that it is assignable. Taking the case of a policy for a sum of money which is payable to a member who takes out the policy, or his personal representative, by virtue of the contract entered into, no one will deny for a moment that such a sum of money, *primâ facie*, is part of the property of the member, or the estate of the deceased member as the case may be. So we have to find something in the Act of 1875, or in the rules of the society which prevents this particular property having this ordinary incident of property.

Now it is admitted on both sides that there is nothing whatsoever express either in the Act of Parliament or the rules which prevents the moneys payable under this policy, or the policy itself, from being assignable. If, therefore, the policy is not assignable it must be from some implication arising under the statute. I do not propose to go through all the legislation upon the subject of friendly societies prior to 1875, or to deal with the arguments which were put forward, based upon the presence in these Acts of Parliament of words and phrases which seem to recognize the rights of persons, not members of the society, claiming through members of the society. I think it is more satisfactory to decide this case upon the interpretation of the Act of 1875. Really there has been brought forward on this case but one section of the Act of 1875 from which it could be argued that the statute takes away by implication the power to assign a policy issued by the society, and that is section 15, sub-section 3. [His lordship read the sub-section.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and continued:] It is said we ought to draw the inference from this provision that the statute intended that the power of nomination thus given by sub-section 3 of section 15 should be the only mode of alienation of moneys under a policy issued by a friendly society governed by this statute. I think we are not bound to draw any such conclusion and that we ought not to draw it. I would point out in the first place that apparently sub-section 3 is a section which is intended not to give so much a power of alienation, but to give a testamentary power. It is a sub-section which enables the nominator to nominate a person to whom the moneys arising under the policy shall be paid at his decease. That power is by the express terms of the Act of Parliament a revocable power, but it is revocable only in a way provided by the statute—that is to say, by delivering a particular notice to the society. But one looks to see why it is suggested that this sub-section 3 of section 15 takes away the power of alienation. It is said that there is an express provision in this Act of Parliament that the money shall be paid in accordance with this nomination unless the nomination has been revoked; and then it is said that if that is so there might be outside and beside the nomination an assignment, possibly an assignment for value, and that having regard to the imperative words of this sub-section the money shall be paid in accordance with the nomination unless it it is revoked: this might put the nominator in a position whereby he could revoke a previous assignment for value, or could defeat the claim of such an assignee. I do not know how that might be. It is said, I know, it is not likely that the Legislature meant to put the nominator or his assignee for value in such a position, and that the way to avoid that is to read sub-section 3 as providing one express mode of alienation, and excluding all others; but as I have already said, this question as to what might be the position of an assignee for value as against a nominee does not really arise in this case and we have not got to decide it. As far as my decision is concerned I must be taken to decide that, whether or not that difficulty, or that hardship, or that strange position would arise, I cannot find sufficient in the Act of Parliament to make me say that by necessary implication the ordinary incident of property is taken away. I think that the policy of insurance and the moneys payable under it are assignable. In the particular case we have before us, the policy was only a £30 policy and there was no nomination; and for that reason I decline to go into the question of what might be the state of things if the policy had been for a larger sum than £50, and there had been a nomination as to £50 and a surplus beyond. We have not got to decide that question. All we have to decide here to-day is whether or not in the case of a policy for £30, there being no nomination, an assignment executed by the member of the society, who took out the policy in his lifetime, is effective to transfer to the assign the right to this £30, or whether this becomes part of his general estate; and I decide it is effective to transfer to the assign that policy and the moneys under it.

ROMER, L.J.—I agree. As my lord has pointed out, the policy moneys in question in this application are *primâ facie* assignable. To make them non-assignable you must find some legislative enactment to that effect either express or arising by necessary implication. I can only say, after considering the various Acts to which our attention has been called, that I can find no such legislative enactment. The case is really governed by the Act of 1875, and far from finding any express enactment in that Act prohibiting assignment, there are expressions used in that Act and provisions in it which seem to me to militate against the idea that assignment in this case was not recognized. There is, for example, the definition in section 4 of the Act. That section defines persons claiming through a member, and it defines the expression in this way; it says it includes the heirs, executors, administrators, and assigns of a member, and also his nominees where nomination is allowed. Putting together in that definition both the assigns and the nominees seems to my mind significant. And you find that section followed up by several important sections where the expression I have referred to is used. For example, section 21, sub-section 2, which gives a right of suing the friendly society by a member or person claiming through a member. In legal proceedings, it says, which may be brought under this Act by a member or person claiming through a member the society may be sued in a particular way. Now the chief section relied on by the respondents in this case as supporting their contention is section 15. To my mind that section may one of these days give rise to questions of some difficulty which fortunately do not arise on this appeal, and I should like to keep my mind free to decide those questions when they come before us. I mean such as might arise when you find persons nominated under that section, by a member to receive moneys payable on his death, when difficulties may arise as between those nominees and the express assigns of the person who effected the policy. Also questions of this kind, as to whether as between the member and his nominee there might not be provisions enforceable on behalf of some persons which had made the nominee a trustee. I am not indicating my opin on one way or the other. I only say that these questions and similar questions may arise and may have to be considered hereafter. In the case before us there are no nominations, the member has not nominated any person to receive these policy moneys, so that the question is this: Is there anything in section 15 which would tend to show—or show by necessary implication, for there is nothing expressed—that in a case where there are no nominees under the section an assign for value or an assign from a member in his lifetime should have no legal position and could not have his rights in any way recognized or enforced. I am bound to say I cannot find in this section any such necessary implication. It appears to me that even giving the fullest rights to the nominees it does not follow that in a case where there are no nominees there should not be a right to assignment and that the assign should have no rights whatever. The mere fact that nominees have been provided for by the 15th section does not, in my opinion, justify the argument or the conclusion that the Legislature had intended that no other persons claiming through a member should be recognized but these nominees. It may well be that when such questions as I have before referred to come to be answered it may be held that these nominees are really only in the nature of assigns, assigns claiming under what is equivalent to an assignment which is revocable in a particular way, or that they are in the position only of assigns whose position in the absence of revocation is conclusive as between them and the society. It may well be that that is the proper view to take. I express no opinion upon it, for, as I have said, it does not arise here. But I can find nothing in the Act of 1875 that will justify the court, even assuming that the nominees are in the position of persons who have titles for all purposes, which negative when they do exist the rights of the assignees for value—even assuming that I can find

nothing that justifies the inference that when there are no such nominees you can have no other assignees at all.

I should like to say, further, with reference to the judgment of Phillimore, J., to which my attention has been called, that I cannot see anything in the previous Act of 1867 which justifies the conclusion that Phillimore, J., came to in that case. All that the Policies of Assurance Act, 1867, did, was this, to give the assigns of most policies the right to sue on those policies at law. It excepted the policies of such a class as we have to consider on this appeal, but it appears to me that might well have been because if the last-mentioned policies were not excepted it might have justified the argument that these policies could have been sued on in the ordinary way without being hampered or hindered in any way in the ordinary course of law, whereas we know from the course of legislation on the subject of friendly societies that provisions more or less of a stringent character have been made to settle disputes before special tribunals, and I need not say now that those provisions compel dispositions to be settled in a special way and only render them enforceable in special cases. But it may well be that the Legislature in passing the Act of 1867 did not want to throw any doubt on the efficacy of those provisions in the case of policies of the kind we have to consider in this appeal. Lastly, I cannot find anything in the case of *Bennett* v. *Slater* which would justify us in allowing this contention of the respondents on this appeal, and for those reasons I agree in thinking that the appeal should be allowed.

COZENS-HARDY, L.J.—I agree. This is really an appeal from the decision of Phillimore, J., in *Caddick* v. *Highton*. He then decided in terms that policies of this nature cannot be assigned, they can only be nominated; and unless and in so far as they are nominated they vest both legally and beneficially in the legal personal representative of the member. In order to establish that it is important to remember how to approach an Act like the Friendly Societies Act, 1875; it is not necessary to find any clause enabling assignments to be made. You must find if the view of Phillimore, J., is correct, some words preventing the owner of the property from disposing of that which does not belong to anyone else. I do not find any such words in this case. I will not go through the section my learned brothers have gone through, but I mention section 18, sub-section 1, which seems to me strong to show as to this Act that the owner of that policy can deal with it as part of his property. It provides a mode in which the funds of the society may be invested, and the Legislature said in effect that the funds of this society may be lent to members on personal security with two satisfactory sureties to the amount of half the value of the policy, and you may deduct the amount due on the loan from the policy when it matures. That seems to me consistent, and only consistent with a view that this is part of the property of the assured. Then reliance is placed on *Bennett* v. *Slater*; but that case when carefully considered seems to me to be a strong authority in support of the view that this is property subject to assignment, for the Lords Justices there held that although so long as there was nomination in force and unrevoked the will of the assured had no operation on the policy, yet if it had been revoked the policy would have formed part of his estate and been subject to his disposition by will. We are not met here with the more difficult problem of an assignment for value followed by nomination. I desire, as my learned brothers have, to keep that an open point. Here, where there was no nomination, and we have nothing but the policy, the assignment, and the death of the assured, I have no doubt the assignment was perfectly good.

Appeal allowed.

Solicitors, *Pritchard, Englefield, & Co.*, for *J. J. Lambert*, Manchester; *R. B. Wheatley, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester; *Rowcliffes, Rawle, & Co.*, for *Bremner, Sons, & Corlett*, Liverpool.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 6.

In re HERBERT REEVES & CO. (*a.*)

Practice—Appeal—Summons for delivery of bill of costs and taxation—Order on summons—Final order.

Any order which disposes of the matter in dispute between parties is a final order, even though inquiries may have to be carried out after the order.

Accordingly held, that an order dismissing an originating summons for delivery of a bill of costs and taxation thereof was a final order, and that an appeal from such order ought to be prosecuted as a final and not an interlocutory appeal.

This was an appeal from Kekewich, J.

On the 10th of April an originating summons was taken out by Mr. C. E. Bessington asking that Messrs. Herbert Reeves & Co., solicitors, should deliver a bill of costs of all matters wherein they had acted for him, and for taxation of such bill when delivered.

On the 7th of August, 1901, Kekewich, J., made an order dismissing the summons with costs.

The applicant obtained leave to appeal, if leave was necessary, and gave a four-day notice of appeal on the footing that this was an interlocutory order.

On the appeal coming on for hearing the preliminary objection was taken that the order appealed from was a final order, and that fourteen days' notice of appeal ought to have been given and the appeal ought to have gone into the general list.

At the date of the hearing the time for giving notice of the appeal as from a final order had expired.

S. O. Buckmaster, for the appellant.

P. O. Lawrence, K.C., and *B. A. Hall*, for the respondents.—The order appealed from is really a final order, consequently the notice of appeal is irregular: *Salaman* v. *Warner*, 39 W. R. 547, [1891] 1 Q. B. 734; *In re Debenham and Walker*, 43 W. R. 699, [1895] 2 Ch. 430; and *Smith* v. *Davies*, 31 Ch. D. 595, 34 W. R. Dig. 142.

S. O. Buckmaster.—The order appealed from is not a final one. It does not determine the rights of the parties, and is only a step in the procedure for determining those rights: *In re Oddy*, 43 W. R. 363, [1895] 1 Q. B. 392.

VAUGHAN WILLIAMS, L.J.—This is an appeal from an order of Kekewich, J., dismissing a summons taken out for delivery of a bill of costs by solicitors and for taxation of that bill. A preliminary objection has been taken that this is really a final and not an interlocutory appeal. It is an objection which, if nothing is done to correct the mistake, is fatal to this appeal. I am of opinion that it is a good objection. In my opinion the order made upon this summons is a final order. The question raised on the summons is

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

whether there is a right to delivery of the bill and to taxation, and that question is finally decided one way or the other whatever order is made upon the summons. If the order is, as the order of Kekewich, J., is, that the summons stands dismissed, there is once and for all a final determination that the client has no right to relief under the Solicitors Acts in the nature of delivery of a bill and taxation. If, on the other hand, an order is made for delivery of a bill and taxation, that finally disposes of the matter on the summons on the other possibility; it is then decided once and for all that the client is, in the circumstances before the court, entitled to an order for delivery and taxation. It is suggested that in the last alternative I have put the order is not final, because after the order there will be taxation and a certificate and possibly a review of the taxation. But it is really plain that the mere fact that there may be inquiries to be carried out after the order or after the judgment has been delivered does not prevent the order or the judgment from being a final order or a final judgment. After you have got an order for winding up a company, there are obviously an enormous quantity of questions which may be raised, and, as pointed out in the course of the argument, after you get an order in a redemption action there are inquiries which will have to be proceeded with after the order. In these circumstances it seems to me that the objection raised that this is a final and not an interlocutory order is a good objection. I can quite understand that people may regard a summons for an order for delivery of a bill of costs and taxation as a summons the ultimate end of which is not to ascertain whether or not there is a liability to deliver a bill and have it taxed, but as a summons initiated for the purpose of ascertaining the quantum of money which the client is liable to pay to the solicitor, or which the solicitor may have to pay to the client. The proceeding may be so regarded, but it is not so here, and the form of the proceedings show that as things stand one must regard the object of the summons as being to ascertain whether or not there was a liability to deliver a bill of costs and have it taxed. It is said that it is an inconvenient thing that questions of this sort as to the liability to deliver bills of costs and taxation should stand over for the length of time for which they will have to stand over if the appeals come into the final list before the question can be determined. If that is so it can be got over by an alteration of the rules; but we sitting here cannot deal with the matter otherwise than according to the existing practice.

Romer, L.J.—I agree, and need only add this: When you have, as here, not an application in an action, but an original proceeding, an originating summons, in order to see whether an order made on that proceeding is final or not, you ought to consider what was the object of the proceeding as a matter of substance, and the test whether an order is a final order or not is to be arrived at by considering as a matter of substance what was the matter in dispute, what was it that gave rise to the litigation in which the order is to be made. Applying that test here, what was the matter in dispute and to be decided by this order? The matter in dispute was simply this: the applicant said that the respondents were his solicitors and ought to give him a bill of costs and that that bill ought to be taxed. That was in substance the matter in dispute between the parties. What was the order made. It was an order dismissing the application. If the order had been the other way, if an order had been made in favour of the applicant, it would equally have disposed of the matter in dispute. That being so, the order would be a final order within the definition in *Salaman* v. *Warner*, and following that, I am of opinion that this was a final order.

Cozens-Hardy, L.J.—I agree. I think the order is none the less final because it does not settle the exact amount due between the parties.

[Subsequently the Court granted an extension of time for giving notice of appeal, and directed that the appeal should be transferred into the general list and come on for hearing after interlocutory appeals the following Wednesday. It came on accordingly on the 13th and 14th of November and was compromised.]

Solicitors, *Godfrey & Webb; Herbert Reeves & Co.*

High Court of Justice.

Chan. Div. } Jan. 23.
Byrne, J. }

In re The London and Globe Finance Co. (Limited). (*a*.)

Company—Winding up—Public examination—Discretion of registrar as to allowing question—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63) *s.* 8.

The discretionary power of allowing a question to be put at a public examination given to the court by section 8, *sub-section* 7, *of the Companies (Winding-up) Act.* 1890, *is in no way limited by the other provisions of that section, but is a discretion that must be judicially and carefully exercised under all the circumstances of each particular case.*

Motion for an order that Mr. Whitaker Wright, who had taken part in the promotion and formation of the above company, might be ordered to answer certain questions which the registrar had refused to allow to be put to him at his public examination. These questions had reference (as was conceded at the bar although not proved) to an alleged agreement which was the subject of pending litigation between the company and persons who were not before the court, and the official receiver had objected to their being put by certain shareholders who were not parties to that litigation; this objection was upheld by the registrar.

T. Terrell, K.C., and *W. Stewart*, for the shareholders in question, argued (1) that the power of the registrar under section 8, sub-section 7, was confined to disallowing questions which did not fall within sub-section 3, and (2) that if the registrar had in fact a wider discretion such discretion had been wrongly exercised.

Gore Browne, for the official receiver.

Muir Mackenzie, for Mr. Whitaker Wright.

Byrne, J., held that the discretion given by sub-section 7 of section 8 to the registrar of refusing to allow a question to be put was not in any way limited by the preceding sub-sections of section 8, but that it was a discretion that must be judicially and carefully exercised under all the circumstances of the case for the benefit of all parties interested. Without saying that because litigation was pending a question which had reference to such litigation must not be put, he thought that in the present case the registrar had properly exercised the discretion given to him by the

(*a*.) Reported by L. W. Byrne, Esq., Barrister-at-Law.

Act. The questions were in the present case intended to be put, not by, but in the interests of persons against whom the company had commenced proceedings, and had been objected to by the official receiver on the ground that the interests of the company and its creditors and contributories might be prejudiced; the registrar in the judicial exercise of his discretion had come to the conclusion that the official receiver's objection was well founded, and with this view he agreed. The application would be dismissed with costs.

Solicitors, *George Terrell & Terrell; Burn & Berridge; Hollams & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Dec. 16.

WAKEFIELD CORPORATION *v.* COOKE AND OTHERS. (*a.*)

Highway—Repair—Local government—Recovery of expenses—Wakefield Corporation Act, 1887, *ss.* 28-31—*Private Street Works Act,* 1892, *ss.* 6, 8.

A finding of magistrates that a certain street is a highway repairable by the inhabitants at large is not conclusive, and does not operate as a judgment in rem *in any subsequent proceedings taken by the local authority respecting the same street against different parties.*

Reg. *v.* Hutchings, 29 *W. R.* 724, 6 *Q. B. D.* 300, *followed.*

Case stated.

By the Wakefield Corporation Act of 1887 the corporation had the power to do certain works, and they charged, under section 29 of the Act, a portion of the expenses on certain frontagers, alleging that Hedge-lane was a private street.

At the hearing before the magistrates the objectors alleged that, the magistrates having previously held that Hedge-lane was a highway repairable by the inhabitants at large, the matter was *res judicata.*

The magistrates dismissed the application on this ground, but stated a case.

Macmorran, K.C., and *Senior,* for the corporation.—This case is similar to *Reg.* v. *Hutchings,* 29 W. R. 724, 6 Q. B. D. 300, and as the partes are different here the justices were wrong in not hearing the application.

Danckwerts, K.C., Glen, and *Compston,* for the respondents.—*Reg.* v. *Hutchings* does not apply here; the case turns upon the provisions of the Private Street Works Act, 1892, and the provisions of that Act give power to the justices to finally determine all objections.

The judgment of THE COURT (Lord ALVERSTONE, L.C.J., and DARLING and CHANNELL, JJ.) was delivered by

Lord ALVERSTONE, L.C.J.—This is an appeal from the decision of the magistrates of the city of Wakefield deciding that certain proceedings under the Wakefield Corporation Act, 1887, for providing for the expense of paving, metalling, and channelling a certain street of the city were invalid on the ground that in similar proceedings taken in the year 1898 it had been decided by the justices having jurisdiction in the matter that the street was a highway repairable by the inhabitants at large. The matter arises under sections 29 and 30 of the Wakefield Corporation Act, 1887, which contains provisions analogous to those in section 150 of the Public Health Act, 1875, and practically identical with sections 6 to 8 of the Private Streets Works Act, 1892. The point raised for our decision is whether a finding of the magistrates upon a proceeding properly taken under section 30 of the Act of 1887 to the effect that a street is a highway repairable by the inhabitants at large is conclusive in any subsequent proceedings for apportionment whoever may be the parties to the subsequent proceedings. In the case of *Reg.* v. *Hutchings* it was decided by the Court of Appeal that an adjudication by justices upon a summons by them to recover the amount of an apportionment made under section 150 of the Public Health Act, that a street was a highway repairable by the inhabitants at large, did not prevent the local authority from subsequently claiming the amount of apportionment in respect of the same street under proceedings subsequently taken. It was, however, contended before us that the provisions of section 31 of the Act of 1887 and the corresponding provisions of section 8 of the Private Street Works Act, 1892, had altered the law in this respect, that proceedings under these sections were of the nature of proceedings *in rem,* or that at least they were conclusive and final as between the corporation and the persons who either themselves or their predecessors in title had been parties to the earlier proceedings. This contention was based upon the following among other grounds: That under sub-section *b* of section 30 the owner of premises shown in a provisional apportionment liable to be charged could object, among other grounds, that the street in question was a highway repairable by the inhabitants at large, and that under sub-section 1 of section 31 a court of summary jurisdiction was to appoint a time for the determining the matter of all objections, and might proceed to hear and determine the matter of all such objections in the same manner as if the corporation were proceeding summarily against the objectors to enforce payment; and, further, that by sub-section 2 of the same section it was provided that no objection which could be made under this Act shall be otherwise made or allowed in any court, proceeding, or manner whatsoever. It was argued that these provisions show that any objection which could be raised by objectors was to be determined once and for all, not only as regards the apportionment then under consideration, but for the purposes of any future proceeding under the same section then under consideration. The consequences of such a view are very far-reaching. For example, although some only of the owners liable to be charged may have taken objections, the finding would be held binding upon the owners or persons entitled to object, who were no parties to the proceedings. If the justices had power to determine finally and against all parties that a street was a highway repairable by the inhabitants at large, they must have power to determine that it was not, and in that case a serious injury might be inflicted on other owners who might be in a position to produce quite different evidence from that on which the decision proceeded; still the consequences of giving effect to that contention would not be sufficient to prevent us from so holding if the language of the section, fairly read, leads to that conclusion. But, in our opinion, the provisions were enacted with an entirely different view, and not, as suggested, with the object of altering the law as laid down in the case of *Reg.* v. *Hutchings.* We think that the objects of sections 30 and 31 were to enable objectors to raise objections to the apportionment before any expense had been incurred, and also

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

to enable preliminary points to be determined at an early stage which could not be raised upon a summons to recover the apportioned amount. Under section 150 of the Public Health Act the urban authorities were compelled, before they could take proceedings to recover the amount, to execute the work. The section in question, section 30 of the Act of 1887, allows owners to raise questions as to the character of the proposed works, the propriety of the estimate, the sufficiency of the plans, and the matters which, if they are to be raised at all, it is convenient should be raised before the works are executed. We think that the real jurisdiction given to justices is that contained in the concluding words of sub-section 1 of section 31, "quash in whole or in part or may amend the resolution, plans, estimates, and provisional apportionments," and that the earlier words, "appoint a time for determining the matter of all such objections," are only intended to enable the justices to determine the questions which, as provided by section 30, may be raised by the persons entitled to object. This determination enables the justices to quash, or amend, or confirm the resolution, plans, estimates, and provisional apportionments. In this view the reasoning of the Court of Appeal in *Reg.* v. *Hutchings* applies to this case, and we think that the objection taken on behalf of the objectors that there has been a previous determination that the street in question was a highway repairable by the inhabitants of the city at large was no bar to proceedings taken in this case. It is unnecessary to consider the other points which were raised on behalf of the appellants.

Solicitors for the appellants, *Sharpe, Parker, Pritchards, Barham, & Sharpe*, for *C. J. Hudson*, Wakefield.

Solicitors of the respondents, *Radford & Frankland*, for *C. B. L. Fernandes*, Wakefield.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 9.

HOPKINS *v.* M'BRIDE. (*a.*)

Ship—Seaman—Obligation of seamen under articles—Agreement with crew to pay increased wages—Action to enforce agreement.

In an action by seamen to enforce an agreement made by the master with them abroad, while under articles, to pay additional remuneration in consideration of their remaining on board and working the vessel home after an accident, which had, in fact, not rendered the vessel unseaworthy,

Held, that in the absence of evidence that the risk of navigating the vessel in her then state was such as would have justified the crew breaking their articles abroad, the agreement was not one that could be enforced.

Case stated by the justices of West Hartlepool, the point raised being whether an agreement entered into by a captain to pay his men additional remuneration in consideration of their agreeing to navigate the vessel home was binding.

The justices held that it was not, and the case stated included the following statement of facts:

". . . 6. The said complaint was made to us pursuant to section 164 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

"7. On the hearing of the said complaint the following facts were proved before us: (1) That the appellant signed articles pursuant to the Merchant Shipping Act, 1894, in London, as seaman on board the British steamship *Tymeric*, of which the respondent was master, for a voyage to the Cape, with Government stores, calling at St. Helena with cattle, and back to a port in the United Kingdom, at wages after the rate of £4 per month. (2) That during the voyage to and when near Port Elizabeth the vessel struck on a reef, where she remained for some minutes, being got off under her own steam, and towed into Port Elizabeth. (3) That the respondent reported the stranding of the vessel to the shipping master, and also to the captain of the port at Port Elizabeth, and an inquiry was held there into the matter of the stranding of the vessel. (4) That while at Port Elizabeth the master received the following document, signed by several members of the crew, including the appellant: 'S.S. *Tymeric*.—To the Captain,—Sir,—We, the undersigned, comprising the crew forward, desire to know, in the event of this ship going to sea in the damaged condition she is in at present if there is to be any terms arranged with the crew in regard to taking her to sea (Signed) J. Greer.' (5) That the respondent promised to give the men half a month's pay to take the vessel to Cape Town, about 400 miles distant, but subsequently told them that the dock at Cape Town was occupied, and that if they would consent to go in the vessel he would get his clearance papers, shore up the tanks, and take her to England. (6) That the vessel was examined by two Lloyd's surveyors and a surveyor of the London Salvage Association at Port Elizabeth. (7) That on the 26th of April, 1901, a document, of which the following is a copy, signed by the appellant and other members of the crew, was handed to the respondent: '26/4/01. Port Elizabeth.—S.S. *Tymeric*.—To Captain M'Bride.—Sir,—We, the undersigned, numbering fifteen of the crew, agree to go to sea in the above steamer for the sum of £14 (fourteen pounds) bonus independent of our monthly wages. In the event of the ship not reaching her destination the above bonus to be made good, each man to hold a promissory note signed by the captain to that effect.' (8) That the respondent went ashore and endeavoured to obtain another crew, but was unable to do so. (9) That on the 28th of April, 1901, the appellant and another seaman had an interview with the respondent with regard to the documents which have been handed by the crew to the respondent, when the respondent threatened that if they did not go in the vessel he would put them in gaol, and the appellant replied, 'Very well, sir, I'll see the shipping master in the morning before I'll go to gaol.' (10) That on the following day the respondent, not being able to obtain other men, and knowing that he could not get the vessel back to England without the assistance of the appellant and the other members of the crew, called them aft and said to them, 'I will give you £14 each if you will go in the ship, independent of wages,' and at the request of the men he gave them each a document, but at the time he agreed to give them the money he never intended to pay it. (11) That the appellant never stated to the respondent (as he had a right to do under section 211 of the Merchant Shipping Act, 1894) his desire to make a complaint to a justice of the peace, British Consular officer, or officer in command of one of his Majesty's ships, nor was he prevented by the respondent from making such complaint, but that naval officers were frequently on board the vessel, and the appellant had ample opportunity of making such a complaint to them if he had desired to do so. (12) That the respondent could not have got another crew, and could not have

brought the vessel to England if the appellant and the other members of the crew had not consented to sail in her. (13) That the vessel sailed for England with the appellant on board. Fine weather generally prevailed during the voyage, but rough sea was occasionally experienced. After a voyage of forty-five or forty-six days (the usual length of a voyage being about thirty days) she arrived at West Hartlepool, where she was put into dry dock. (14) That the vessel was cellular bottomed, having two bottoms, the outer one of which was all perforated, but the inner one entire, and her tanks were shored down at Port Elizabeth under Lloyd's survey. (15) That the only reason alleged by the appellant for refusing to proceed in the vessel unless the respondent promised to pay him £14 bonus independent of his monthly wages was that the vessel was unseaworthy. (16) That the vessel when she left Port Elizabeth was not unseaworthy. (17) That on the voyage to England the appellant performed only his usual duties of seaman, no additional labour being required of him, and that the vessel not being unseaworthy, he incurred no unusual risk or danger to his life by proceeding in her from Port Elizabeth to West Hartlepool. (18) That on the arrival of the vessel at West Hartlepool the crew were paid off, the appellant being offered £4 in addition to his ordinary wages, but refused to take the £4, claiming £14. That the £4 were deposited with the shipping master at West Hartlepool, to be paid to the appellant as a gratuity on condition he gave up the document given to him by the respondent at Port Elizabeth, and that this sum was so deposited 'without prejudice.' . . .

"On the facts proved before us as above stated, and having regard to the cases of *Harris* v. *Watson*, 1 Peake 102; *Stilk* v. *Myrick*, 2 Camp. 317; *Harris* v. *Carter*, 2 W. R. 409, 23 L. J. Q. B. 205; *Fraser* v. *Hatton*, 5 W. R. 632, 26 L. J. C. P. 226; and *Hartley* v. *Ponsonby*, 5 W. R. 659, 26 L. J. Q. B. 322, we were of opinion: (1) That as the vessel (as we found to be the fact) was not unseaworthy, the appellant was not justified in refusing to proceed or in demanding extra wages or a bonus as a condition of his proceeding in the vessel on the voyage for which he was under contract to serve in her. (2) That nothing had occurred up to the time when the respondent promised or agreed to give the appellant such extra wages or bonus or did occur between that time and the time of the arrival of the vessel at West Hartlepool which discharged the original articles, and the contract contained therein. (3) That the promise or agreement by the respondent to pay the appellant such extra wages or bonus in addition to the wages fixed by the original articles was void for want of consideration. (4) That the appellant and respondent were bound by the original articles, and the appellant was not, therefore, entitled to recover the extra wages or bonus which the respondent had promised or agreed to pay him."

The justices accordingly gave judgment for the respondent.

The question upon which the opinion of the court was desired was whether the justices upon the above statement of facts came to a correct determination and decision in point of law, and if not, what should be done in the premises?

R. I. Simey, for the appellant.—The question here is whether when the agreement was entered into there was reasonable apprehension of unseaworthiness—whether the ship was in such a condition that the crew were not bound to re-embark. There was no finding that there was actual risk.

H. H. Gregory, for the respondent.—There is nothing to show that the seamen felt that their articles were at an end, and unless the appellant can prove that some risk was in the mind of both parties at the time that the agreement was entered into the court will not enforce such a bargain: see *Harris* v. *Carter* and *Hartley* v. *Ponsonby*.

Simey, in reply.—The cases cited were decisions where the alleged unseaworthiness was apparent. That was not the case here; moreover, the appellant was bought off going to the shipping master to have the question of seaworthiness determined, and the agreeing to forego this right would be sufficient consideration in any case to support the claim.

Lord ALVERSTONE, L.C.J.—I do not think upon the facts found that this agreement can be enforced. For upwards of one hundred years there has been a principle of law that in the case of contracts made by seamen (who were not entitled to break their articles), even if there might apparently have been some consideration, as, for instance, the difficulty of getting the ship away—this was not enough to justify the contract if in fact the circumstances were not such as to justify the crew in thinking that the contract under the articles was at an end.

In this case it was found that the vessel was in fact seaworthy; that the appellant performed only his usual duties of seaman during the voyage home and incurred no risk or danger to his life. No sufficient reason, in our opinion, having been given to justify the appellant in breaking his articles, he was bound by them, and his contract for extra remuneration came under the class of contracts which have over and over again been held not binding. The law, in my opinion, is correctly stated in *Hartley* v. *Ponsonby*, and those references to the law are not the less weighty because they were delivered in a case in which the judges concluded that, as the finding of the jury amounted to a finding that the vessel was unseaworthy, there was a case in which a fresh contract could be made. I think that, broadly, a seaman who seeks to insist on a fresh contract is bound to show a state of circumstances in which he would be justified in breaking his articles. In this case it was found, as a fact, that the vessel was in fact seaworthy, and that the appellant incurred no unusual risk or danger by proceeding on the voyage. It was said that there was some evidence that the men proposed to go before the shipping master and lodge a complaint if terms were not made with them, and that this was sufficient consideration. I would like to postpone my judgment on any case in which the question was really raised whether, when it was in the power of the seaman to detain the ship and he did not do so, it might not be a good ground, but in my opinion it is not raised in the present case, and it is therefore not open to us to consider it.

DARLING and CHANNELL, JJ., concurred.

Appeal dismissed.

Solicitors, *Chas. H. Dodd*, for *James J. Dodd*, West Hartlepool; *Holman, Birdwood, & Co.*

House of Lords.

From C. A. (England). July 8, 1901.

CARR v. FRACIS, TIMES, & Co. (a.)

Conflict of laws—Tort in foreign country—Right of action—Foreign government—Jurisdiction.

To constitute an actionable wrong, where the injury is committed abroad, it must be actionable in the country where committed as well as in this country

Where a British subject seized goods in Muscat waters, which act was authorized by the Sultan and therefore lawful in that country, no action lies in our courts for such seizure.

Appeal from an order of the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) reversing a judgment of Grantham, J.

The respondents, who were merchants carrying on business in London, Bushire, and Muscat, sued the applicant, a captain in the British navy, for an alleged wrong committed abroad. The facts and arguments are shortly given in the judgments.

Sir R. Finlay, A.G., Sir E. Carson, S.G., and *R. B. D. Acland*, for the appellant

Sir R. Reid, K.C., J. Walton, K.C., and *Hollams*, for the respondents.

Earl of HALSBURY, L.C.—This is an action in which the plaintiffs claim in tort for an act which, in the first instance, I shall assume to have been done within the territorial waters of the Sultan of Muscat. The arguments of the respondents come to this, that the Sultan was not entitled within his own territory to say what should or should not be a subject of traffic. The Sultan had said—and he enforced his prohibition by authorized armed intervention—that he would not permit a particular kind of traffic to pass through his territory. I am somewhat surprised that there should be any contest on this point, or that any doubt should be suggested. I agree, indeed, that there is no analogy between this proceeding and a judgment *in rem*. There is no relation between an act done or authorized by a sovereign in his own territory and a judgment *in rem*. It is no ground for disputing the validity of this action that, if done in another country, it would have been unlawful. Before the abolition of slavery—to take an illustration from our own history—no action would have been permissible in this country on the ground of a restraint of liberty in Jamaica, which, though unlawful in this country, was perfectly legal in a country in which slavery prevailed. In this case the Sultan has declared what his own law is. It was contended that this was a question for an English jury, who could go behind the Sultan's act. But no such proposition can be maintained. The Sultan's authority is supreme within his own territory. The broad proposition is that the Sultan's declaration was an act of state, which cannot be impugned in an action in this country. The question is no doubt raised whether an act done by such authority by a British subject and participated in by the British Government can be recognized by our courts as lawful, being such an act as would not have been lawful elsewhere. That question is conclusively answered in the decision, to which Tindal, C.J., was a party, of *Dobree* v. *Napier*, 2 Bing. N. C. 781, when it was held that an act of state done by command of the Portugese Crown, although done by an English subject who, by the Foreign Enlistment Act, was forbidden to do anything of the sort, could not be impugned by our courts. This is an *a fortiori* case, because, instead of being done against the law of this country, the act was here done by order of the British Crown. The point is thus a very short one. The law of the Sultan of Muscat is his will—*stet pro ratione voluntas*. In my opinion no British tribunal is competent to go behind the Sultan's declaration. A serious question of policy is involved, and British tribunals cannot decide as against the Sultan what is the law of the Sultan's country. Then comes the other question, which I am somewhat surprised should have been raised for the first time in your lordships' House. It does not appear to have been suggested below. It is that this act was not done within the territorial waters of the Sultan at all. The authority of *Reg.* v. *Keyn*, 2 Ex. D. 63, 25 W. R. Dig. 87, was cited in support of this contention of the respondents. It is an unusual occurrence—but it happened—for the Legislature of this country to pass an Act of Parliament to reverse a judgment of a court. But the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), affirmed in terms that the judgment of the majority of the judges in *Reg.* v. *Keyn* was not the law of England, and declared that the law as in the Act set forth had always been the law of this country. It is, however, only right to add that much of the argument in that case—the entire argument of Cockburn, L.C.J., who gave the leading judgment of the majority of the court—was not whether this tract of land covered with water was a proper subject for English legislation, but whether there had in fact been legislation. The case was one of manslaughter, and the question of jurisdiction was based upon the civil law, the issue being, as it were, between the sheriff and the admiral, the former having jurisdiction by common law in the body of a county, and the latter's jurisdiction being based on the civil law. Now, by the civil law, there is no distinction—it is either murder or nothing. Thus the decision of the Chief Justice was of a technical character—that except by legislation the ordinary criminal law administered in the bodies of counties could not be applied to such a case. Thus the decision of the seven judges as against six in *Reg.* v. *Keyn* has no application, as it is inconceivable that our courts should attempt to split up the jurisdiction of the Sultan of Muscat into what belonged to common law, what to the Admiralty law, and so on. The answer to the claim is final and complete—that the question has been decided by the Sultan himself. I move that the judgment appealed from be reversed, and the judgment of Grantham, J., restored, with costs to the appellant in this House and in the courts below.

Lord MACNAGHTEN.—This case has been very fully and very ably argued; but, after all, it comes to an extremely short point. The respondents, who are or were merchants carrying on business in London, Bushire, and Muscat, sue the appellant, a captain in the British navy, for an alleged wrong committed abroad. He seized their goods—as they allege, illegally—and they claim compensation in damages. Now, it is well settled by a series of authorities of which the latest is the case of *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, 18 W. R. C. L. Dig. 2, that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed. In the present case the whole question turns upon the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

second proposition. It is not disputed that the alleged wrong would have have been actionable if it had been committed in England or on the high seas. It was, however, committed within the dominions of the Sultan of Muscat, who is duly proved to be an independent sovereign. It was committed within the territorial waters of Muscat, which are, in my opinion, for this purpose as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway. The appellant says that the act complained of was done under the authority and by the direction of the Sultan; that he adopted it as his act, and declared it to be legal. In support of this assertion the appellant relies upon two documents—the proclamation of the 13th of January, 1898, and the report of the 15th of April, 1898, adopted and confirmed by the Sultan himself. The real question is, what is the true meaning and effect of these documents. The respondents contend that the documents in question come to nothing more than this—that the Sultan of Muscat announced by formal proclamation that so far as he was concerned her Britannic Majesty was welcome to seize munitions of war destined for Indian or Persian ports, if they were the property of British subjects, when found within the territorial waters of Muscat—that he would not resent such an act as an invasion of his sovereignity, and that afterwards, on inquiry, he declared that he was satisfied that her Britannic Majesty had done no more than he had permitted her to do. I do not think that this was the meaning of these documents. I think that the meaning was that the act, if done, was to be done under his authority, as his act, and that after inquiry he adopted the act as his own, and declared it to be legal—legal, that is, according to the law of Muscat, which, for anything I know to the contrary, may be nothing more than the will and pleasure of the despot who rules over that country. If this was the true meaning of these documents, if the act was legal in Muscat and, therefore, justifiable there, in my opinion there is a conclusive answer to the action; and I am, therefore, of opinion that the appeal must be allowed.

Lord SHAND and Lord BRAMPTON concurred.

Lord LINDLEY.—I am of the same opinion. The answer to the claim—that the seizure complained of was lawful by the law of the state in which it was effected—is sufficient in point of law. This was settled in *Blad* v. *Bamfield*, 3 Swans. 604, and has been frequently recognized in subsequent decisions, as, for example, in *The M. Moxham*, 24 W. R. 597, 1 P. D. 107, *per* Mellish, L.J. No evidence has been adduced to show that the proclamation did not truly represent the law of Muscat applicable to the case; and in the absence of such evidence the declaration of the court held by order of the Sultan, which declaration was approved by the Sultan, ought to be accepted by the courts of this country as sufficient. The plaintiffs complain that the finding by the court of Muscat that the arms were intended for Persian ports was wrong. An English jury might probably construe the proclamation more narrowly than a Muscat court or a Muscat lawyer, and an English jury has found that when seized the arms were intended for Muscat only. But the finding of an English jury, even if relevant for any purpose, does not invalidate the declaration of the law of Muscat or show that the authorities who made it misconstrued the Sultan's proclamation which authorized the seizure, or did what was wrong by the law of Muscat. Mr. Walton has contended that the Sultan had no jurisdiction to give anyone leave to search and take arms out of a British ship passing through his territorial waters in time of peace, and that the seizure, although sanctioned by the governments of Muscat, Persia, and the United Kingdom, was unlawful by the law of nations and ought to be so treated by an English court of law. But no English court can hold on general principles of international law only that the Sultan has exceeded his own powers, though, but for its own concurrence in the seizure, it is possible that the British Government might have demanded reparation.

Judgment appealed from reversed, and judgment of Grantham, J., restored. The respondents to pay to the appellant his costs in this House and in the courts below.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondents, *Hollams, Sons, Coward, & Hawkesley.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 3.

KEATES v. WOODWARD. (a)

County court—Practice—Costs—Action which could have been commenced in a county court—Tort—Recovery of less than £10—Judgment for injunction and nominal damages—County Courts Act, 1888 (51 & 52 *Vict c.* 43), *s.* 116, *sub-section* 2.

An action brought in the Chancery Division for an injunction and damages for trespass to land was transferred to a county court. The county court judge gave judgment for the defendant. On appeal, the King's Bench Division gave judgment for the plaintiff for an injunction and nominal damages.

Held, that the plaintiff was entitled to his costs.

An action which results in a judgment for an injunction and nominal damages is not an action in which the plaintiff recovers a sum less than ten pounds within the meaning of section 116 (2) *of the County Courts Act,* 1888.

St. John's College, Cambridge v. Pierrepont, 61 *L. J. Q. B.* 19, 40 W. R. Dig. 181, *overruled.*

Appeal from a judgment of a Divisional Court (Wills and Channell, JJ.) on an appeal from a county court.

The action was commenced in the Chancery Division. The plaintiff by his writ claimed an injunction and damages for trespass to land.

The defence was that the alleged act of trespass consisted in the removal of an obstruction to a right of way to which the defendant was entitled.

On the application of the defendant the action was transferred to the Birkenhead County Court under section 69 of the County Courts Act, 1888.

The action was tried before the county court judge and a jury. The jury found that there was a right of way, and the judge gave judgment for the defendant with costs.

The plaintiff appealed to the Divisional Court, who held there was no evidence of a right of way, and gave judgment for the plaintiff for an injunction and nominal damages. They allowed the plaintiff his costs of the appeal, but they made no order as to his costs in the county court, considering that they were prevented from allowing him those costs by section 116, sub-section 2, of the County Courts Act, 1888.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Section 116 of the County Courts Act, 1888, enacts as follows: "With respect to any action brought in the High Court, which could have been commenced in a county court, the following provisions shall apply—(2) If in an action founded on tort the plaintiff shall recover a sum less than ten pounds, he shall not be entitled to any costs of the action; . . . unless in any such action . . . a judge of the High Court certifies that there was sufficient reason for bringing the action in that court."

The plaintiff appealed.

F. E. Smith, for the plaintiff.—This action does not come within section 116 of the County Courts Act. In the first place, it is not an action founded on tort, but it is an action for a declaration of right. Secondly, it is not an action in which the plaintiff has recovered less than £10, for he has obtained an injunction, which was the substantial relief sought for. The Divisional Court followed the case of *St. John's College, Cambridge* v. *Pierrepont*, 61 L. J. Q. B. 19, 40 W. R. Dig. 181. But the Irish case of *Bradley* v. *Archibald*, [1899] 2 I. R. 108, is in the plaintiff's favour.

He cited *Chapman* v. *Midland Railway Co.*, 28 W. R. 592, 5 Q. B. D. 431.

Montague Shearman, for the defendant. — First, this is an action founded on tort: see *Bryant* v. *Herbert*, 26 W. R. 898, 3 C. P. D. 389, where it was held that detinue was founded on tort. Secondly, the words "shall recover a sum less than ten pounds" refer only to what is recovered in money. The mere granting of other relief besides damages cannot take a case out of the section. If no damages were sought and an injunction was granted, the case might be different. But this was essentially an action for damages; for it is admitted that it might have been commenced in a county court, and a county court has no original jurisdiction to entertain an action which is brought mainly for an injunction for tort, but only actions for damages for tort: see *Martin* v. *Bannister*, 28 W. R. 143, 4 Q. B. D. 491. If the county court judge had decided this case as he ought to have decided it, he could not have given the plaintiff his costs. For where an action is transferred as this action was, neither the county court judge nor a judge of the High Court has power to certify.

COLLINS, M.R.—This action was brought in the Chancery Division of the High Court for damages for trespass and for an injunction. It was transferred to the county court, and there judgment was given for the defendant. The case was then brought before the Divisional Court, who reversed the decision of the county court judge and granted an injunction. The plaintiff thereupon contended that he was entitled to be allowed his costs in the county court. The judges, however, following the case of *St. John's College, Cambridge* v. *Pierrepont*, held that they had no jurisdiction to allow the plaintiff his costs in the county court. That case deals precisely with the point which is now before us. The question depends on the true construction of section 116, sub-section 2, of the County Courts Act, which is as follows: [The learned judge read the section.] This action could have been commenced in the county court, and it is said that it is founded on tort, and that the plaintiff, having recovered one shilling damages, has recovered less than £10. If that were the true view, it would be a conclusive answer to the plaintiff's application to be allowed his costs. But does this action, in which the plaintiff has recovered one shilling damages and has also recovered something which is of incomparably greater value, and which is the gist of the action—viz., the injunction which he claimed—come within the fair meaning of the section? It seems to me that it does not. I do not think that this action can fairly be described as an action founded on tort in which the plaintiff has recovered a sum less than ten pounds. In the case of *Danby* v. *Lamb*, 10 W. R. 43, 11 C. B. N. S. 423, which was a decision under section 34 of the Common Law Procedure Act, 1860, it was held that that section did not apply to an action of detinue. Erle, C.J., said that the whole purview of the section seemed to him to be directed to the case where damages alone were sought to be recovered by way of compensation for a wrong. That seems to me to cover this case. In *Bryant* v. *Herbert*, 26 W. R. 898, this court held that an action of detinue was an action founded on tort. *Danby* v. *Lamb* has been followed by the Irish Court in the case of *Bradley* v. *Archibald*. *St. John's College, Cambridge* v. *Pierrepont* is a decision to the contrary, but *Danby* v. *Lamb* was not cited in that case. It seems to me, therefore, that the authorities are in favour of the plaintiff. I think that the fair meaning of the section is that it applies to an action which is founded on tort, in the sense that tort is the gist of the action, and in which nothing more is sought than money damages. This case, therefore, is not within the section, and it follows that there was no need for a judge to certify, and that the plaintiff is entitled to his costs.

ROMER, L.J.—I am of the same opinion. I think that section 116, sub-section 2, is primarily directed to actions in which pecuniary damages only are sought, and that it is not intended to apply where other substantial relief such as an injunction is asked for. I do not think, however, that a plaintiff could take himself out of the section by the mere device of colourably adding a claim for an injunction. In the present case the plaintiff has recovered substantial relief in addition to damages. In my opinion the Irish case of *Bradley* v. *Archibald* was rightly decided, and I think that *St. John's College, Cambridge* v. *Pierrepont* was wrongly decided.

MATHEW, L.J.—I am of the same opinion. The county court had jurisdiction to deal with this matter. The power to do so is clearly given by section 89 of the Judicature Act, 1873, and ord. 22, r. 12, of the County Court Rules recognizes that power. The Divisional Court ought to have directed costs to be taxed in the county court as if no mistake had ever been made.

Appeal allowed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Simpson, North, Harley, & Birkett*, Liverpool.

Solicitors for the defendant, *Cunliffes & Davenport.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Jan. 14.

WHITE v. HARROW.

HARROW v. MARYLEBONE DISTRICT PROPERTY CO. (*a*.)

Landlord and Tenant—Lease—Light—Covenant not to object to adjoining buildings—"Adjoining"—"Neighbouring."

Where a lessee covenanted not to object to any works to adjoining premises,

Held, that "adjoining" did not mean "neighbouring," but was used in the sense of "in physical contact with."

Decision of Joyce, J. (ante, *p.* 166), *reversed.*

(*a*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

This was an appeal against the decision of Joyce, J. (*ante*, p. 166).

By an indenture of lease dated the 20th of September, 1894, certain premises known as No. 24, High-street, Marylebone, were let by the trustees of the Portland estate to the plaintiff White. The lease contained a covenant in the following words: "The lessee, his executors, administrators, and assigns, will not object to any works to adjoining premises that may be sanctioned by or on behalf of the said trustee or trustees, or other the person or persons for the time being entitled in reversion to the said estates, and will not claim any easement against the said person or persons entitled in reversion as aforesaid, in or upon any adjoining or neighbouring premises belonging to the said person or persons by reason of any act or thing done or suffered by any tenant of such adjoining or neighbouring premises and that notwithstanding any actual or constructive notice of such act or thing to the said person or persons."

By an indenture of underlease dated the 3rd of August, 1899, and made between the plaintiff White and Thomas Harrow, the said premises were demised to the said Thomas Harrow for the term of twenty-one years. The said underlease contained a covenant by the underlessee similar to the one above set out—namely, that he, the underlessee, would not without the previous written consent of the lessor object to any works to adjoining premises which might be sanctioned by or on behalf of the lessor or the superior landlords, and would not claim any easement against the lessor or his superior landlords over any adjoining or neighbouring premises belonging to the lessor or his superior landlords by reason of any act or thing done or suffered by any tenant of such adjoining or neighbouring premises, and that notwithstanding any actual or constructive notice to the lessor or his superior landlords.

The Marylebone District Property Co., of which company the plaintiff White was a director, acquired from the superior landlords a lease of certain ground adjoining the said premises, No. 24, High-street, Marylebone, and commenced to erect buildings thereon.

The plans of the proposed buildings were submitted by the company to the surveyor of the Portland estate, who after introducing certain modifications therein so as to protect the interests of the defendant Harrow amongst others, gave his sanction to them.

The defendant Harrow thereupon commenced the action of *Harrow* v. *Marylebone District Property Co.* to restrain the company from building so as to interfere with the access of light to the windows of No. 24, High-street. The plaintiff White was not made a party to that action.

The plaintiff White then commenced the action of *White* v. *Harrow*, and moved that the action of *Harrow* v. *Marylebone District Property Co.* might be stayed.

For the purposes of the motion it was admitted that the proposed new buildings would prove a material obstruction to the defendant Harrow's lights. The notice of motion was amended by entitling it in the action of *Harrow* v. *Marylebone District Property Co.* as well as in the action of *White* v. *Harrow*.

Joyce, J., held that the plaintiff White was entitled to have the proceedings in the action of *Harrow* v. *Marylebone District Property Co.* stayed.

The defendant Harrow appealed.

Younger, K.C., and *Edward Ford*, for the appellant.

Hughes, K.C., and *Wace*, for the plaintiff White.

VAUGHAN WILLIAMS, L.J., said it had been contended that upon the true construction of the particular covenant in question the words adjoining premises extended not only to buildings which came in physical contact with the demised building, but also to any buildings which were situate near enough to the demised building for works done on the premises so situate to affect materially the demised premises by obstructing easements enjoyed by the demised premises at the date of the demise. His lordship could not agree to that construction. He thought that "adjoining" meant adjoining in the sense in which the word was used in the London Building Act, 1894. It was plain from the use in other parts of the lease of the wider expression "adjoining or neighbouring" that the word adjoining could not be used in this particular covenant in the sense of "neighbouring." A narrower meaning must be put upon the word adjoining. His lordship's opinion was that in this covenant adjoining was used in the sense of "in physical contact with." It was said that thus to interpret the word was to make the covenant of no practical effect; but so construed it would have the effect of relieving the lessor from the necessity of obtaining on behalf of himself or the superior landlord the consent of the lessee or occupier to works proposed to be done to adjoining premises according to the provisions of the London Building Act, 1894, s. 90. It was argued that the intention of the covenant was to prevent the lessee objecting to the obstruction of an easement by the erection of buildings by the lessor or the superior landlord. In the first place, if this were the intention it would have been easy to say so in plain terms, and this had not been done, although easements were expressly dealt with in the latter part of the covenant. In his lordship's judgment the court ought not to construe a covenant as giving a lessor the power to derogate from his own grant if the words were fairly capable of another construction. Then as to the latter part of the covenant his lordship saw nothing in the case to lead him to suppose that the easement of light arose by reason of any act or thing done or suffered by any tenant of adjoining or neighbouring premises. It might well be that the right of light arose by reason of something done or suffered by the lessor or his superior landlord, and it was by no means clear that the claim which the lessee was precluded from making had any relation to ancient lights acquired by enjoyment prior to the date of the lease. The court was not now deciding on any facts; it was construing the first part of the covenant on the admitted facts. The application of the second part of the covenant must be determined when the facts had been found. The appeal must therefore be allowed.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors, *Samuel Lithgow; Cooper & Bake.*

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Jan. 14.

POISSON AND WOODS *v.* ROBERTSON AND TURVEY. (*a.*)

Practice—Inspection—Joint owners—Trade secret—Secret recipe—"Liberty to apply"—R. S. C., 1883, *ord.* 31, *r.* 14.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

Where A. and B., each claiming under assignments from C., had been held at the trial of an action between A. and B. to be joint owners of a secret remedy, and each entitled to make and sell the remedy, but the paper upon which the secret recipe was written had been destroyed,

Held, that A., to whom the recipe had never been communicated, was not entitled, upon an application made under the liberty to apply given at the trial, to demand from B. either a copy or inspection of the secret recipe.

Decision of Joyce, J. (ante, *p.* 186), *affirmed.*

This was an appeal from the decision of Joyce, J. (reported *ante*, p. 186).

The motion in the action was made by the plaintiff Poisson that he might be at liberty to inspect and take copies of the original recipe for the manufacture of the secret specific or remedy known as "Tacquaru," handed by G. R. Edwards to the defendant Robertson, and then in the possession of the defendant Turvey, and that the defendant Turvey might be ordered to produce the said recipe for such inspection.

The subject-matter of the action was a secret specific for the cure of drunkenness.

By an agreement dated the 2nd of March, 1896, G. R. Edwards, the former owner of "Tacquaru," entered into partnership with the defendant Robertson for the purpose of dealing with the said remedy, and under that agreement Robertson became entitled to one-half the profits, he undertaking the whole business management, and Edwards being in the position of a sleeping partner.

By an indenture dated the 11th of March, 1896, Edwards assigned his interest in the remedy to one Woods, who, however, was not entitled to know the secret of the remedy.

On the 23rd of March, 1896, Woods by an indenture assigned to the plaintiff Poisson one-half of his half interest in the remedy.

On the 6th of July, 1897, the defendant by a document in writing assigned one quarter of his half interest to the plaintiff Poisson, but without communicating the secret to him, though there was no covenant that it should not be communicated to him.

Subsequently, on the 1st of August, 1900, Robertson affected to sell to the defendant Turvey the sole rights in the said remedy, and he thereupon communicated the secret to Turvey, handing to him the original paper upon which it was written.

The plaintiffs thereupon sought a declaration that the last-mentioned assignment was a fraud on their rights and void, and an order that the defendant Turvey should deliver up the recipe. They further asked for an injunction to restrain the defendant Turvey from manufacturing, selling, or dealing with the remedy, or from disclosing the secret to any person other than the plaintiff Poisson, a declaration that the plaintiff Poisson was entitled to have the remedy communicated to him, and an account of all dealings with the remedy by the defendant Turvey.

Upon the hearing of the action Kekewich, J., held that, there being no fraud, the effect of the various assignments was to vest three-eighths in Turvey, three-eighths in Poisson, and two-eighths in Woods. But his lordship held that this did not entitle the plaintiffs to an account, and he gave no decision upon the question of the right of the plaintiff Poisson to inspect the recipe.

The motion was brought on by the plaintiff Poisson under the liberty to apply given in the action.

It appeared in the evidence that the original paper upon which the recipe was written had become worn out, and was consequently, since the hearing of the action, destroyed by the defendant Turvey, who, however, had taken and kept a copy of it.

Joyce, J., held that the plaintiff was in a difficult position in coming to ask the court on the present motion for a remedy which he had failed to obtain at the hearing of the action. His lordship therefore refused to make an order on the defendant Turvey to show the paper, but without prejudice to any subsequent application.

The plaintiff Poisson appealed.

Hughes, K.C., and *Harman*, for the appellant.

Wright Taylor, for the defendant Turvey.

VAUGHAN WILLIAMS, L.J., said that as the matter stood the action appeared to him to have come to an end. There was a judgment, and under it it was plain that the plaintiff had got two-eighths of what had been called a dormant right and one-eighth of what had been called an active right. That judgment reserved "liberty to apply," but that did not take the matter any further. All that the court had been called to adjudicate upon had been adjudicated upon, and the action was not of such a nature as that any consequential remedy had to be worked out. It was not desirable at any time that the court should determine questions which it was not necessary that the court should deal with for the determination of an action before it. So he did not propose in the slightest degree to lay down the law with regard to what might be the rights of a co-owner of property in a case like the present. All he could say was, that if the result of the contract here was that the plaintiff had become co-owner of a chattel and that chattel had been converted by the other co-owner, the defendant, he was not aware of any rule of law which would debar the other co-owner from bringing an action for that conversion. If the co-owner, the defendant in this case, had dealt with the joint property by selling it, his lordship wished to say, speaking for himself, that he was not, as at present advised, prepared to say that the other co-owner, who was not originally a party to the sale, could not come in by action and compel his co-owner to account for the moneys resulting from the sale of that common property or any part of it. But the court had not to decide that question on the present occasion, and he would not further discuss it.

STIRLING, L.J., was of the same opinion. The present application could not be made under "liberty to apply." The judgment contained a declaration as to the interests of the parties with "liberty to apply," but the addition of those words did not enable the court to deal with matters which did not arise in the course of working out the judgment. His lordship was not prepared to say that the plaintiff was not entitled to some relief in a properly-constituted action.

COZENS-HARDY, L.J., agreed. It had been argued on behalf of the plaintiff that inspection could be had at any time under ord. 31, r. 14, but his lordship did not think this was a pending cause or matter within the meaning of that rule.

Appeal dismissed.

Solicitors, *J. A. Maxwell; Maurice Moseley.*

From K. B. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Dec. 18.

In re LONDON AND NORTHERN BANK.
ARCHER'S CASE. (*a.*)

Company—Winding up—Pending action—Privilege—Officer of company—Examination—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 115.

An officer of a company which has gone into liquidation is not justified in refusing, in the course of an examination under section 115 *of the Companies Act,* 1862, *to answer questions as to documents belonging to the company which have come into his possession as an officer of the company, on the ground that such documents have passed into the possession of persons who are in litigation with the company, and have successfully claimed privilege in the litigation in respect of such documents.*

Judgment of Wright, J. (ante *p.* 167), *affirmed*

This was an appeal from an order of Wright, J. (reported *ante*, p. 167).

A bank registered under the Companies Acts, shortly before passing resolutions for voluntarily winding up, had commenced a libel action against Sir George Newnes (Limited) claiming damages for a statement which had appeared in a paper called the *Money Maker* that the bank was being wound up.

Mr. J. H. Archer, an ex-manager of the bank, had, in that action, handed over to the solicitors for the newspaper a letter belonging to the bank.

In the winding up the liquidator obtained an order under section 115 of the Companies Act, 1862, for the private examination of Mr. Archer. In the course of the examination the witness was asked questions as to what had become of this and other letters of the bank which he had had in his possession. These questions, on the advice of his counsel, he refused to answer.

The registrar before whom the examination was held ordered him to answer, but referred the matter to the court.

In the action the secretary of Sir George Newnes (Limited) had made an affidavit of documents in which he claimed privilege in respect of certain specified documents, and it was said that the questions which were objected to were put in order to enable the liquidator to get behind the privilege and obtain evidence for the purposes of the action.

Wright, J., ordered the witness to attend and answer the questions.

Mr. Archer appealed.

H. Reed, K.C., Muir Mackenzie, and *Lush,* for the appellant.—This is an attempt to get information by means of section 115 of the Companies Act, 1862, for purposes unconnected with the winding up of the company. The court has a discretion as to making an order for the examination of a witness under this section, and the decision in *In re North Australian Territory Co.*, 38 W. R. 561, 45 Ch. D. 87, shows that the examination will not be allowed for the purposes of eliciting information which is wanted for the purpose of a pending action and not for winding up the company.

They also referred to *In re Franks*, 40 W. R. 384, [1892] 1 Q. B. 646.

Macaskie, K.C., and *Cooper Willis,* for the liquidator, were not called.

VAUGHAN WILLIAMS, L.J.—The question is whether, under the circumstances of this case, it was right that the appellant should be summoned to be examined under section 115 and whether he was bound to answer the questions put to him. In my judgment it was right that he should be examined and should answer the questions put. It is admitted that there is no question of jurisdiction whatsoever. There can be no doubt as to the jurisdiction of the court under section 115 to examine this witness and compel him to give information touching the affairs of the company. But it is said that the witness ought not to be examined because the liquidator of the company is engaged in litigation against Sir George Newnes & Co., and that the court ought not, in the exercise of its discretion, to allow any examination under section 115 pending that litigation with reference to matters to which that litigation relates. I am far from saying that the pendency of litigation between the liquidator of a company and some other person may not be a good reason for postponing the examination of a witness who might be expected to give information relevant to the litigation in the interest of the other litigant. Very often it would be proper to postpone the examination, because very often such an examination would have a tendency to defeat the ends of justice. The rules which apply to the conduct of actions are not arbitrary rules. They have been laid down on principle and for the express purpose that justice may be obtained in an action. Therefore, if a step is taken which will render ineffectual steps which have been taken in an action, it may be, *primâ facie*, a very good reason for not allowing the examination to take place immediately, that the action may go on in its ordinary course. But in the present case what has happened is that an action is pending and the defendant has had to make an affidavit of documents and has claimed privilege from production in terms which are very general and cover all cases of communications made to his solicitor for the puposes of the action, and his claim for privilege has succeeded. Now the liquidator desires to have a former servant of the bank examined for the purpose of ascertaining what documents he has in his possession which came into his possession as a servant of the bank, and what information he can give to the liquidator as to matters which came within his knowledge as a servant of the bank. *Primâ facie* that would be proper subject-matter for examination under section 115. But it is said that, if this witness is examined, the liquidator may find out that the witness has had documents in his possession as a servant of the bank which he has handed over to the defendants or their solicitor for the purposes of the action, and that under these circumstances this examination is intended for the purpose of disturbing the ordinary course of proceedings in the action and giving an advantage to the liquidator. But it is plain that, irrespective of the course of this action, it was the duty of the liquidator, if he thought it necessary, to examine this witness for the purpose of getting information about these documents, and to say that such an examination would defeat justice seems to me to be contrary to the fact. The fact is that the witness was guilty of a breach of duty in handing over these documents to anyone but his former employers, and under these circumstances I think that a proper discretion was exercised in ordering this examination. There is nothing in what I have said which interferes with the rule laid down in *In re North Australian Territory Co.* I think, therefore, that the order of Wright, J., ought to be affirmed.

ROMER, L.J.—I agree. The court will always take great care that the powers conferred by section 115 are not used oppressively or vexatiously or for any purpose other than those intended by the Legislature.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

In the present case the examination is sought only for the purpose of obtaining information from a former servant of the bank as to documents belonging to the bank which were in his possession. It is clear that this was a very proper case for the liquidator to put in force the powers conferred by section 115, and none the less so because the former servant of the bank may have handed over those documents to persons who are engaged in litigation with the bank. I agree, therefore, in thinking that the order of Wright, J., was correct.

COZENS-HARDY, L.J.—I agree.

Solicitors, *G. H. Hoyle; Helder, Roberts, Walton, & Thomas*, for *Simpson & Simpson*, Leeds.

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 23.

VEAZEY *v.* CHATTLE. (*a.*)

Master and servant—Employer's liability—Accident—Compensation—Scaffolding—Ladder and crawling-board—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s* 7.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the applicant and a fellow-workman, in the course of their duty, carried a crawling-board up a ladder and placed it on the roof of a building for the purpose of doing some repairs. While the applicant was adjusting the upper end of the board to the ridge of the roof, and the other man, standing on the ladder, was holding the lower end of the board, the board slipped, and the applicant fell and was injured.*

Held (Stirling, L.J., *dissenting*), *that the applicant was employed in repairing a building by means of a scaffolding within the meaning of the Act.*

Appeal from an award of the judge of the Derby County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman who met with an accident which incapacitated him for work while engaged in the employment of a builder in making preparations for doing some repairs to the roof of a building. The applicant and a fellow-workman erected a ladder against the side of the building, and took a "crawling-board" up the ladder for the purpose of doing the repairs which were required, the roof being covered with slates. The "crawling-board" was a plank about 20ft. in length and 10in. in width, and across it upon the upper side were nailed or screwed strips of wood for the purpose of giving foothold to anyone who was working on it, and at one end of the plank on the underneath side there was another strip of wood which was used for the purpose of hooking the plank over the ridge of a roof.

The two men placed the crawling-board on the roof, the board not being in any way attached to the ladder. The applicant then climbed up the board for the purpose of lifting the end of it over the ridge of the roof. The other man stood on the ladder and held the board with one of his hands to keep it steady. Before the applicant had succeeded in hooking the board over the ridge of the roof, the board slipped, and the applicant fell and was injured.

The county court judge found that the applicant was employed on or in or about a building which exceeded thirty feet in height and which was being repaired by means of a scaffolding within the meaning of section 7 of the Workmen's Compensation Act; and he made an award in favour of the applicant.

The employer appealed.

Ruegg, K.C., and *Cranstoun*, for the employer.—The county court judge was wrong in holding that the ladder and crawling-board constituted a scaffolding within the meaning of the Act. It was expressly decided in *Wood* v. *Walsh & Sons*, 47 W. R. 504, [1899] 1 Q. B. 1009, that a ladder by itself could not be a scaffolding. Neither did the ladder and the crawling-board together form a scaffolding, for they were not in any way connected. A scaffolding must be a structure of some sort. There must be something attached to and resting upon something else.

They referred to *Maude* v. *Brook*, 48 W. R. 290, [1900] 1 Q. B. 575; *Ferguson* v. *Green*, 49 W. R. 105, [1901] 1 Q. B. 25; *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, [1901] A. C. 49.

Chester Jones, for the applicant.—The county court judge was right. The crawling-board by itself, as used in this case, was a scaffolding. A scaffolding is a contrivance for enabling a man to work at a height above the ground. This was in fact the only suitable contrivance for enabling the man to do the work which had to be done: see the judgment of Lord Brampton in *Hoddinott* v. *Newton, Chambers, & Co.*

COLLINS, M.R.—I have come to the conclusion with some difficulty that this appeal ought to be dismissed. The decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* has eliminated from consideration certain matters which seemed to us in the earlier cases to raise some difficulty, which was caused by our inquiring into the object of the Legislature in introducing into the Act of Parliament this provision as to scaffolding. Some of us then found it difficult to suppose that it could have been intended to let in the operation of the Act where there was nothing but a temporary arrangement of boards and trestles in a room for the purpose of enabling workmen to work at a height from the floor. That view has now been entirely overruled by the House of Lords, and it must be taken that what we have to deal with is a purely arbitrary provision introduced by the Legislature into an Act of Parliament. We have to find out what that arbitrary provision means without refining on it in any such way as to prevent the Act from having full operation. The provision in question is that the Workmen's Compensation Act shall apply to employment on a building over thirty feet in height which is being constructed or repaired by means of a scaffolding. Some of the learned lords in the case of *Hoddinott* v. *Newton, Chambers, & Co.* suggest that the standard to be applied in construing the word "scaffolding" is the popular meaning of the word. Lord Macnaghten says: "I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be." But other learned lords thought that the meaning of the word ought not to be confined to its popular sense. Lord Brampton, whose judgment was approved by Lord Davey, said he entirely agreed with what was said by Rigby, L.J. in *Maude* v. *Brooke*: "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything, whether usual or unusual, that can properly be called scaffolding is within the Act." There is, therefore, authority for saying that that

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

which would not ordinarily be called scaffolding may be scaffolding within the meaning of the Act.

In this case some work had to be done on the roof of a house at a considerable height from the ground. A workman had to mount to the place where the work was to be done, and he had to be provided with a secure foothold while he was doing the work. For this purpose what is called a "crawling-board" was used. This was a plank about 20ft. long, with strips of wood fastened on the upper surface at intervals for giving a foothold, and another strip at the upper end and on the lower side in order to keep it in its place. A ladder was placed against the side of the house, and one workman went up the ladder holding one end of the crawling-board, while another workman followed having hold of the lower end. The board was placed on the roof, but there was a danger, if the board were pushed up the roof, of knocking off some of the tiles on the ridge of the roof. One man therefore had to climb up the board for the purpose of adjusting the underneath strip to the ridge of the roof while the other man had to stand on the ladder to steady the board, and also, as it seems to me, to lift it to a certain extent. If the accident had not happened, then the position of things would have been this, that one end of the board would have been resting partly on the hand of the man on the ladder and partly on the lower portion of the roof, and the other end would have been resting on the ridge of the roof. Now, can I say as a matter of law that this arrangement could not be a scaffolding within the meaning of the Act? It seems to me that such an arrangement as this fufils the purpose for which it is used—viz., the repair of the roof of a building, as well as the trestles and boards in the cases which have been cited fulfilled the purpose for which they were used. A crawling-board is in fact a platform such as is suitable for enabling a workman to do a particular sort of work. It is a special contrivance such as is usually adopted for the purpose of allowing a workman to work safely in a position at a considerable height above the level of the ground, and it affords a means of supporting him for doing his work in the same way as the trestles and boards which have been held to be scaffolding. In *Wood* v. *Walsh & Sons* this court held that a ladder was not a scaffolding. If that was intended to be held as a matter of law, I think it is not consistent with the principles on which the learned lords based their judgments in *Hoddinott* v. *Newton, Chambers, & Co.* It seems to me to be now clear that a ladder may be scaffolding. In my opinion it is impossible to refuse to consider the arrangement used in this case as answering to the description of scaffolding. I therefore think that the appeal should be dismissed.

STIRLING, L.J.—I am sorry that I cannot agree with the judgment of the Master of the Rolls. It seems to me that it is the duty of the court to give effect to the interpretation of this enactment which has been laid down by the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* In that case the learned lords expressed their opinion on what is the duty of this court with regard to this matter. Lord Macnaghten said: "I ought, perhaps, to add that I agree with my noble and learned friend Lord Brampton, and with Collins, L.J., in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the county court judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion." Lord Brampton said: "I thoroughly agree that the arbitrator or county court judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not 'scaffolding' within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, &c.; but whether upon the facts so found the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of section 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal." Lord Lindley expressed himself to the same effect.

Therefore it is not enough to say that the county court judge has found as a matter of fact that the arrangement used in this case was a scaffolding. His decision is open to review in this court. The question therefore remains, what is "scaffolding" within the meaning of the Act? I must again refer to the judgments in the House of Lords. [His lordship read the passages from the judgments of Lord Macnaghten and Lord Brampton already read by the Master of the Rolls.] Then Lord Lindley says: "What is meant by a scaffolding? Is any scaffolding meant? Is there any difference material to the present question between a scaffolding and a scaffold? There is nothing in the Act which requires the scaffolding to be of any particular description or dimensions, or to be in any particular place or of any particular height. I cannot help thinking that to make any distinction between one scaffolding and another, or between a scaffolding and a scaffold, would be to introduce a subtlety not required by the Act, and one far too fine for practical work. In my opinion anything which can fairly be called a scaffold is a scaffolding within the meaning of section 7, if used as mentioned in the Act."

The question therefore seems to be whether the structure which was used in this case can, in the language of Lord Brampton, properly be called scaffolding, or, in the language of Lord Lindley, can fairly be called a scaffolding. The crawling-board is described as being a long plank from eighteen to twenty feet long, and ten inches wide, across which are nailed or screwed ridges of wood to give the climber a foothold, and on the other side another ridge to hook over the ridge of the roof. Is this a scaffolding? To my mind it is not. It seems to me to be a form of ladder. It is well known that ladders are often used in the way in which this board was used. The crawling-board had not been put in position when the accident happened. If it had been hooked over the ridge of the roof, what should we have got? Two ladders not attached to each other, one on the ground leaning against the side of a house, the other hooked on to the ridge of the roof and resting on the roof. This combination does not seem to me to be one which can either fairly or properly be called a scaffolding. In my opinion, therefore, the appeal ought to be allowed, but in the circumstances I cannot express regret that my opinion is not adopted by the other members of the court.

MATHEW, L.J.—In my opinion the appeal ought to be dismissed. There was abundant evidence before the county court judge that what was used by the applicant and his fellow workman in this case is a mechanical contrivance such as is ordinarily used for

the purpose of repairing roofs. I think that this is a case which was intended to be covered by the Act, and that the county court judge was justified in coming to the conclusion that this was a scaffolding within the meaning of the Act. I agree with the Master of the Rolls.

Appeal dismissed.

Solicitors for the employer, *Cameron, Kemm, & Co.*, for *C. D. Miller*, Deroy.

Solicitors for the applicant, *Shuen, Rose, Massey, & Co.*

High Court of Justice.

Chan. Div. Byrne, J. — Nov. 28; Dec. 2.

JONES *v.* GARDINER. (*a.*)

Vendor and purchaser—Delay in completion—"Purchaser in default"—Interest—Conveyancing difficulties—Property sold with possession—Damages to purchaser for vendor's unreasonable delay.

The fact that property is sold subject to a condition that the "purchaser in default" shall pay interest on the purchase-money will not apply where the delay in completion is due to the fault of the vendor.

Where the delay in completion is due to the fault of the vendor the purchaser is entitled to reasonable damages by way of compensation.

This was an action in which the purchasers claimed specific performance for the sale to them of two plots of freehold land situate at Peppard Common, in the county of Oxford, on one of which was erected a farmhouse and buildings, and on the other a certain iron erection.

The facts of the case were as follow:

By an agreement bearing date the 2nd of September, 1900, the defendant agreed to sell to the plaintiffs the said two plots of freehold land with possession for the sum of £620. Condition 3 of the conditions of sale, which was embodied in the contract, provided that if from any cause whatever the completion of the purchase was delayed beyond the date mentioned (22nd of October) the "purchaser in default" should pay interest on the remainder of the purchase-money at the rate therein mentioned. A considerable delay occurred in the investigation of title.

On the 1st of October an incomplete abstract was delivered, upon which requisitions were made and, on the 11th of October, answered.

On the 3rd of November a further abstract was delivered, on which requisitions were also made and answered. Meanwhile notice had been given to the vendor's solicitors that the purchase-money was lying idle. A further delay was occasioned by a correspondence as to the release of an equitable charge on the property, which release was not obtained until the 13th of March, 1901. A considerable delay also took place with regard to the settling of the form of the conveyance.

On the 19th of February legal proceedings were threatened by the plaintiffs' solicitors, but were not initiated, the defendant's solicitors promising at once to make an appointment for immediate completion.

On the 4th of March the plaintiffs demanded possession, and on 6th of March the writ in the action was issued.

On the 29th of March, upon the hearing of a summons for directions, the purchase was ordered to be completed on the 1st of April, reserving the question of costs and damages to be argued.

On the 1st of April the sale was completed, and the plaintiffs paid the balance of the purchase-money and £10 3s. 4d. for interest, the last under protest and without prejudice to their rights in the action.

According to the plaintiffs' evidence their object in making the purchase was to convert the farmhouse on Lot 22 into residential premises and to let the same in the following spring and summer. They also purposed to convert the iron buildings above-mentioned into a bungalow for visitors desirous of boating. Owing to the delay the plaintiffs stated that they were unable to repair and let the premises during the season in which there was any demand for the same, and they claimed the total sum of £65 for rent lost in respect of both. The questions left for his lordship's decision were—(1) was the defendant entitled to retain the interest paid to him as above mentioned; (2) whether the plaintiffs were entitled to any, and if so what, damages in respect of the delay attending completion?

Eustace Smith, for the plaintiffs.—The property was sold "with possession," and the delay was caused by the default of defendant. He is not therefore entitled to retain any interest. The plaintiffs are also entitled to damages for lost rents which they might otherwise have obtained: *Jaques* v. *Millar*, 25 W. R. 846 6 Ch. D. 153; *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch. D. 390, 35 W. R. Dig. 69.

Lyttelton Chubb, for the defendant.—The delay was owing to the difficulties in obtaining the release of the equitable charge. The purchasers must therefore pay interest: *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517; Seton on Judgments and Orders (6th ed.), vol. 3, pp. 2, 250. The words in condition 3, the "purchaser in default," mean "the purchaser of the lot in question as to which the delay occurs."

He also referred to *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158; *Rowe* v. *London School Board*, 36 Ch. D. 619, 36 W. R. Dig. 194. [BYRNE, J., referred to Webster on Conditions of Sale (2nd ed.), p. 298, and *Denning* v. *Henderson*, 1 De G. & Sm. 689, there cited.]

Eustace Smith replied.

Cur. adv. vult.

BYRNE, J. (after stating the facts).—The first question I have to decide arises upon the construction of conditions upon which the vendor claims interest upon the balance of the purchase-money from the date fixed for completion, the 22nd of October, 1900, to the actual date of completion, the 1st of April, 1901. That condition contains, as I have said, the phrase, "the purchaser in default" is to pay interest, and with reference to the meaning of this qualification I find in *Denning* v. *Henderson* (a case for which I am indebted, and not for the first time, to Mr. Webster's very careful book on Conditions of Sale) it was decided that a purchaser could not be compelled to pay interest on his purchase-money where the condition as to delay in completion was on "the purchaser making default," if the delay be due to the state of the vendor's title. I am therefore of opinion that the plaintiffs, the purchasers in this case, were not in default within the meaning of this condition, and that the amount paid by them without prejudice for interest on the balance of the purchase money must be returned.

The next question is whether or not damages can be recovered for delay in completing a contract for the sale of real estate, where the delay has been caused by the default of the

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

vendor, not in consequence of want of or defect in title or in consequence of conveyancing difficulties, but by reason of the vendor not having cared or troubled or taken reasonable pains to perform his contract. There is no question in the present case of want of good faith as evinced by any desire to repudiate the contract or of fraud; but having considered all the proceedings and the correspondence and the evidence, I am of opinion that a very considerable part of the delay which has occurred in carrying out the contract (after making full allowance for the time which may fairly be considered to have been due to difficulties in making out title, and to a controversy as to the form of the conveyance) has arisen entirely from the default of the vendor—default, that is, in doing what he could have reasonably and fairly have done, had he been duly careful to fulfil his contract. So far as the materials before me enable me to judge, the contract certainly might have been carried out, making a liberal allowance for delay in consequence of the difficulties I have referred to, three months earlier than the actual date of completion.

The case of *Bain* v. *Fothergill* established what is now familiar law, that a vendor of real estate acting in good faith is not liable to the purchaser in damages for loss of bargain where he is unable to perform his contract owing to defect of title. The purchaser can recover the expenses he has been put to in investigating the title and what I may call proper conveyancing expenses, but nothing more. I see no reason to doubt that a similar rule ought to be applied where delay has taken place for a similar reason.

On the other hand *Engel* v. *Fitch*, which was considered in *Bain* v. *Fothergill* so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law. *Jaques* v. *Millar* is a distinct authority for giving damages against a vendor in addition to specific performance in respect of delay caused by wilful refusal to carry out a contract, and for the measure to be applied in ascertaining such damages—viz., such damages as may reasonably be said to have materially arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract. That case was followed in *Royal Bristol Permanent Building Society* v. *Bomash*.

I think that the plaintiffs were justified in bringing this action. I think that they are entitled to a return of the interest paid without prejudice, the defendant taking what he can get from the tenant for the period between the time named and the actual date of completion, there being according to his statement some arrangement as to this.

I think that the plaintiffs are also entitled to reasonable damages, having regard to the measure laid down in *Jaques* v. *Millar*, for the delay and for not having vacant possession.

I bear in mind that one of the lots was sold as for a building site, that both were sold as with possession, and that the purchasers intended to build, and have been delayed in their work by the defendant's default. On the other hand I have had regard to the fact that some of the claims in the plaintiff's particulars are untenable and exaggerated, and the evidence is loose and unsatisfactory, and I award £25 by way of damages.

The defendant must pay the costs of the action.

Judgment for plaintiffs.

Solicitors, *Hempsons; Byfield & Sons.*

Chan. Div. Buckley, J. — Nov. 8, 9; Jan. 21.

In re TRENCHARD.
TRENCHARD *v.* TRENCHARD. (*a.*)

Settled land—Equitable tenant for life—Condition requiring residence—Power of sale—Trustee—Compromise—Settled Land Act, 1882, *s.* 51—*Trustee Act*, 1893, *s.* 21.

Where there was an equitable tenant for life of a house, valued at £320 a year, subject to a condition requiring residence, and some of the remaindermen were infants, the court being of opinion that the condition was not void under section 51 *of the Settled Land Act*, 1882,

Held, that the court could sanction an agreement between the tenant for life and the trustees whereby the tenant for life should release to the trustees her life estate in the house in consideration of their paying to her out of the general trust estate an annuity of £275.

In re Eastman's Settlement, 43 *SOLICITORS' JOURNAL*, 114, [1898] *W. N.* 170, *considered.*

By his will dated the 20th of November, 1897, a testator (clause 3) gave to his wife the use of his residence, "Woodville," Honor Oak, so long as she should desire to make it her permanent place of residence and should remain his widow, his estate to pay all rates, taxes, and outgoings in respect thereof and to keep the house and grounds in tenantable repair.

The will contained a devise and bequest of his residuary real and personal estate to his trustees upon trusts for sale and conversion and to hold the proceeds on the trusts declared concerning his residuary estate, with powers to them to postpone the sale of his Honor Oak estate until the death or remarriage of his widow and to lease his freehold and leasehold estates. The persons entitled to his residuary estate were his children, the shares of some of whom were settled.

The testator died in 1899. Questions arose as to the rights of the widow, and by an order of the 26th of July, 1900, made in *In re Trenchard, Ward* v. *Trenchard*, 16 Times L. R. 525, Byrne, J., declared that she was a tenant for life under section 58 (vi.) of the Settled Land Act, 1882, and that by the exercise of her power of sale she would not lose the benefits given her by the will.

Differences arose between the widow and the trustees as to the amount to be expended by them on repairs and as to the development of the Honor Oak property as a building estate. It was ultimately agreed between the beneficiaries that she should release to the trustees her beneficial interest in the house (amounting in the aggregate to £320 a year) and should receive in exchange therefor an annuity of £275 a year so long as she should remain a widow. The widow took out the present summons against the trustees to obtain the sanction of the court for the proposed arrangement. It was first argued on the 8th and 9th of November, 1901, and stood over for the persons entitled to the settled shares, some of whom were infants, to be added as parties.

Astbury, K.C., and *J. Bradford*, for the applicant.—Subject to the question of legal right, all parties are agreed that the compromise is a beneficial one for the estate. The qualification in the will of the benefit given to the tenant for life is void: Settled Land Act, 1882, s. 51; *In re Paget's Settled Estate*, 33 W. R. 898, 30 Ch. D. 161. *In re Haynes*, 36 W. R. 321, 37 Ch. D. 306, is against us, but sufficient effect was not given by it to *In re Paget's Settled Estate*, and it was not followed

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

in *In re Eastman's Settlement*, 43 SOLICITORS' JOURNAL 114, [1898] W. N. 170. Even if the qualification is only void as far as it tends to prevent her from exercising her power of sale, she has something to give up; for if she exercised her power of sale she would be able to obtain a greater income than is now proposed to be given her. A release of an estate to which a power of sale is incident is not an assignment of the power of sale within section 50 of the Act. The compromise is within the powers of the trustees under section 21 of the Trustee Act, 1893. If the court is satisfied that the transaction is one which the infants would carry through if they were of full age, it will sanction it on their behalf: *In re New, ante*, p. 17, [1901] 2 Ch. 534.

They also cited *In re Ames*, 41 W. R. 505, [1893] 2 Ch. 479; *In re Carne's Settled Estate*, 47 W. R. 352, [1899] 1 Ch 324; *In re Smith*, 47 W. R. 357, [1899] 1 Ch. 331.

Hunt, for the persons entitled to the settled shares.

Clayton, for the trustees.—I admit that the compromise will be a beneficial one, but I submit that the court cannot authorize trustees to sell infants' property, and, *a fortiori*, that it cannot authorize them to buy property with their money; it would be an unauthorized investment.

BUCKLEY, J., after stating the facts, continued: The applicant has argued that the provision as to residence contained in this gift is, by section 51 of the Settled Land Act, 1882, to be deemed void, and that she is entitled during widowhood whether she reside or not. In my opinion this is not so. Section 51 of the Settled Land Act, 1882, does not provide that a provision such as this shall be void, but that, as far as it tends to induce the tenant for life not to exercise the power under the Act, it shall be void. It is in the words "as far as" that, in my opinion, the solution of the question lies. Residence may cease upon sale and consequent delivery of possession to a purchaser, or may cease upon cesser of residence irrespective of sale. Complete effect is given to section 51 if the provision be deemed to be void in the first case, but not in the second. Suppose a disposition of property in favour of A. B. during life or widowhood, with a gift over in case of failing to reside, followed by a proviso that, for the purposes of the gift over, cesser of residence upon sale shall not be deemed a cesser of residence, and suppose a power of sale given to A. B. with an interest for life or widowhood in the proceeds of sale. Such a provision would not tend to induce the tenant for life not to sell; on the contrary, it would rather induce a sale. If she sold she would be entitled to the income of the proceeds of sale discharged from the obligation of residence. I see no reason why there should not exist consistently with the Act a valid gift over in the event of ceasing to reside voluntarily, and not upon a sale. It seems to me that that is the joint effect of this will and of the Act. In the present case Byrne, J., has declared that the widow has the power of a tenant for life under the Settled Land Act and that she will not forfeit the benefits given her by the will by selling under such power. In other words, she can sell, and if she sells she will be entitled, as against the proceeds of sale, to the same annual benefit (which must then be represented by money) as if she had not sold. This follows the decisions of Pearson, J., in *In re Paget's Settled Estate* and of North, J., in *In re Ames* and in *In re Smith*. The result of section 51 is that the provision, as far as it is a fetter upon the power of sale, is void, and, under sub-section 2 of that section, a new estate is given to the beneficiary by virtue of the statute extending to a like interest in the proceeds of sale. But, this having been insured, the words "as far as" in section 51 are satisfied, and, if there be a voluntary cesser of residence apart from sale, there is no reason why the testator's disposition should not have effect, inasmuch as that proviso does not tend to induce the tenant for life not to sell. This was the decision of North, J., in *In re Haynes*. It was argued that the decision of Romer, J., in *In re Eastman's Settlement*, of which the best report is in the SOLICITORS' JOURNAL, is inconsistent with this view. In my opinion that is not so. The form of the summons is stated in the SOLICITORS' JOURNAL; it did not go to the question of what the rights of the widow would be if she voluntarily ceased to reside apart from sale. The question whether the provision for the reduction of the annuity was void under section 51 was raised in connection with the question whether the applicant was entitled, during widowhood, to the income arising from the proceeds of sale. That question, as it seems to me, is the only question which the learned judge answered. He did not decide that, if she voluntarily ceased to reside, the reduction of the annuity would not take effect. In my judgment, therefore, the applicant in this case is not entitled to an interest during widowhood discharged from the provisions as to residence. But if she sells, and, therefore, ceases to reside, she will, by virtue of section 51 of the Act of 1882, be entitled, as against the income of the proceeds of sale, to the same benefits as if she had not sold. Under these circumstances the question is whether the trustees can compromise her rights in the manner proposed. The attitude of the applicant, as I understand it, is this. She says: "I have a beneficial interest in this house, and I propose to keep it by continuing to reside there or by exercising my right of selling it under the Act of Parliament, and therefore having a beneficial interest in the proceeds measured by the benefit given me by the will." Under section 50 she cannot release or assign her powers of sale, but there is nothing in the Act to prevent her from making any arrangement for disposing of her beneficial interest in the house. The nature of the compromise is this: The pecuniary benefit given to her by clause 3 of the will is, at present, about £320 a year, which is measured by the rent of the house in which she is entitled to live rent free and the rates, taxes, and other outgoings which the trustees are bound to pay. She says: "I am willing to take in exchange for that £275 a year; pay me something less than the amount to which I am entitled to under the will, and I will give up my right to reside in the house." If that offer is accepted and she goes out of residence, her estate ceases, but she has been paid for it by a sum payable annually. The sale must be either good or bad. If it is good, she loses her power of sale and forfeits her interest, but she keeps the purchase-money; if it is bad, there is no forfeiture and she resumes her right of residence and her power of sale. She only goes out of residence because she is paid the value of the right. It is argued for the trustees that this is an investment of money belonging to married women and infants, and is a misapplication of their funds. That argument seems to me to be fallacious. This is not an investment of their funds. At present they are subject to a payment of £320 a year, and in future they will be liable to pay £275. In fact they are receiving something, they are not paying anything They pay something less than before, and, to that extent, get a benefit. The widow gives up something, but she obtains this benefit, that she is no longer obliged to reside in a certain house. The trustees get this benefit, that they are relieved from the difficulty in which they have been placed, that the widow might have continued to reside, and thus interfere with the

building scheme, or she might have sold the house under her statutory power, and yet have retained her interest in the proceeds of sale. It seems to me that this is a fair compromise for all parties, and I declare that it is within the power of the trustees to enter into it, and I sanction it accordingly.

Solicitors, *Harston & Bennett; Ward, Perks, & McKay.*

Chan. Div. Joyce, J. } June 12, 13, 14, 1901; Nov. 19.

LONDON AND NORTH-WESTERN RAILWAY CO. v. MAYOR, &c., OF WESTMINSTER. (a.)

Metropolis—Public health—Public convenience—Approaches—Subway—Trespass—Subsoil of roadway and footway—Injunction—Public Health (Metropolis) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

Section 44 *of the Public Health (Metropolis) Act,* 1891, *vests the subsoil of the roadway in the sanitary authority for the purpose of making public conveniences; in making these it is within their power to make subways from either side of the street as a means of approach. The fact that the public may use these subways as a means of passing from one side of the street to the other without availing themselves of the conveniences does not make the construction of these subways* ultra vires.

It is, however, a trespass upon the lands of the adjoining owner to take any portion of the footway as a site for such convenience or the approaches thereto, for though section 44 *of the Act vests the subsoil of the roadway in the sanitary authority for that purpose, the subsoil of the footways is expressly excepted, and the rule that the land* usque ad medium filum viæ *belongs to the adjoining owner still applies up to the line of the kerb.*

The fact that the footway has been recently widened makes no difference to this rule.

Witness action.

The plaintiffs moved for an injunction to restrain the defendants from continuing to trespass upon certain premises of the plaintiffs by permitting a staircase, tunnel, and other works to remain upon their land.

By a conveyance dated the 26th of July, 1886, the plaintiffs purchased certain freehold messuages and tenements being Nos. 34, 35, and 36, Parliament-street, and Nos. 11 and 12, Bridge-street, Westminster, and occupied a portion of the corner house as buildings and offices. At the date of this conveyance the footway pavement of Parliament-street was 12ft. wide opposite to these premises. There were certain vaults belonging to the premises in Parliament-street under the footway pavement and projecting into the roadway.

In 1899 Parliament-street was widened by the then local authority, and the footway pavement was increased to a width of 21ft.

In November, 1900, the defendants, as the sanitary authority of the district, constructed certain underground sanitary conveniences in the centre of Parliament-street, and provided them with approaches by means of a subway from either side of the street, with staircases at either end at or near the edge of the pavement. One of these staircases was opposite the plaintiffs' premises and was placed partly in the roadway and to the extent of 2ft. 9in. within the line of kerb-stones of the pavement as altered in 1899.

The plaintiffs claimed that by the conveyance of 1886 the land to the centre of the roadway belonged to them, and that the defendants in making this subway had committed a trespass on their land, and that by so placing a staircase and railing opposite to their premises the free access to the highway was interfered with, and claimed an injunction to restrain the defendants from so trespassing or alternatively an injunction to restrain the defendants from so causing an obstruction to their use of the highway to the particular damage of the plaintiffs.

The defendants denied the plaintiffs' title to the soil to the middle of the roadway, and pleaded that in erecting these conveniences they had acted in pursuance of their statutory powers under section 44 of the Public Health (Metropolis) Act, 1891.

Younger, K.C., and *Montague Shearman,* for the plaintiffs.—The subway is quite distinct from the sanitary conveniences, for if the latter were shut up the former would still exist and be capable of use. The defendants' powers are derived from section 44 of the Public Health (Metropolis) Act, 1891; this vests the subsoil of the roadway in the sanitary authorities for the purpose of providing public lavatories, ashpits, and public sanitary conveniences; it does not permit them to make subways under the street. Even if this subway is not *ultra vires* yet the staircase encroaches on the footway, the soil of which is not vested in the sanitary authority. Part of the staircase stands on what was the footway when the defendants commenced these works; they cannot go into the history of the street and say that at one time this was part of the roadway and not of the footway. The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is applicable to a town street (*In re White's Charities, Charity Commissioners* v. *Mayor, &c., of London,* 46 W. R. 479, [1898] 1 Ch. 659) unless it is shown that something made it necessary for the vendor to retain the soil *ad medium filum. Micklethwait* v. *Newlay Bridge Co.,* 33 Ch. Div. 133, 35 W. R. Dig. 71. Here, nothing is shown to rebut the presumption that the land *usque ad medium filum* was conveyed to the plaintiffs. The soil of the footway not being vested in the defendants by the section they have clearly trespassed on the plaintiffs' land in making the staircase partly on the footway. The plaintiffs are clearly entitled to a mandatory injunction: *Goodson* v. *Richardson,* 22 W. R. 337, L. R. 9 Ch. App. 221.

Hughes, K.C., and *Deighton Pollock,* for the defendants.—The defendants were justified under section 44 of the Act of 1891 in making conveniences with proper approaches. This staircase does not infringe any right of the plaintiffs: *Chaplin* v. *Westminster Corporation,* 49 W. R. 586, [1901] 2 Ch. 329. At most this is a question of damages and not a case for an injunction: *Mayfair Property Co.* v. *Johnson,* [1894] 1 Ch. 508. As to the staircase being partly inside the footway, as highway authority we have power to move the kerb further back, when the subsoil of the roadway will vest in us under the section.

Nov. 19.—JOYCE, J.—In the year 1886 the London and North-Western Railway Co., the plaintiffs in this action, purchased certain freehold property situate at the corner of Parliament-street and Bridge-street, Westminster, which was described in the conveyance as "all those freehold messuages or tenements situate in Parliament-street, in the parish of St. Margaret, Westminster, in the county of Middlesex, and numbered 34, 35, and 36 in Parliament-street aforesaid, and also all those two freehold messuages or tenements situate in Bridge-street in the said parish of St. Margaret, Westminster, and numbered

(a) Reported by C. W. MEAD, Esq., Barrister-at-Law.

respectively 11 and 12 in Bridge-street aforesaid but which were formerly numbered 46 and 47 in the same street, all delineated in the plan drawn in the margin of these presents and therein coloured red." This plan appears to me to comprise not merely the site of the buildings then on the premises but also a small area outside, being a portion of the foot pavement in Parliament-street. The pavement of such portion is said to have stood originally a few inches above the pavement of the general footway, but this difference of level has since been removed. I consider it highly improbable that either party supposed any interest in the soil of the adjacent footway, outside the area coloured red on the plan, or the moiety of Parliament-street as then existing, to be the subject of the sale or of the conveyance. But as a matter of fact there were in connection with the premises certain vaults underneath the footway and projecting into Parliament-street beyond the boundary line of the premises as shown upon the plan. At the date of the conveyance, and thenceforward until certain alterations made by the then local authority and completed in June, 1899, the pavement for pedestrian traffic in front of the plaintiffs' premises in Parliament-street was of the width of no more than 12ft. or thereabouts, measured from the front wall of the plaintiffs' buildings. In the year 1899, upon the removal of the block of buildings between Parliament-street, as it then was, and King-street, and the consequent widening of Parliament-street, the kerb of the footway in front of the plaintiffs' premises was advanced into the roadway so as to make the width of the footway about 21ft., and the edge of this footway was the line of the kerbing before the alterations in question in this action. Parliament-street as widened is nearly 100ft. in breadth. At the corner where the plaintiffs' premises are situate between Parliament-street and Bridge-street leading to Westminster Bridge there is very considerable traffic of all kinds, as everybody knows, and it was at one time contemplated by the local authority to construct, there or thereabouts, certain sanitary conveniences and a general system of subways underground, so as to enable foot passengers thereby to cross the streets in safety. For some reason or other this project for a general system of subways had to be given up, but it was finally decided to construct extensive sanitary conveniences for the use of both sexes respectively underneath the middle of Parliament-street, with approaches thereto by a descending staircase from the footways on either side, one effect of this being, of course, that if anyone chose to descend from the foot pavement, pass underneath the street, using or not using one of the conveniences in passing, he or she might cross the street without danger of being run over by any of the vehicles which there at certain hours crowd the roadway. At first it was proposed to place the descending stairs, from the eastern side of Parliament-street to these conveniences, upon or within the outer portion of the foot pavement, widened as it was in 1899 opposite the plaintiffs' premises; but it was found that this could not be done without acquiring or interfering with a small portion of the vaults I have mentioned belonging to the plaintiffs. They objecting to these stairs being in front of their premises, though at a distance of 15ft. or thereabouts from the front of their buildings, the stairs were placed further away, so as to stand for a portion of their width on the roadway as then existing and for the rest—viz., 2ft. 9in. or thereabouts—upon the foot pavement as extended in the previous year, 1899, in the manner I have mentioned. At the time of the trial the works were nearly completed, what I may call the general line of the kerb on the edge of the foot pavement having been put back so as to be distant about 19ft. or a little less from the adjacent buildings. It is not alleged or suggested that this has not left more than ample width for the use of foot passengers there. Indeed, I suppose the footway was widened as it was in 1899 not so much from necessity as to improve the appearance of the street. It was stated, and is probably the fact, that the only power the defendants had to do what they have done must be found in section 44 of the Public Health (London) Act, 1891, and it was argued that, apart from any question of the right of property in the subsoil, the situation selected for the convenience was unreasonable and improper, and that, inasmuch as people could cross Parliament-street by means of the approaches to the conveniences, those approaches did in fact constitute a subway which the defendants had no authority to make, and that all that they have done is thus *ultra vires* and ought to be removed. Apart from any question depending upon the legal right of the subsoil, or assuming this to be vested in the defendants, I have come to the conclusion that what the defendants have done is in no way *ultra vires*, unreasonable, or improper. Their primary object was, in my opinion, the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom, and because, by reason of there being approaches from both sides, these may be used for crossing the street, I decline to hold that the defendants have not acted *bonâ fide* in the exercise of their statutory powers, or that they have occasioned any nuisance that was not authorized by law. In other words, I think this action fails, unless the plaintiffs can establish that a portion of the site of the eastern approach or staircase down to the conveniences is their property, and a part of the footway within the meaning of that expression in the 44th section of the Public Health Act, 1891. The plaintiffs relied upon the presumption which is thus stated in Pratt's Law of Highways (14th ed.), p. 39: "It is a presumption of the law, in the absence of evidence to the contrary, that the soil of a highway to the middle of the road (*usque ad medium filum viæ*) belongs to the owner of the land adjoining the highway. This presumption has been said to rest on the supposition that, when the road was originally set out, the proprietors of the adjoining land each contributed a portion of their land for its formation." And the presumption is also stated in Elphinstone, Norton, & Clark on the Interpretation of Deeds, at p. 179, as follows: "By the conveyance of land abutting on a highway or separated from it by a strip of uninclosed land, the *primâ facie* presumption of law, in the absence of evidence of ownership, is that the strip and the soil of the road *usque ad medium filum* passes." The defendants hardly contested the application of this presumption to the present case, notwithstanding what is said in *Beckett* v. *Corporation of Leeds*, 20 W. R. 454, L. R. 7 Ch. App. 421, Romer, L.J., having held in *In re White's Charities*, that the presumption that half the soil of the road is intended to pass to a purchaser of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country." I cannot say that I consider this last case to be an altogether satisfactory authority. Still it is a deliberate decision to the effect above stated. In considering my judgment it occurred to me that Parliament-street was quite a modern street and that it was very possible that the land required for making it might have been purchased by some road authority. Upon referring to Wheatley's London I found it there stated that Parliament-street was made pursuant to the statute 29 Geo. 2, c. 38, King-street having been previously the only highway from Whitehall to Westminster. That Act provided

the Commissioners of Westminster Bridge with funds for the purchase of houses and grounds for the purpose of widening the ways and making more safe and commodious the streets, avenues, and passages from Charing Cross to Westminster. In J. T. Smith's Antiquities of Westminster (1807) an elaborate plan is given, showing the streets, courts, alleys, and yards near the *locus in quo* as they appeared before the erection of Parliament-street. If this plan be correct, the site of the portion of Parliament-street now in question must have been purchased, or the right to use it somehow acquired—it is hardly likely to have been given—by the Commissioners of Westminster Bridge. I thought it my duty under the circumstances to mention the case again in court and to call counsel's attention to the point. Upon a subsequent day, however, counsel for the defendants informed me that he had nothing more to say, and that his clients did not desire or were unable to adduce further evidence. I may add that by the Act 16 & 17 Vict. c. 47 the estates of the Commissioners of Westminster Bridge were transferred to the Commissioners of Her Majesty's Works and Public Buildings. The Act 50 & 51 Vict. c 34 also deals with the approaches to Westminster Bridge.

Now, whatever I may conjecture to be the true facts if investigated and ascertained in reference to the ownership of the subsoil in Parliament-street where the staircase has been constructed, I suppose I must act upon such evidence only as was before the court at the trial, and hold that the presumption I have mentioned applies, and consequently that the land or soil where the staircase is constructed as to 2ft. 9in. in width is the property of the plaintiffs, and, being part of the footway, not liable to be taken and used by the defendants under the Act of 1891 for the purpose of the construction of sanitary conveniences. I must, therefore, as it seems to me, grant an injunction for the removal of this portion of the staircase. This result appears, under the circumstances, to be most unsatisfactory. I cannot help suspecting that the soil in question does not belong to the plaintiffs. My order will do the plaintiffs no real good if the defendants choose, as they may, to simply put the staircase 2ft. 9in. further out into the roadway, thus making it to stand clear of the footway as it was before the works were commenced. Nor do I see how I can compel the defendants to restore the old line of the kerb or edge of the footway as it existed at the end of 1899. As to the costs, it appears to me that the plaintiffs have failed in substance as to part of their case and succeeded as to the rest. Therefore I make no order as to costs. I shall stay the operation of the injunction for six months and give leave to apply to the judge in chambers to extend that period if an appeal be presented or for any other reason.

Solicitor for plaintiffs, *C. H. Masson.*

Solicitor for defendants, *Percy Gates.*

K. B. Div. (Phillimore, J.) — Jan. 14, 15.

ATTORNEY-GENERAL *v.* LORD MONTAGU. (*a.*)

Inland Revenue—Estate duty—Settled property—Mortgage by tenant for life and remaindermen for benefit of remaindermen—Indemnity to tenant for life—Value of property passing on death of tenant for life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (b), *and* 7 (7).

By his will the Duke of B. settled a certain estate on his wife for life, then on his second son, Lord M., for life, with remainder in fee tail on the eldest son of Lord M. With the consent of the duchess-dowager Lord M. and his said son disentailed the estate and resettled it subject to the life estate of the duchess-dowager to such uses as Lord M. and his son should jointly appoint, and in default of appointment to the use of Lord M. for life, with remainder to his said son in tail male. In exercise of the above power of appointment Lord M. and his son—the duchess-dowager joining in in respect of her life estate only—mortgaged the estate in fee to secure a sum of £27,000, which money was entirely for the benefit of Lord M. and his son, and they alone entered into the personal covenants By an indenture of even date between the duchess-dowager and Lord M. and his said son the latter jointly and severally covenanted to indemnify the former from any liability or loss of profits or any action or suit arising through or from the mortgage, and they conveyed an annuity and rent-charge to trustees as security for the performance of the covenant. On the death in 1895 of the duchess-dowager, Lord M., in delivering an account for the purposes of assessing estate duty, claimed to deduct the mortgage debt of £27,000 from the capital value of the said settled estate.

Held, that as the duchess-dowager during her life must be deemed to have been beneficially interested in the estate to its full value, the estate which passed on her death was the full beneficial life interest in it, and that estate duty was therefore payable without deduction of the incumbrance of £27,000.

Information by the Attorney-General.

By the will dated the 8th of August, 1883, the Duke of Buccleuch and Queensberry appointed the Ditton Park estate to the use of his wife, Charlotte Anne, Duchess of Buccleuch and Queensberry, for life, and from and after her decease to the use of his second son, the defendant, in tail male.

The said duke died on the 16th of April, 1884.

By an indenture dated the 28th of May, 1888, and made between the duchess-dowager of the first part, the defendant of the second part, and the eldest son of the defendant of the third part, and certain trustees of the fourth part, and enrolled as a disentailing assurance pursuant to 3 & 4 Will. 4. c. 74, the estate by way of resettlement was conveyed unto the trustees on trust subject to the life estate of the duchess-dowager to such uses as the defendant and his said son should jointly appoint, and in default of such appointment to the use of the defendant for life, with remainder to the use of the defendant's said son for life, with remainder in tail male.

By an indenture dated the 29th of May, 1888, and made between the duchess-dowager of the first part, the defendant of the second part, the defendant's said eldest son of the third part, and certain mortgagees of the fourth part, in consideration of £27,000 lent to the defendant and his said son at the request of the duchess-dowager by the mortgagees, the defendant and his son only entering jointly and severally into all the ordinary covenants, the duchess-dowager as tenant for life in possession and the defendant and his said son in exercise of the joint power of appointment given to them by the aforesaid deed of the 28th of May, 1888, conveyed the Ditton Park estate unto and to the use of the mortgagees in fee simple, subject to a proviso for redemption.

By an indenture dated the 29th of May, 1888, and made between the defendant of the first part, the defendant's said son of the second part, the duchess-dowager of the third part, and certain trustees of the fourth part, it was witnessed that the defendant and

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

his said son did jointly and severally covenant to keep indemnified the duchess-dowager against the aforesaid "mortgage debt of £27,000 and interest, and against all actions, suits, proceedings, claims, and demands which might be brought or made by any person or persons against her or the said Ditton estate during her life by way of enforcing the said mortgage security or for or in respect of the said sum of £27,000 and interest thereby secured." An annuity and rent-charge were conveyed by the defendant and his son to the trustees as security for the performance of the above covenant.

The duchess-dowager died on the 28th of March, 1895.

The information then went on to show that the mortgage was created wholly for the benefit of the defendant, Lord Montagu, and his said son, or one of them, and that the duchess-dowager was in fact kept wholly indemnified by them, or one of them, against the said mortgage and all claims for interest or otherwise in respect thereof. That the defendant as tenant for life in possession was bound to deliver an account and to pay estate duty under the Finance Act of 1894 on the principal value thereof, but that, in delivering such account, he claimed to deduct the mortgage for £27,000 from the capital value of the estate.

The Crown now claimed that upon the death of the said Charlotte Anne, Duchess-Dowager of Buccleuch and Queensberry, estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the Ditton Park estate devised by the will of Walter Francis, Duke of Buccleuch and Queensberry, as property which passed on her death within the meaning of the said Act, without deduction of the mortgage debt of £27,000, and that the defendant was bound to deliver an account and pay duty accordingly.

Sir R. B. Finlay, A.G., Sir E. Carson, S.G., and *Vaughan Hawkins*, for the Crown.

Danckwerts, K.C., and *J. Austen-Cartmell*, for the defendant.

The arguments sufficiently appear in the following judgment.

PHILLIMORE, J.—On the 28th of May, 1888, the Ditton Park estate stood limited to the Duchess-Dowager of Buccleuch and Queensberry for her life, and then, subject to, but for other purposes, an overriding power, to Lord Montagu for life, with remainder to his eldest son for some estate of freehold. On the 29th of May, by an indenture to which the Duchess, Lord Montagu, and his son were parties as grantors, by conveyance of the duchess's life estate and by an appointment made by Lord Montagu and his son in exercise of the power which I have mentioned, the estates were mortgaged to secure a sum of £27,000 and interest. The ordinary personal covenants for payment by the mortgagor or mortgagors were expressly made by Lord Montagu and his son only, and the power of redemption was given, not to the duchess nor to the successor in fee only, but it was given to Lord Montagu, who had a life estate in remainder, and his son, successors in fee, otherwise there is no peculiarity, unless the last is a peculiarity, of which I am not certain, in the mortgage deed. By an indenture of even date—reciting what one would have conjectured already from the form of the mortgage, that the duchess was not the real borrower, but that the money was borrowed for Lord Montagu and his son—Lord Montagu and his son covenanted personally to keep the duchess indemnified, and to indemnify her if she should suffer loss in respect of her estate in Ditton Park; and, further, to convey by way of security sufficient interest which they had in other properties during the lifetime of the duchess.

In these circumstances the duchess apparently was never the sufferer during her life by the fact that she had joined in the mortgage and incumbered, as between her and the mortgagees, her life estate in the Ditton Park estate, and she died, as she had lived, beneficially interested in the Ditton Park estate to its full value. Upon her death the Crown claimed estate duty from Lord Montagu and those claiming after him; and Lord Montagu and those claiming after him admitted their liability to estate duty. The question then arose as to the measure of that liability. The Crown said it was to be assessed on the supposition that the duchess had been beneficially interested during her life, until her death, in the Ditton Park estate to its full value. Lord Montagu and those claiming under him said that she was to be treated as only interested in the Ditton Park estate incumbered by the mortgage for £27,000; and that is the matter which I have to determine.

The Crown rests its claim upon section 1, section 2 (1) (*b*), and section 7 (7) of the Finance Act of 1894, and those seem to me to be in substance the only material portions of the Finance Act which I have to consider.

The argument on behalf of the defendant rests upon the deductions which it is said are to be drawn from the decision of the House of Lords in *The Attorney-General* v. *Cowley*, 47 W. R. 525, [1899] A. C. 198. The decision of the House of Lords in *The Attorney-General* v. *Beach*, 47 W. R. 257, [1899] A. C. 53, and the decision of the Court of Appeal in *The Attorney-General* v. *De Preville*, 48 W. R. 193, [1900] 1 Q. B. 223, are also prayed in aid.

Now I may perhaps say once and for all that there will never be found any reluctance in me to carry those three decisions to their full conclusion, and I may now say with all respect that I have not the slightest intellectual difficulty in following and applying them wherever they become important; and for the purpose of this case I accept the contention of the defendant that the duchess's estate in the Ditton Park estate was legally incumbered and that that legal incumbrance must be taken into consideration in assessing what her successors have to pay. But having said that, I nevertheless come to a conclusion in favour of the Crown. I have, in my opinion, to consider what was the beneficial interest which the duchess enjoyed in the Ditton Park estate, and which upon her death she relinquished, and having to consider that, I have no hesitation in saying that she must be deemed to have been beneficially interested in it to its full value. I am not certain that it really makes any difference that the defendant and his son in this case happen to be also the people who are bound to keep the duchess's interest in the Ditton Park estate up to its full value.

If it does make any difference it makes the case for the Crown stronger. I think, however, it would have been quite the same if it had been other persons who had covenanted to indemnify and secure the duchess, provided always that the security was ample and sufficient. I think, looking, as I ought to do, at the mortgage deed and the deed of indemnity as constituting, as far as the duchess and Lord Montagu and his son were concerned, one transaction, I must come to the conclusion that though the Ditton Park estate in respect both of the duchess's interest and the interest in remainder was the security of the mortgagees, nevertheless as between those interested in the Ditton Park estate the duchess's estate therein was only liable by way of suretyship, and Lord Montagu and his son were bound to prevent the duchess ever suffering any diminution of her

interest. If it had been necessary during the duchess's life to estimate *inter vivos* the value of her life interest in that property, if, for instance, a tax had been imposed upon capital instead of upon income, or if the duchess had conveyed her estate and there had been a question of the *ad valorem* duty to be imposed upon that conveyance, it is possible, or probable, that the possible liability of the duchess's estate to meet the mortgage would have to be assessed as a contingent liability, and assessing the contingent liability at some figure, would, *pro tanto*, have diminished the value of her life interest. If—which might have happened—the duchess had been called upon to pay the mortgage, or if the mortgagees had entered into possession, or if they had sold, or compelled the duchess to join in selling, some portion of the property to meet their claims, then the estate which the duchess relinquished on her death would have been *pro tanto* diminished, and a lesser rate of duty would have been recoverable from Lord Montagu and his successors. But now that I have to assess the duty upon the duchess's death, I know that there can be no liability, and I know that there has been no demand, and no payment, in respect of the liability, and therefore I think I am bound to treat the duchess as no doubt having subjected her estate to a legal incumbrance, but having that incumbrance in fact as a mere shell without any kernel, and as in fact being beneficially interested in this estate to its full value up to the date of her death; and taking that view it becomes unnecessary to consider many other circumstances which have been raised and met during the course of the argument of this case.

Accepting to the full the canons which binding authorities have imposed upon me, and applying my mind to the construction of section 1 of the Finance Act, 1894, though it may also come under section 2 (1) (*b*), I am of opinion that the estate which the duchess relinquished, or which passed on her death, in the Ditton Park estate was the full beneficial life interest in it, and that therefore the duty must be paid without deduction of the incumbrance of £27 000.

Judgment for the Crown, with costs.

Solicitor for the informant, *Solicitor of Inland Revenue.*

Solicitors for the defendant, *Nicholl, Manisty, & Co.*

K. B. Div. (Walton, J.) Nov. 26, 27.

BLACKBURN AND ANOTHER *v.* LIVERPOOL, BRAZIL, AND RIVER PLATE STEAM NAVIGATION CO. (*a.*)

Ship—Bill of lading—Exceptions—Perils of seas—Negligence—Admission of sea-water.

Goods were carried by sea under a bill of lading which exempted the shipowner from liability for damage arising from perils of the seas or navigation, whether arising from the negligence of the shipowner's servants or otherwise. As the ship was nearing her discharging berth the engineer, with the intention of admitting sea-water into a ballast tank for boiler use during the discharge of the cargo, opened a wrong valve, thereby letting the water into a hold of the ship where part of the cargo was stowed, which was in consequence damaged.

Held, that the damage was due to a peril of the seas arising from the negligence of the engineer, and that the shipowner was not liable to the owner of the cargo.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Action in the commercial list tried before Walton, J., without a jury.

The action was brought to recover damages in respect of the deterioration of part of a cargo of sugar shipped by the plaintiffs on board the defendants' steamship *Tropic* for carriage from Pernambuco to New York under bills of lading.

The plaintiffs remained holders of the bills of lading and were receivers of the cargo.

The bills of lading contained the following exceptions: "Loss or damage resulting from . . . any of the following perils (whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise howsoever) excepted, namely, . . . other peril of the seas, rivers, or navigation of whatever nature or kind soever, and howsoever such collision, stranding, or other peril may be caused."

On the arrival of the ship at New York a considerable quantity of the sugar was found on delivery to be in a damaged condition. The damage had been caused by an incursion of sea-water into the *Tropic's* deep tank, in which part of the cargo was being carried, and which was a usual and proper place in which to carry the cargo.

It appeared that when the *Tropic* was outside Sandy Hook the chief engineer being under the mistaken impression that she was going to Williamsburg Wharf to discharge her cargo, desired to fill No. 4 ballast tank with water for boiler use while discharging instead of taking in water at the wharf, where, according to his previous experience, it was contaminated with sewage. He therefore opened the sea-cock, and intended to open the valve of No. 4 ballast tank, but by mistake opened the valve of the deep tank, with the result that the water ran into the deep tank where the bags of sugar were instead of into No. 4 ballast tank. The sea-cock was open from 11.30 a.m. on the 30th of January until 3 p.m. of the same day. The mistake was not discovered until 6 a.m. of the 31st of January, and the water was then pumped out. *The Tropic* was not intended to go, and did not in fact go, to Williamsburg Wharf.

The damages were agreed at £1,319.

Carver, K.C., and *Bailhache*, for the plaintiffs.—The defendants are not protected from liability by the exceptions in the bill of lading. It cannot be said that the damage was due to a peril of the sea; in order to come within those words there must have been something in the nature of an accident. The admission of the sea-water was not an accidental occurrence. The water was intentionally let into the ship by the engineer, the only mistake was as to the part of the ship into which it was allowed to flow. Again, the damage was not due to a peril of navigation. The navigation had, in fact, come to an end, but even if it had not, the water was not admitted for any purpose connected with the sailing or handling of the ship, but only in connection with the discharge of the cargo: *The Accomac*, 39 W. R. 133, 15 P. D. 208; *Good* v. *London Steamship, &c., Association*, 20 W. R. 33, L. R. 6 C. P. 563; *Carmichael* v. *Liverpool, &c., Sailing Ship Association*, 35 W. R. 793, 19 Q. B. D. 242; *Canada Shipping Co.* v. *British Shipowners, &c., Association*, 38 W. R. 87, 23 Q. B. D. 342. These cases are authorities to show that "navigation" must be some act in connection with the sailing of the ship. Further, the damage resulted from the intentional act of the engineer, so that, even if it was an act of navigation, it was not a peril of navigation.

He also cited *The Ferro* [1893] P. 38, 41 W. R. Dig. 223; *The Glenochil*, [1896] P. 10 44 W. R. Dig. 148; and *The Rodney*, 48 W. R. 527, [1900] P. 112.

Horridge, K.C., and *Maurice Hill*, for the defendants—The damage was caused by a peril of the sea or of navigation brought about by the negligence of the engineer, and therefore the defendants are not liable. The admission of the water. from whatever cause, was a peril of the sea: *The Xantho*, 36 W. R. 353, 12 App. Cas. 503; *Hamilton, Fraser, & Co.* v. *Pandorf*, 36 W. R. 369, 12 App. Cas. 518. It was also a peril of navigation having occurred in the course of the voyage: *The Southgate*, [1893] P. 329; *The Cressington*, [1891] P. 152, 39 W. R. Dig. 206.

Carver, K.C., replied.

WALTON, J.—In this case the plaintiffs shipped a cargo of sugar on board the defendants' steamship *Tropic* for carriage from Pernambuco to New York under bills of lading of which the plaintiffs were the holders. The plaintiffs were also the receivers of the cargo. While the ship was still on her way to New York, but had got near to Sandy Hook, the chief engineer, with the object of filling No. 4 ballast tank with water, for the use of the boiler while discharging the cargo at New York, opened the sea-cock, and by doing so, in one sense, admitted water into the ship. The engineer intended the water thus admitted to flow into the ballast tank, but, by mistake, he opened the valve of the deep tank, in which part of the cargo was stowed, instead of the valve of the ballast tank, with the result that the water flowed into the deep tank and damaged the cargo so that its value was diminished to the extent of £1,319. The plaintiffs in this action seek to recover that amount, and their contention is that the defendants were bound to carry and deliver the cargo safely, and that they failed to do so. The defendants rely upon an exception in the bills of lading of "perils of the seas or navigation," "of whatever nature or kind soever (whether arising from the negligence, default, or error in judgment of the . . . engineers . . . or otherwise howsoever)." The defendants contend that in the circumstances of this case the damage was due to perils of the seas or navigation.

The kind of risk which a clause such as this is intended to cover is explained by the three cases in the House of Lords: *Thames and Mersey Marine Insurance Co.* v. *Hamilton*, 36 W. R. 337, 12 App. Cas. 484; *The Xantho; Hamilton* v. *Pandorf*. It is to be observed that in none of those three cases was there any exception of the negligence of those on board the ship, so no question as to negligence arose, and the shipowner was, as I understand the law, bound absolutely to carry and deliver the goods safely, subject, of course, to the exception of perils of the seas and other exceptions contained the bills of lading. But, as was explained in those and earlier cases, the contract of the shipowner, when it contains no negligence clause, is not only to carry safely, subject to the excepted perils, but also to use due care and skill to avoid and prevent damage from any cause whether within the exceptions or not; so that, even if the cause of damage is within the excepted perils, and the shipowner is therefore relieved from his absolute obligation to carry safely, he still remains liable if the peril arose from the negligence of his servants. In the present case, however, the shipowner is by the express terms of the bills of lading relieved from liability for loss occasioned by perils of the seas even though the peril may have been caused by the negligence of his servants. The only question, therefore, which I have to determine is whether the loss was due to a peril of the seas or navigation. Now, as was pointed out by Lord Halsbury in *Hamilton* v. *Pandorf*, to bring the case within the exception there must in the first place be an accident. Things which must necessarily happen cannot be perils of the seas. Further, the accident must have been "of the seas." But it seems to me to be a fallacy to say that because the loss was due to negligence there was no accident. Using words in their ordinary and proper sense, damage caused by negligence of servants is the result of accident. Now, one peril of the seas is that if the ship be not kept tight the sea-water will come in, and if there be an incursion of sea-water due to an accidental opening, and damage result, then this damage is due to a peril of the seas. The chief engineer in merely opening the sea-cock, did not render the ship otherwise than tight, but when, by mistake, he opened the valve of the deep tank, and so let water into the carrying part of the ship, she ceased to be tight. This case cannot, I think, be distinguished from the case in which a port-hole was by mistake accidentally left open, whereby sea-water was let in: see *Carmichael* v. *Liverpool, &c., Sailing Ship Association*. The shipowners have therefore brought themselves within the bills of lading and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs, *Walker, Son, & Field*, for *Weightman, Pedder, & Weightman*, Liverpool.

Solicitors for defendants, *Field, Roscoe, & Co.*, for *Thornely & Cameron*, Liverpool.

Privy Council.

(*From the Supreme Court of the Cape of Good Hope.*)

Nov. 5; Dec. 18.

MARAIS v. THE GENERAL OFFICER COMMANDING THE LINES OF COMMUNICATION AND THE ATTORNEY-GENERAL OF THE CAPE OF GOOD HOPE. (*a.*)

Martial law—State of war—Ordinary tribunals—Jurisdiction of courts.

Where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities. Should martial law be proclaimed over certain districts, the civil courts, though permitted to continue for ordinary purposes, have no authority over the military tribunals.

Petition *ex parte* by David François Marais for special leave to appeal from a judgment of the Supreme Court of the Cape of Good Hope.

The general circumstances and the course of the proceedings are given in their lordships' judgment. The petition stated that D. F. Marais was a British subject; and on the 15th of August last that he was arrested at Paarl in his office by the chief constable (who stated he was acting under instructions from the military authorities) and lodged in the town gaol; that afterwards he was removed by the military to Beaufort West and lodged in gaol there.

The petitioner submitted he had committed no crime; that if he had, he should have been arrested and tried according to law; that the civil courts were open for his trial, and that his arrest, deportation, and confinement were illegal, and that he was entitled to his immediate discharge.

On the 12th of September, 1901, the Supreme Court of the Colony of the Cape of Good Hope refused the petitioner's application for an order for his immediate discharge.

The petitioner now claimed special leave to appeal

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

against the decision of the Supreme Court of the Cape of Good Hope.

Haldane, K.C., and *F. Mackarness*, for the petitioner.

Dec. 18.—The judgment of their lordships (Earl of HALSBURY, L.C., Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, LINDLEY, and Sir HENRY DE VILLIERS) was delivered by the

Earl of HALSBURY, L.C.—This is a petition by D. F. Marais for special leave to appeal against a decision of the Courts in Cape Colony, which had refused to release him from an arrest effected by the military forces of the Crown on the 15th of August last. It appeared sufficiently from the petitioner's own petition as well as from the documents accompanying it that the district in which he was arrested, and the district to which he was removed (of which removal he also complained), was a district which had been proclaimed under martial law. The petitioner applied to the Supreme Court complaining of his arrest and imprisonment; and on the 12th of September last the matter of the petitioner's arrest was brought before Buchanan, J., and that learned judge, after hearing the matter, made the following order: "In the Supreme Court of the Colony of the Cape of Good Hope.—Cape Town, Thursday, the 12th of September, 1901.—In the matter of the petition of David François Marais.—Having heard Mr. Currey, with him Mr. S. Solomon, for petitioner; Mr. Searle, K.C., for the General Officer Commanding Lines of Communication, Cape Town, and the Hon. the Attorney-General Sir James Rose-Innes, K.C.M.G., with him Mr. Ward, for the Colonial Government upon petitioner's application for his immediate liberation and discharge, and having read the order granted on the 6th inst., calling upon the gaoler at Beaufort West to return to this court the authority on which he detains petitioner; having also read the further affidavits filed, and having heard the return made by the Attorney-General verbally, that the gaoler who has the custody of the petitioner holds him as an officer acting under the authority and control of the military authorities in the district in which martial law prevails, it is ordered that the said application be and the same is hereby refused.—By order of the court. J. H. GATELY, Acting Registrar." From the petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major-General Wynne, that in the opinion of the military authorities there were military reasons that the petitioner should be removed and kept in custody. All the persons arrested were, as appeared by the warrant under which they were arrested, charged with contravening what were called "Martial Law Regulations," which regulations are set out in the petitioner's affidavit as follows: "No. 14.—Rebellion, Dealings with Enemy, &c.—Notice is hereby given that from and after the 22nd of April, 1901, all subjects of his Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails—(1) Be actively in arms against his Majesty, or (2) directly incite others to take up arms against his Majesty, or (3) actively aid or assist the enemy, or (4) commit any overt act by which the safety of his Majesty's forces or subjects are endangered, shall immediately on arrest be tried by a military court convened by authority of the General Commanding-in-Chief his Majesty's Forces in South Africa, and shall on conviction be liable to the severest penalties. These penalties include death, penal servitude, imprisonment, and fine. Any person reasonably suspected of such offence is liable to be arrested without warrant, or sent out of the district, to be hereafter dealt with by a military court."

Under these circumstances their lordships were appealed to to give special leave to appeal, and Mr. Haldane, on behalf of the petitioner, was fully heard on the 5th of November last. The only ground susceptible of argument urged by the learned counsel was that whereas some of the courts were open it was impossible to apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, and that where acts of war are in question the military tribunals alone are competent to deal with such questions. The question was as fully argued before their lordships by the learned counsel as it could have been argued if leave to appeal had been given; and their lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals; and that war in this case was actually raging, even if their lordships did not take judicial notice of it, is sufficiently evidenced by the petitioner's own petition and affidavit. Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830. In *Elphinstone* v. *Bedreechund*, 1 Knapp P. C. Rep. 316, the Supreme Court at Bombay had given a large sum as damages against the appellant for the seizure of certain treasure at Poona. During the time of the seizure no actual hostilities were carried on in the immediate neighbourhood of Poona, but the great battle of Kirkee had been fought and Poona had been taken possession of by the British forces. The treasure was seized on the 17th of July, 1818. At Poona some courts had been open from the previous February, and it was argued, and held by the Bombay courts, that it must be held to be a time of peace and that the military authorities were responsible in damages for seizure of the treasure. To this the Attorney-General, Sir James Scarlett, replied that a military commander may allow the usual courts of justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the commander, but this does not deprive the commander of his power or free the country from military government. Lord Tenterden, in giving judgment, said: "We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject," and the judgment was accordingly reversed. The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities. Doubtless, cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot or disturbance, neither so serious nor no extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the necessity for the intervention of the military force was necessary; but once let the fact of actual war be established and there is a universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities. The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of

the illegality of unconstitutional procedure. For these reasons their lordships advised his Majesty to refuse leave to appeal.

Solicitors for petitioners, *Charles Russell & Son.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Jan. 30.

GUARDIANS OF THE POOR OF WEST HAM UNION *v.* LONDON COUNTY COUNCIL. (*a.*)

Poor law—Settlement—Amalgamation of part of parish with another parish—Divided Parishes and Poor Law Amendment Act, 1876 (39 *&* 40 *Vict. c.* 61)—*Poor Law Act,* 1879 (42 *&* 43 *Vict. c.* 54).

Where a pauper has acquired a settlement in a parish, and subsequently by an order of the Local Government Board, made under the Divided Parishes and Poor Law Amendment Act, 1876, *as amended by the Poor Law Act,* 1879, *part of another parish has been amalgamated with the former parish, the parish does not thereby cease to exist, and the pauper's settlement is not lost.*

Judgment of the Divisional Court (49 *W. R.* 443, [1901] 1 *K. B.* 720) *affirmed.*

Appeal by the Guardians of the West Ham Union from the judgment of the Divisional Court (Darling and Channell, JJ.) upon a case stated by the London Quarter Sessions on an appeal from the order of justices of the County of London, whereby it was adjudged that the place of the last settlement of one Elizabeth Heritage, a pauper lunatic confined in the Claybury Lunatic Asylum belonging to the London County Council, at Woodford, in the county of Essex, was in the parish of West Ham, in the West Ham Union, and whereby the Guardians of the West Ham Union were ordered to pay to the treasurer of the said asylum for the maintenance of the pauper. The case is reported in 49 W. R. 443, [1901] 1 K. B. 720.

Elizabeth Heritage was born in Stephenson-street, Canning Town, in the parish of West Ham, in the West Ham Union, on or about the 11th of February, 1852, and resided at 40 and 42, Barking-road, in the parish of West Ham, for about seventeen years, until August, 1888. She resided at the above address in such circumstances, during the whole of the seventeen years and in each of such years, as to render her irremovable from the parish in which such residence took place.

By an order of the Local Government Board dated the 24th of August, 1886, and made under the Divided Parishes Act, 1876, as amended and extended by the Poor Law Act, 1879, it was ordered that all that part of the parish of Wanstead which was included in the borough of West Ham should cease to be part of that parish and should be amalgamated with the parish of West Ham.

The said address at which Elizabeth Heritage so resided was situate in the parish of West Ham as constituted previously to the date of the said order, and not in any part of the parish of Wanstead. Heritage left the parish of West Ham in August, 1888, and did not thereafter acquire a settlement in any other parish. She was afterwards found in the hamlet of Ratcliff in the Stepney Union, in the County of London, and was sent therefrom to the said Claybury Lunatic Asylum.

By an order of two justices of the County of London dated the 14th of February, 1900, Heritage was, under section 290 of the Lunacy Act, 1890, adjudged to be chargeable to the County of London. On the 15th of May, 1900, the London County Council procured from two justices of the County of London an order adjudging her to be settled in the parish of West Ham. The quarter sessions reversed the order on the ground that *Dorking Union* v. *St. Saviour's Union,* 46 W. R. 309, [1898] 1 Q. B. 594, applied not only to a parish which was divided, but also to a parish to which part of another parish was added.

The Divisional Court reversed the order of quarter sessions, holding that the addition of a portion of the parish of Wanstead to the parish of West Ham did not destroy the old parish of West Ham, and that the settlement of the pauper remained unaffected.

The Guardians of the West Ham Union appealed.

Horace Avory, K.C. (*J. C. Earle* and *Lewis Richards* with him), for the Guardians of West Ham.—A parish loses its entity whether it is divided into two or more parishes, or whether part of another parish is added to it. The old parish is destroyed and the settlements in it are gone. The principle is that it is unfair to the inhabitants of the added portion of the parish to make them chargeable with the maintenance of the paupers in the parish to which the part is added. The last of the cases upon the point is *Dorking Union* v. *St. Saviour's Union,* and the principle of that case covers the present case.

Macmorran, K.C., and *F. F. Daldy,* for the London County Council.—The decisions show that, where a parish is destroyed, the settlements acquired in it are gone: *Reg.* v. *Inhabitants of Tipton,* 3 Q. B. 215; *Reg.* v. *Inhabitants of Hunnington,* 5 Q. B. 273; *Stourbridge Union* v. *Droitwich Union,* L. R. 6 Q. B. 769, 19 W. R. C. L. Dig. 58; *Dorking Union* v. *St. Saviour's Union.* The judges who decided the later cases did not approve of the principle of the earlier decisions, but said that as they had stood so long they could not overrule them. That principle ought not to be extended to the case of an addition to an existing parish. The parish is not destroyed by the addition: *Reg.* v. *Inhabitants of St. Martin, New Sarum,* 9 Q. B. 241. The word used in the order of the Local Government Board in the present case, following the language of section 1 of the Divided Parishes Act, 1876, is "amalgamated," which excludes the idea of the destruction of the parish.

Horace Avory, K.C., in reply.—In *Reg.* v. *Inhabitants of St. Martin, New Sarum,* two entire parishes were united into one by a special Act of Parliament, and it was held right, by reason of the two parishes having themselves obtained the Act authorizing the union, that the united parish should bear the burden of maintaining the paupers formerly borne by each parish.

COLLINS, M.R.—This case raises the question whether the pauper has lost her settlement in the parish of West Ham, or whether it remains unaffected by what has taken place. The facts are that the pauper was born in the parish of West Ham, and resided there for a number of years. She therefore acquired a settlement in that parish, and never acquired a settlement in any other parish. Subsequently by an order of the Local Government Board made under the Divided Parishes Act, 1876, as amended and extended by the Poor Law Act, 1879, a small part of the parish of Wanstead was added to the parish of West Ham. The question thus arises

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

whether the pauper's settlement in the parish of West Ham has been destroyed by reason of that addition to the parish. The Divisional Court has held that the settlement in the parish of West Ham has remained unaffected by the change. It is contended that that decision is wrong, as being inconsistent with a long line of cases beginning with *Reg.* v. *Inhabitants of Tipton* and ending with *Dorking Union* v. *St. Saviour's Union.* These cases decided that where a pauper had acquired a settlement in a parish, and that parish was divided into two or more different parishes, inasmuch as the entity in which the pauper had acquired a settlement had ceased to exist, the settlement also ceased to exist and was gone. The judges who decided the later cases do not seem to have approved of the principle upon which the earlier cases had been decided, but they said that as the decisions had stood for so long they could not be overruled and must now be accepted as law. It is said that the principle of those decisions covers the present case. It is to be observed that the parish of West Ham has not been divided up and new parishes substituted in its place. It cannot be contended that its identity has been destroyed in that way. All that has happened is that the parish has acquired an accretion from the parish of Wanstead, and when one looks at the legislation and the order under which the addition has been made to the parish it does not seem to me to have the same effect as the division of a parish into a number of new and different parishes. That part of section 1 of the Divided Parishes Act, 1876, under which the order was made necessitates no division of the parish, but gives power to cut off a bit of one parish and add it to another. Even if I were not assisted by authority, I should be of opinion that such an addition would not alter the identity of the parish, and that both parishes would remain. That at once takes the case out of the line of decisions which say that, as the identity of the parish is gone, the settlements acquired in it are gone too. The case, however, is not without authority. In *Reg.* v. *Inhabitants of St. Martin, New Sarum,* two parishes were united, and it was held that the settlements acquired in each parish before they were united still remained. It is said that the effect of so holding in the present case will be to compel the inhabitants of that portion of Wanstead which has been added to the parish of West Ham to assist in supporting the paupers which were settled in the old parish of West Ham, and that that will create an injustice. That may be so, but precisely the same objection could have been urged in the case of *Reg.* v. *Inhabitants of St. Martin, New Sarum.* An attempt was made to answer that by saying that in the *St. Martin, New Sarum* case the union of the two parishes was effected by the consent and at the instance of the two parishes. I do not know whether the order in the present case was obtained by the consent and at the instance of the two parishes affected. There is this, however, in common to both cases, that what has been done in each case has been done under statutory powers. The case, in my opinion, falls outside the line of authorities which say that a settlement acquired in a parish, which has been subsequently divided into new parishes and thus destroyed, is gone with the parish, and there is no authority to prevent us from holding that a mere accretion to a parish, whether by virtue of an Act of Parliament or from some natural cause, does not destroy the identity of the parish. The appeal must therefore be dismissed.

ROMER, L.J.—I am of the same opinion. There can be no doubt that the case of *Reg.* v. *Inhabitants of Tipton* and the other cases which followed it must be accepted as law. I cannot think, however, that those decisions are wholly satisfactory, and the principle on which they were decided ought not to be extended to other cases where the facts are of a different character. It is argued that logically those decisions cover the present case. Even if that were so, it has been pointed out by Lord Halsbury in a recent case (*Quinn* v. *Leatham, ante,* p. 139, [1901] A. C. 495) that it is often misleading to be guided by the strict principles of logic in coming to a decision upon English law. It does not therefore follow that the present case must be decided in the same way as *Reg.* v. *Inhabitants of Tipton* was. But it is unnecessary to pursue that topic further, because it is clear that the real ground upon which *Reg.* v. *Inhabitants of Tipton* was decided was that the old parish had ceased to exist by being subdivided up into a number of new parishes. The reason for that decision does not exist in the present case. Upon the facts stated in the present case I have come to the conclusion that the parish of West Ham has not been destroyed, but continues to exists, though a part of another parish has been added to it.

MATHEW, L.J.—I agree with Lord Lindley when he said in *Dorking Union* v. *St. Saviour's Union* that the court in *Reg.* v. *Inhabitants of Tipton* put a very narrow construction on the statute 13 & 14 Car. 2, c. 12. That case decided that where a parish was divided under the powers of that Act, it ceased to exist, and consequently the settlements acquired in it ceased to exist also. The judges in the later cases, though with faltering steps, followed that decision. The decision was founded on the presumed intention of the Legislature that the old parish should disappear. In the present case there is no such intention. The order of the Local Government Board did not apparently contemplate the wiping out of the parish of West Ham, but treated it as a still existing parish with which part of another parish was amalgamated.

Appeal dismissed.

Solicitor for the West Ham Union, *F. E. Hilleary.*

Solicitor for the London County Council, *W. A. Blaxland.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Dec. 9.

GORDON *v.* LONDON, CITY, AND MIDLAND BANK (LIMITED).

GORDON *v.* CAPITAL AND COUNTIES BANK (LIMITED). (*a.*)

Banker—Bill of exchange—Cheque—Crossed cheque—Receipt of payment for customer—Agent for collection—Crediting customer in account—Crossing of cheque by banker—Draft by branch bank on head office—Cheque drawn on other branch of collecting bank—Conversion—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 60, 82.

In an action for conversion it appeared that the plaintiff's clerk stole a number of drafts payable to the plaintiff's order, and, after putting on them forged endorsements of the plaintiff's signature, paid them into a branch bank of the defendants, where he had an account. The majority of the drafts were cheques drawn on other banks, and were crossed before they were received by the defendants. Some of them were cheques drawn on other banks, but were not crossed when received by the defendants.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Others were drafts signed by the manager of another branch of the defendants' bank and addressed to the defendants' head office. Others were cheques drawn on other branches of the defendants' bank. The defendants crossed all the drafts, whether they were crossed before or not, and placed the amounts at once to the clerk's credit. In nearly every case the clerk added his own endorsement.

Held, that the defendants were liable in respect of all the cheques drawn on other banks, not being protected by section 82 of the Bills of Exchange Act, 1882; for, by giving credit to the clerk at once, they acted not as agents for collection for a customer, but as holders of the cheques for value.

Held, also, that the defendants could not, by crossing the cheques which were uncrossed when they received them, acquire for them the protection of section 82.

Held, also, that the defendants were liable in respect of the drafts addressed by the branch manager to the head office; for such drafts were not cheques at all, and on that ground the defendants were not protected by section 82.

Held, also, that the defendants were not liable in respect of cheques drawn on other branches, being protected by section 60.

Application by the plaintiff for judgment or a new trial in two actions tried before Bucknill, J., and a jury.

The first action was brought to recover damages for conversion by the defendants, the London, City and Midland Bank, of 116 cheques, the property of the plaintiff; or alternatively for £2,067 16s. 11d., money received by the defendants for the use of the plaintiff.

The second action was a similar action brought against the Capital and Counties Bank in respect of thirty-two cheques.

The facts of the first case were as follows:

The plaintiff, who carried on business in Birmingham under the style of Gordon & Munro, had employed one Alfred Jones for about ten years as a ledger clerk, whose duty it was to take the business letters from the letter-box daily and place them on the plaintiff's desk. When customers remitted cheques to the plaintiff it was his (the plaintiff's) custom to enter the same in his cash-book and pay them into his bank, but when he was absent from business Jones was authorized to open the letters and to put on one side all cheques and remittances until the plaintiff returned. Jones had no authority to endorse any cheques in the plaintiff's name, or to deal with them in any way.

Between August, 1895, and February, 1899, Jones stole from letters which had been received through the post at the plaintiff's office a great number of cheques, and, having endorsed them in the name of his employer, took them to the defendants, who had a branch at Sparkbrook, Birmingham, where Jones, who carried on business on his own account as "Jones & Co.," had an account.

One hundred and sixteen cheques were so paid in by Jones. The amount for which the cheques were made payable was £2,067 16s. 11d.

The cheques so paid in consisted of eight classes, which were as follows: (1) Cheques which were drawn on banks other than the defendants' bank, payable to the order of the plaintiff's firm, and which, when received by the defendants, were not crossed. (2) One cheque payable to bearer, drawn on a bank other than the defendants' bank, and not crossed when received by the defendants. (3) Bankers' drafts, addressed to the defendants' head office in London, signed by R. J. Henn, the manager of the defendants' Leamington branch, as such manager, requiring the head office to pay on demand on account of the branch a sum of money to the order of the plaintiff's firm, which drafts were not crossed when received by the defendants. (4) Cheques drawn on branches of the defendants' bank other than the Sparkbrook branch, payable to the order of the plaintiff's firm, and crossed before the defendants received them. (5) Cheques drawn on bankers other than the defendants' bank, payable to the order of the plaintiff's firm, marked "not negotiable," and crossed before the defendants received them. (6) Cheques drawn on banks other than the defendants' bank, payable to the order of the plaintiff's firm, and crossed before they were received by the defendants. This class included the bulk of the cheques in respect of which the action was brought. (7) Cheques drawn payable to bearer on banks other than the defendants' bank, and crossed before they were received by the defendants. (8) Orders addressed to a bank other than the defendants' bank for payment of money to the plaintiff's firm conditional on the signature and presentation of a subjoined receipt for the same, and crossed when received by the defendants.

From July, 1895, to November, 1897, the account of Jones as "Jones & Co." was in credit. In October, 1898, Jones took a partner into his business, and a new account was opened with the defendants at the same branch, in the name of "Jones, Blackbam, & Co." From November, 1897, to February, 1899, the account of Jones, whether as "Jones & Co," or as "Jones, Blackham, & Co.," was from time to time overdrawn. The practice of the defendants with regard to all the cheques paid in by Jones was as follows: When Jones brought the cheques to the bank with the forged name of "Gordon & Munro" endorsed thereon, he added also the name of Jones & Co., or Jones, Blackham, & Co., as the case might be, the bank requiring the security of such endorsement. The defendants crossed the cheques (whether they were crossed before or not) by stamping them "The London and Midland Bank (Limited), Sparkbrook, Birmingham, to Head Office, London," the object and effect of which was to make them payable to or through the head office only. The defendants at once credited Jones with the amounts of the cheques in account, and allowed him to draw against the cheques before they were cleared. The cheques drawn on other banks were presented by the defendants, who received payment of the amounts. The cheques which were drawn on the defendants' own bank were collected by the ordinary book-keeping process of debit and credit at the head office and the amount placed to the credit of the Sparkbrook branch.

The facts of the second case were in almost all respects similar to those of the first case, except that all the cheques in the second case were drawn like those belonging to class 6 in the first case, and there was no evidence that the defendants insisted on Jones putting his own endorsement on the cheques, though in most instances he did so endorse them.

The defendants in each case, while denying liability, paid a sum of money into court.

At the trial the jury found that the payment in of the cheques by Jones was not made in such circumstances as to put the defendants on inquiry, and they added the following rider: "We wish to express our opinion that more care is desirable on the part of banks in general in respect of cheques of this character."

All other questions were by agreement left to Bucknill, J.

On further consideration the learned judge held that all the stolen cheques were received by the defendants from Jones as his agents to collect on his

behalf, and that they received the amount on collection for his benefit, and not on their own account. He held that the plaintiff could recover the value of the cheques which were drawn on other banks than the defendants in favour of "Gordon & Munro or order," and which were, when paid in, uncrossed, the defendants not being protected by section 82 of the Bills of Exchange Act, 1882, on the authority of *Bissell* v. *Fox*, Cababé & Ellis, 395, 51 L. T. Rep. 663, 33 W. R. Dig. 11. He also held that the plaintiffs were entitled to recover the value of a cheque payable to Gordon & Munro or bearer" not drawn on defendants' bank and uncrossed when received by them, being of opinion that, on the authority of *Fine Art Society* v. *Union Bank of London*, 35 W. R. 114, 17 Q. B. D. 705, and *Kleinwort, Sons, & Co.* v. *Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157, the defendants had converted it to their own use. He accordingly held that the defendants were liable with regard to the cheques in classes 1 and 2. With regard to the cheques in class 3 he held that the defendants were protected by the provisions of section 60 of the Bills of Exchange Act, 1882, they having paid them in good faith and in the ordinary course of business. With regard to class 4 he held that they were protected by sections 60 and 82. And with regard to classes 5, 6, 7, and 8, and all the cheques in the second action, he held that they were protected by section 82 on the authority of *Clarke* v. *London and County Banking Co.*, 45 W. R. 383, [1897] 1 Q. B. 552.

The defendants having substantially succeeded in each case, judgment was entered for them.

The plaintiff appealed in each case, asking for judgment or a new trial.

Section 82 of the Bills of Exchange Act, 1882, enacts as follows: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

A. T. Lawrence, K.C., and *Leslie*, for the plaintiff.

Haldane, K.C., *Hugo Young, K.C.*, and *P. G. Henriques*, for the defendants in the first action.

Cohen, K.C., and *Spencer Bower*, for the defendants in the second action.

The following cases were cited: *Matthiessen* v. *London and County Bank*, 27 W. R. 838, 5 C. P. D. 7; *Ex parte Richdale*, 30 W. R. 262, 19 Ch. D. 409; *Bissell & Co.* v. *Fox Brothers & Co.*; *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95, 32 W. R. Dig. 35; *National Bank* v. *Silke*, 39 W. R. 361, [1891] 1 Q. B. 435; *Royal Bank of Scotland* v. *Tottenham*, 43 W. R. 22, [1894] 2 Q. B. 715; *Great Western Railway Co.* v. *London and County Banking Co.*, 50 W. R. 50, [1901] A. C. 414; *Arnold* v. *Cheque Bank*, 24 W. R. 759, 1 C. P. D. 578; *Fine Art Society* v. *Union Bank of London*.

COLLINS, M.R.—These two cases raise questions of considerable difficulty and complication. The plaintiff, who traded under the firm name of Messrs. Gordon & Munro, had a clerk named Jones. Jones opened an account, in the first case, at the defendant bank, the London, City, and Midland Bank, and after opening that account he began a series of dealings with cheques made payable to Gordon & Munro, in most instances to their order, which came into his custody as the plaintiff's clerk. He took the cheques into his own possession, he forged the signatures of the plaintiff's firm on the back of the cheques, and took them to the bank, having in the majority of instances first crossed them, if they were not crossed before. The bank thereupon credited him with the amounts in his account, and he drew on his account as and when he required money. The evidence shows that during two years Jones's account would have been in debit if it had not been for these cheques. The plaintiff, as the true owner of the cheques, brings this action against the defendants for conversion, and the question is whether the defendants, who are *primâ facie* liable, because the forged endorsements gave them no title to the cheques, are protected from liability by any of the provisions of the Bills of Exchange Act. The cheques were drawn in different ways, but the great majority of them were drawn by persons on banks other than the defendant bank, and were drawn to order, and at the time that they were paid into the bank were crossed, and also bore the endorsement of Jones.

Two questions were left to the jury—first, whether there was anything in the circumstances of the case which ought to have put the defendants on inquiry as to Jones's title to the cheques; secondly, whether the defendants had been guilty of negligence. The jury answered the first question in favour of the defendants—viz., that there was nothing to put them on inquiry, and they were not asked the second question. The case was fairly summed up by the learned judge, and the question being one of fact for the jury, I think there is no ground whatever for disturbing the verdict.

I now come to the question of law. Section 24 of the Bills of Exchange Act enacts that, where a signature on a bill is forged or unauthorized, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature. The defendants seek to protect themselves against the effect of that section by relying on the provisions of section 82, which enacts as follows: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Before the legislation as to crossed cheques, a banker dealing with a cheque drawn on any other bank than his own was unprotected against the risk of the endorsement being a forgery. He had to take the risk, and, if he dealt with a cheque bearing a forged endorsement, he was liable to an action at the suit of the true owner. The legislation in respect of crossed cheques, by enacting that such cheques shall not be paid except to a banker, throws upon bankers the duty of collecting and receiving payment of all such cheques, and at the same time it gives them protection against the liability they might incur in such collection and receipt of payment. But it was not to be expected that the protection should go beyond that which is incidental to the performance of the particular duty so imposed upon bankers. Accordingly, so far as regards all other cheques except those that are crossed, bankers are unprotected.

The evidence shows that the defendants, when they received cheques which were drawn on other banks and were crossed, immediately credited Jones in account with the amounts without waiting to see whether they would be paid or not, and that in most instances they insisted on having, and in fact had, Jones's own endorsement on the cheques. In all those cases I think that they did not merely receive the cheques for Jones and receive payment of them for him, and that, therefore, they are outside the

protection of section 82. Where they took Jones's endorsement, there can be no question about it, for they thereby became holders for value with a right of action against the drawers, and what they did was altogether outside the necessities of collection. But I prefer to rest my decision on the larger principle that the protection of the section ought to be limited to what is necessary for the purpose of carrying out that duty which the Legislature has imposed on bankers. The defendants here chose to treat these cheques as cash before they carried them to their destination, and they credited the customer with them at once as if they were cash. Where bankers deal with crossed cheques in that way, instead of merely conveying them to the bank on which they are drawn and receiving the money from that bank for their customer, I think they are not receiving payment for a customer, but for themselves. I should have held the law to be so if the matter had been free from authority. But the decided cases all support my view. [His lordship referred to *Matthiessen* v. *London and County Bank, Bissell* v. *Fox, Great Western Railway Co* v. *London and County Banking Co.*, and *Clarke* v. *London and County Banking Co.* Unless the defendants come strictly within the terms of the section which gives protection they are unprotected. But in giving their customer credit for the amount of the cheques immediately they were paid in they did something which was outside the section. The giving credit could not assist them in collecting the cheques. The authorities clearly show that the giving of credit in account constituted the bankers holders for value. [His lordship further referred to *Lacave & Co.* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148, 45 W. R. Dig. 8; *Ex parte Richdale*; and *Royal Bank of Scotland* v. *Tottenham.*] That decides the main point in both cases in favour of the plaintiff.

There are also some subsidiary points. There were a number of cheques in the first action which were not crossed when they were presented to the defendants, but were afterwards crossed by the defendants themselves. It is true that the Bills of Exchange Act by section 77, sub-section 6, allows a banker to whom an uncrossed cheque has been sent for collection to cross it himself, but that does not apply here, for here the defendants began by dealing with a cheque which was not within the protection of section 82, and they did not purge the conversion by afterwards trying to collect it. The plaintiff accordingly succeeds as to class 1 also. Then there was one cheque drawn payable to bearer, which constituted class 2. With regard to this the plaintiff conceded that he could not succeed, the defendants being protected by section 31. Class 3 consisted of drafts drawn by one of the defendants' branch banks on another branch. The defendants claimed that they were protected with regard to these by section 60. The plaintiff contended that they were not cheques within the Act, and therefore outside the protection. Inasmuch as they are not drawn by one person on another, I am of opinion that they are not cheques. *Primâ facie* they are not cheques within the definition of a bill of exchange in section 3, sub-section 1; nor are they brought within the definition by section 17 of the Revenue Act, 1883. The plaintiff therefore succeeds as to this class also.

Class 4 consisted of crossed cheques drawn on one branch of the defendants' bank and presented to another for collection. Entries were made in the books of the latter branch in favour of the customer who presented the cheques, and entries were made in the books of the former branch whereby the amounts were credited to the other branch. It was argued that the defendants, having paid these crossed cheques otherwise than to a banker, had violated section 79 of the Act, and were therefore unprotected. On the other hand it is clear that, if the cheques had not been crossed, the defendants would have been protected by section 60. I think on a fair construction of the Act we may say that these cheques, though they were paid by the defendants to themselves, were paid by a bank to a bank, and therefore the requirements of section 79 were satisfied. In respect of class 4, then, the defendants succeed.

Class 5 consisted of cheques which were marked "not negotiable." I think the only argument founded on this difference was that it afforded an additional ground for drawing the inference that the defendants, in dealing with these cheques as they did, and becoming the holders of them, were acting outside the scope of section 82. The plaintiff therefore succeeds as to this class also.

With regard to class 7 the plaintiff has abandoned his claim, and no question now arises thereon. The case with regard to class 8 seems to me to be decided by what I have said as to classes 5 and 6.

With regard to the second action I wish to observe that, in my opinion, the fair reading of section 82 is that its protection cannot be limited to the mere receipt of the money by the banker. I think the protection covers the whole transaction of receiving payment—viz., the receiving of the cheque, the crossing of it with his own stamp, and all the necessary dealings with it down to its payment by the bank upon which it is drawn. But I think that the defendants in this case, as in the first case, did not act merely as the agents of their customer for collection. The appeals succeed in the main, and must be allowed.

STIRLING, L.J.—I am of the same opinion. I will deal first with the cheques comprised in class 6, and the cheques which are the subject of the second action. It is not disputed that, if it were not for the provisions of section 82, the defendant banks would be liable to the plaintiff as the true owner of those cheques: see *Arnold* v. *Cheque Bank* and *Fine Art Society* v. *Union Bank of London*. Section 82, following section 12 of the Crossed Cheques Act, 1876, is framed as if the liability of the banker arose only by reason of the receipt of payment of the cheque. It seems to me, however, that, in order to give effect to the intention of the Legislature, the section must be construed as covering every act which is necessarily incidental to the transaction of receiving payment. The only question is whether the defendant banks received payment of these cheques for a customer. In class 6 of the first case every cheque was endorsed by Jones himself, in order that the bank might have the security of his name, and the amount was at once placed to his credit. I draw the inference that there was an agreement between the bank and Jones that the cheques should not merely be collected by the bank for him, but that the bank should become holders of the cheques. In the second case the cheques were also credited to Jones at once, and from the fact that he on several occasions drew against the cheques immediately I think that the same inference ought to be drawn. On the authority of *Ex parte Richdale* and *Royal Bank of Scotland* v. *Tottenham* I am of opinion that the plaintiff is entitled to succeed on the ground that the defendants made themselves holders for value of the cheques. And I think this applies equally to those cheques which were not endorsed by Jones.

I now come to the other classes of cheques in the first case. As to class 1, it is argued that the defendants, by crossing the cheques after they received them from Jones, brought themselves within section 82. I cannot agree with that argument,

because I think the Legislature only intended to protect bankers when they were collecting crossed cheques as agents for a customer; and here the defendants were not acting merely as agents for a customer. As to class 2, there is now no question. As to class 3, I agree that these drafts were not cheques within the meaning of the Act, and that section 17 of the Revenue Act, 1883, does not avail the defendants in this respect. As to class 4, it is argued that the defendants are protected by section 60, which protects a banker who pays a bill drawn upon him payable to order on demand in good faith and in the ordinary course of business, although it bears a forged endorsement. By section 73 the provisions of the Act applicable to a bill of exchange payable on demand are to apply to a cheque except as otherwise provided in Part III. of the Act. I see nothing in this part of the Act to take the case out of section 60, and therefore I think that with regard to class 4 the defendants are protected. As to class 5 I think the defendants are not more protected than they are with regard to class 6. As to class 7 no question now arises. As to class 8, those drafts are not really cheques at all. I agree that both appeals should be allowed.

MATHEW, L.J., concurred.

Appeals allowed.

Solicitors for the plaintiff, *Pepper, Tangye, & Co.*, for *Pepper, Tangye, & Winterton*, Birmingham.

Solicitors for the defendants in the first action, *Keen, Rogers, & Co.*

Solicitors for the defendants in the second action, *Cameron, Kemm, & Co.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 26.

BRITISH ELECTRIC TRACTION CO. (LIMITED) *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

*Inland revenue—Stamp duty—Lease—Bond, covenant, or instrument, being the only or principal or primary security for any annuity—*Ad valorem *duty—Covenant relating to the matter of the lease—Lease of tramways by municipal corporation to electric traction company—Covenant to pay additional rent for repair of demised premises—Covenant to purchase electrical energy from corporation—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *ss.* 4, 77 (2); *First Schedule.*

By an indenture made between a municipal corporation and an electric traction company in pursuance of section 19 *of the Tramways Act,* 1870, *the corporation demised to the company the right of user of certain tramways for a term of years. The indenture provided for the payment by the lessees of an annual rent of* £3,250. *It further provided for the payment by the lessees of an annual sum of* £900 *for the repair of the demised premises. It further provided that the lessees should pay the corporation an annual sum of* £4,000 *for the supply of electrical energy. A special power of distress was given in the event of non-payment of any of the rents or moneys thereby made payable, except the payments to be made for or in respect of electrical energy.*

Held, first, that the instrument was chargeable with ad valorem *stamp duty on the total sum of* £3,250 *plus* £900, *the latter sum being in the nature of additional rent. Secondly, that it was not chargeable with any further stamp duty in respect of the sum of* £4,000; *for the provision for the payment of that sum was a "covenant relating to the matter of the lease" within the meaning of section* 77, *sub-section* 2, *of the Stamp Act,* 1891, *and therefore the lease, being made for a consideration in respect whereof it was chargeable with* ad valorem *duty and in further consideration of that covenant, was not to be charged with any duty in respect of such further consideration.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from the judgment of Kennedy and Phillimore, JJ., upon a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891.

On the 24th of January, 1900, an instrument was presented on behalf of the British Electric Traction Co. (Limited) to the Commissioners of Inland Revenue, under the provisions of section 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the instrument was chargeable.

The instrument was an indenture, dated the 23rd of January, 1900, and made between the Corporation of Croydon of the one part and the British Electric Traction Co. (Limited) of the other part. It contained a recital that the corporation were empowered by the Tramways Act, 1870, s. 19, with the consent of the Board of Trade, and subject to the provisions of the said Act, to demise the right of user of the tramways referred to in the indenture and the right of demanding and taking tolls in respect of the same; and a recital that the corporation and the company had agreed to execute a lease to that intent.

By clause 1 the corporation granted and demised unto the company the right of user, for the purpose of conveying passengers and small parcels only, of the said tramways, together with the right of demanding and taking tolls and charges in respect of the same with certain reservations.

By clause 2 these rights were granted to the lessees for the term of twenty-one years from the 1st of January, 1900, for their exclusive use, subject to a power reserved to the corporation to determine such term in certain events.

Clause 3 provided for the payment during the term of the clear rent or sum of 6½ per cent. on the cost of purchase, reconstruction, electrical equipment, rolling stock, agreed extensions, and other works carried out by the corporation, part of which amount was ascertainable at the date of the indenture and amounted to £3,250 per annum.

By clause 4 there was a provision that the lessees should further pay, as from the date of a certificate of the Board of Trade authorizing electric traction, the sum of £100 per annum per mile of road along which the tramways were laid in lieu of repairing roads and maintaining tramways, which sum was not to be less than £900 per annum.

By clause 5 a further uncertain sum was reserved as rent in certain contingencies.

Clause 6 provided for the determination of the lease at the option of the corporation, the option being exercisable at the end of a period of five years from the commencement of the term in certain contingencies and thereafter at the end of any subsequent period of five years.

Clause 24 provided that the corporation should not without the consent of the lessees grant any right to any other person or corporation over the tramways.

Clause 27 provided that the lessees should purchase all electrical energy required for the purpose of the tramways from the corporation.

Clause 30 provided that the lessees should as from the date of the certificate of the Board of Trade

authorizing electric traction pay the corporation at the rate of 2d. per Board of Trade unit for the supply of electrical energy supplied by the corporation during the continuance of the lease, with a provision that so long as the corporation duly supplied the energy reasonably required by the lessees for working the said tramways the minimum sum which should be payable in any one year should be £4,000, and contained a further provision for revision of the price charged at the end of the second year from the date of the certificate of the Board of Trade authorizing electric traction. The instrument fixed no time within which the certificate was to be obtained.

Clause 33 provided that the corporation should repair and maintain the roads on which the tramways were placed.

Clause 42 provided for the determination by the lessees in certain contingencies of their obligation to purchase electrical energy from the corporation.

Clause 44 gave a special power of distress in the event of non-payment of any of the rents or moneys thereby made payable, except the payments to be made for or in respect of electrical energy.

The lease was expressed to be made in pursuance of the Tramways Act, 1870.

It was contended by the lessees that the instrument fell to be charged under the head of "Lease or Tack" in the first schedule of the Stamp Act, 1891, under sub-head 4—viz, "of any other kind whatsoever not hereinbefore described," and was liable to a duty of 10s. only.

The commissioners held that in respect of the provisions other than those contained in clauses 5 and 30 the instrument was chargeable, under sub-head 3 of the above-mentioned head, as a lease "for any indefinite term . . . of heritable subjects where the consideration . . . moving to the lessor . . . consists of any money, stock, or security," and was therefore liable to *ad valorem* duty at the rate of 5s. on every £50 on the rent of £3,250, plus £900—namely, of the sum of £20 15s. They also held that it was chargeable with the fixed duty of 10s. in respect of the rent mentioned in clause 5, which was at the date of the indenture unascertainable, and further in respect of the minimum sum of £4,000 per annum mentioned in clause 30 was chargeable, under the head "Bond, Covenant," &c., sub-head 1, in the same schedule, with £105, being 2s. 6d. per cent. on the minimum sum multiplied by twenty-one, the number of years during which the same might have been payable if the tramways had been electrically equipped and the certificate of the Board of Trade obtained on the 1st of January, 1900, and if the corporation had made no default in the supply of electrical energy during the continuance of the lease.

The questions for the court were whether the instrument was chargeable with the several sums of £20 15s., 10s., and £105, and, if not, with what duty the instrument was chargeable.

Section 77 (2) of the Stamp Act, 1891, enacts as follows: "A lease made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration."

On the hearing of the special case the Divisional Court were divided in opinion. Kennedy, J., held that the sums of £900 and £4,000 were not chargeable either as rent or under the head "Bond, Covenant, or Instrument," and that the stipulations as to the payment of those sums were "covenants relating to the matter of the lease" within section 77 (2) of the Stamp Act, 1891, and that, therefore, those sums were exempt from the payment of duty in addition to that charged on the rent. Phillimore, J., held that both sums represented rent, and ought therefore to be taken into consideration in assessing the *ad valorem* duty with which the instrument was chargeable as a "lease or tack." Phillimore, J., having withdrawn his judgment, the judgment of the court was entered in accordance with the opinion of Kennedy, J.

The Commissioners of Inland Revenue appealed.

Sir Robert Finlay, A.G., and *S. A. T. Rowlatt*, for the Crown.

Pickford, K.C., and *Llewelyn Davies*, for the respondents.

Cur. adv. vult.

Nov. 26.—COLLINS, M.R., read the following judgment: The question in this case is what stamp duty is payable upon a certain instrument executed between the Corporation of Croydon and the British Electric Traction Co. (Limited). The learned judges in the court below differed in opinion. Kennedy, J., decided against the Crown, while Phillimore, J., decided, in the main at all events, in its favour. The latter learned judge withdrew his judgment, and the Crown now appeals.

The instrument in question purports to be a lease from the corporation to the Traction Co. By clauses 1, 2, and 3 it was witnessed that, in consideration of the yearly rent and other payments thereinafter reserved, and of the covenants, conditions, and agreements thereinafter contained, the corporation did thereby grant and demise unto the lessees the right of user, for the purpose of conveying passengers, &c., of the tramways delineated and described in the plan annexed thereto for a term of twenty-one years, yielding and paying yearly the clear rent or sum of 6½ per cent. on the cost of purchase, &c., on the 1st of January, the 1st of April, the 1st of July, and the 1st of October in every year. The amount of the rent payable under this clause has been agreed at £3,250, and the lease has been stamped with an *ad valorem* stamp based upon that figure. The dispute between the parties arises upon two other provisions. First, under clause 4 of the agreement, which provides as follows: [His lordship read clause 4.] As to this the Crown contend that further *ad valorem* stamp duty is payable as upon rent of £900 per annum. The other point arises under clauses 27 and 30 of the agreement. [His lordship read clauses 27 and 30, and also clauses 42 and 44.] It is contended by the Crown that the contract of clause 30 for the payment of £4,000 per annum is subject to stamp duty as a "bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack": see schedule to the Stamp Act, 1891. Failing that, they say that it is rent, and subject to further *ad valorem* stamp duty as such.

The Traction Co. contend that, in accordance with the judgment of Kennedy, J., they are excused from any further duty in respect of either the covenant for the payment of £900 per annum under clause 4, or of £4,000 per annum under clause 30, by the provisions of section 77, sub-section 2, of the Stamp Act, 1891. [His lordship read the sub-section.] And they say that the effect of this sub-section is to create an exception in favour of a lease chargeable with *ad valorem*

duty, as this is an exception to the provisions of section 4 of the Stamp Act, which is as follows: "Except where express provision to the contrary is made by this or any other Act, (*a*) an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters; (*b*) an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations." On the other hand, the Crown contend, as I have already said, that as to £900, under clause 4, it is to be treated as rent and as such swelling the *ad valorem* stamp duty. While as to the £4,000 their primary contention is that, though in the lease, it relates to a distinct matter and is to be charged as if it was a separate instrument under section 4, and that, inasmuch as if it had stood alone in a separate instrument it would have been subject to stamp duty as a "bond, covenant, or instrument, being the only, &c.," so equally it is now stampable as such, notwithstanding the fact that it is contained in the lease. Their alternative contention, which was very faintly pressed, is, I have already said, that the £4,000 may be treated as rent.

First, then, with respect to the claim in respect of £900, under clause 4, at first sight, having regard to the form of the words used, it looks to me as if it was assumed that a liability had already been imposed on the lessees to repair the road and maintain the tramways, and that the effect of the provision is to commute that liability for a money payment to the corporation to take upon themselves the duty of repairing instead of leaving the lessees to do it, and if this were the true view of the position I should be disposed to agree with Kennedy, J., that it falls within the provision of section 77, sub-section 2, exempting a lease chargeable with *ad valorem* duty from paying a duty in respect of the further consideration arising upon that covenant. It is a fact, however, that by the General Tramways Act the liability for these repairs is imposed on the corporation itself—a liability from which it cannot escape by demising the tramways—while there are certainly no express provisions in the lease throwing the obligation of repairing upon the lessees. Construing the clause, therefore, in view of this fact, it seems to me in substance to be what the Attorney-General contended it was—viz., a stipulation for additional rent payable to the lessors by reason of their undertaking to keep the demised premises in repair, and it is to be noted that under clause 44 this sum, as well as the rent of £3,250 above-mentioned, is made recoverable by distress. Therefore, I accept the contention of the Crown on this part of the case.

As to the £4,000, which is, under clause 30, the minimum sum payable by the lessees for the supply of electric energy by the corporation, I do not think that this sum can be properly described as rent. It is not in fact rent, it is a sum payable for electric energy to be supplied just as gas, or water, or any other commodity might be supplied, and the parties themselves do not pretend to treat it as rent, and have expressly excepted it from the provision as to distress in clause 44. On the other hand, I do not think it can be treated as a distinct matter falling outside the exception of section 77, sub-section 2, which relieves "any covenant relating to the matter of the lease" from "any duty in respect of such further consideration." It is one of the covenants in the lease, and it seems to me to relate to the matter of the lease, within the meaning of that section. If there were an express covenant to draw the supply of electric energy from the corporation for the purpose of using it on the tramway, I think it would be a covenant touching and concerning the thing demised within the strict rules applicable to covenants running with the land, just as much as a covenant to take all the beer to be consumed on the premises of a particular public-house from the lessor: see *Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503. And the covenant to pay £4,000 as a minimum sum is really ancillary to the main provision and a security for its performance, and even though technically such a covenant might not be capable of running with the land, I think the words of the section "any covenant relating to the matter of the lease" ought to receive a wider interpretation. I think the object of the Legislature was to relieve from charge all covenants fairly within the scope of the lease and being part of the consideration for the lease, and I think the covenant in question fairly comes within the exemption which the Legislature intended to bestow. This reasoning, if correct, disposes equally of the alternative view of Phillimore, J., which was not pressed by the Crown, that the consideration is "money, stock, or security." For these reasons I think the contention of the Crown fails as to the £4,000 either as grounding a claim for stamp duty as a bond or covenant or as being rent. The result is that the Crown succeeds as to the claim for stamp duty on the £900, but fails as to the claim for stamp duty on the £4,000.

STIRLING and MATHEW, L.JJ., concurred.

Judgment varied.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitor for the respondents, *Sydney Morse.*

High Court of Justice.

Chan. Div. } Feb. 6, 7, 8.
Farwell, J. }

PARKER v. W. F. STANLEY & CO. (LIMITED). (*a*)

Light—Ancient lights—Prescription—Purposes requiring special quantity of light—Abandonment—Mandatory injunction.

Although less than twenty years have elapsed since an ancient light has been used for a business requiring a special quantity of light, and although such business could not have been carried on but for the enlargement of the ancient light, which enlargement was made within that period,

Held, nevertheless, that the light, so far as ancient, must not be substantially interfered with, and that the court would take into consideration the nature of the business.

Warren v. Brown, ante, p. 97, [1902] 1 *K. B.* 15, *discussed.*

Action.

The plaintiffs in this action were photographers carrying on business at 288, High Holborn.

The lights in question were those in a one-storey extension of the plaintiffs' premises to the back, which extension was divided into three portions for the purposes of their business, called respectively the gallery, the studio, and the dark-room.

(*a*) Reported by J. F. CARR, Esq., Barrister-at-Law.

In 1890, when the plaintiffs' tenancy began, each of these portions had been for some time lighted by a skylight. But soon after that time the skylight in the studio was removed and the whole roof glazed, thus including in its glazed area the space occupied by the old light.

Up to 1884 a building stood on the defendants' land to the west of these lights, but from 1884 to 1900 the land formerly occupied by such building was vacant. In that year the defendants began to build on their land and the plaintiffs complained that the building which they had erected caused a substantial interference with their light as compared with the building which had stood in 1884, and claimed a mandatory injunction for the removal of so much of the defendants' building as caused such interference.

For the defence it was pleaded that there was no substantial interference, and that so far as the dark-room was concerned the right to light had been abandoned. It was also contended that as the business of photographers had not been carried on for twenty years in the premises, the plaintiffs were entitled to no more light than was necessary for its reasonable use for the purpose for which it had been previously used—viz., a restaurant.

The defendants' building was higher than the building which had occupied the site down to 1884. At the time of the issue of the writ it had reached to about the same height as the old building, and was subsequently completed.

Jenkins, K.C., Colt, and *Coltman*, for the plaintiffs.—We can, of course, only protect that part of the glazed roof in the studio which represents the old light. As to the abandonment, it is not proved. Evidence of non-user which might prevent a right arising is not enough to prove abandonment. It is not necessary to show prescriptive title to a special amount of light: *Lazarus* v. *Artistic Photographic Co.*, 45 W. R 614, [1897] 2 Ch. 215; *Warren* v. *Brown, ante*, p. 97, [1902] 1 K. B. 15. We are entitled to a mandatory injunction, for the damage is speculative and the defendants continued their building with full notice of our intention to claim it: *Aynsley* v. *Glover*, 23 W. R. 457, L. R 10 Ch. App. 283; *Home and Colonial Stores* v. *Colls*, 83 L. T. 759, 49 W. R. Dig. 55.

Bramwell Davis, K.C., and *P. Wheeler*, for the defendants.—We admit that the plaintiffs' lights are ancient. The defendants could not have known that the light was required for special purposes. Until the enlargement of the skylight it would not have been possible to have taken photographs in the studio. The plaintiffs can be in no better position than the previous occupier, who did not want special light for his business.

FARWELL, J.—This is an action for a mandatory injunction to give effect to rights of ancient lights. The defendants do not contend that the lights in question were not ancient in 1890, and I find accordingly. Since 1890 the plaintiffs have carried on on the premises the business of photographers. The lights concerned are two windows, or rather skylights, in what are called the studio and the dark-room. I will deal first with the dark-room. It follows from the finding of fact that the plaintiffs would have to prove release of those rights by acts showing an intention to abandon them. The use of the room as a photographic dark-room in the manner described in the evidence is not such an act, for the obstruction used was not sufficient to exclude all light, and the prospect of using the dark-room for some other purpose in the future was contemplated. I find that there has been substantial interference with the dark-room lights.

As to the studio, when the plaintiffs took the premises it had a window placed across the apex of the roof like a saddle, the roof itself being in a continuous line with the rest of the building. The plaintiffs glazed over the whole of the roof so that the new glass roof covers the space formerly occupied by the old windows. There was a cone of light which came over the defendants' old building to the old window of the plaintiffs' premises.

Less than twenty years ago there was a building on the west which obstructed the light to that window. The building was irregular in outline and the defendants have filled up the interstices and have in my judgment materially obstructed the access of light to the old window. The plaintiffs carry on business as photographers, for which a special light is most important and is reasonably required. It has now been held by the Court of Appeal that a man is entitled to have his light not interfered with, but "the right would not be interfered with if there were no substantial diminution of the light such as to cause substantial damage to the tenant or owner. And in considering what would be a substantial diminution and substantial damage, it is held that the proper point of view is to pay regard, not to what some person having fantastic or peculiar views might choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment And, in particular, in considering whether a house has been substantially injured it is proper to have regard to the ordinary user by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put": Romer, L.J., in *Warren* v. *Brown*. In that case special light was required for a particular business which had not been enjoyed with that business for twenty years. Wright, J., found that there had been no obstruction except to the particular business carried on, and dismissed the action. The Court of Appeal reversed this decision and held that, as substantial damage to the light had been proved, there must be judgment for the plaintiff.

It follows therefore that the plaintiffs are entitled to complain because they are injured in the particular business which they carry on. I am clear on the evidence that there has been such substantial diminution of the light as to interfere with their business as photographers. Mr. Wheeler argued very ingeniously that as the photographic business has been made possible only by enlarging the window, which was done less than twenty years ago, I ought not to take into consideration the particular business carried on. But the plaintiffs are entitled to the cone of light passing over the defendants' building through the old aperture subject to the qualification of the rule, called for convenience the rule of give and take. They are only entitled to the light reasonably required for the use of the premises for ordinary business if ordinary business is carried on or for a special business if a special business is in fact or could reasonably be proposed to be carried on. The plaintiffs cannot ask for more than a reasonable man can require. As photographers they were well within their rights in opening new windows, and it is quite impossible to take the new lights into consideration upon the question of the reasonable light required for the business. The plaintiff's press for a mandatory injunction. There is substantial damage proved, certainly more than £50 or £100 if it could be assessed in money, but it is, beyond that, exceedingly difficult to assess in figures. The defendants went on building after the writ was issued and after receiving a warning that a mandatory injunction would be sought. They had just about reached the height of the old building at the

time the writ was issued. I therefore grant a mandatory injunction and make the declaration asked for.

Solicitors, *Eady; Finch & Turner.*

Chan. Div.
Farwell, J. } Jan. 28.

AMERICAN STEEL AND WIRE CO. *v.* GLOVER & CO. (LIMITED). (*a.*)

Practice—Patent—Action for infringement—Certificate as to particulars of objections — Costs — Patents, Designs, and Trade-Marks Act, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 29, *sub-section* 6.

When in an action for infringement of a patent the plaintiffs offer no evidence and the action is dismissed with costs, the court will not hear evidence that the defendants' particulars of objections were reasonable and proper, and will not grant a certificate under section 29, *sub-section* 6, *of the Patents, Designs, and Trade-Marks Act,* 1883, *to that effect.*

In this action for infringement of a patent the defendants had delivered particulars of objections in the usual course. Upon the action coming on for hearing,

A. J. Walter, for the plaintiffs, offered no evidence, and applied to have the action dismissed.

T. Terrell, K.C. (*Jenkins, K.C.,* and *Frost* with him), for the defendants, applied for a certificate under section 29, sub-section 6, of the Patents Act, 1883, that the particulars of objections were reasonable and proper. These particulars were reasonable and proper on the face of the documents, and, therefore, upon the authority of a note in the Annual Practice, 1902, p. 922, mentioning a case decided by Stirling, J., in chambers, a certificate should be granted.

FARWELL, J., pointed out that in the case mentioned in the Annual Practice the action was discontinued and not dismissed. He held that *Mandelberg* v. *Morley,* 43 W. R. 266, was a binding authority upon him, and refused the application for a certificate.

Solicitors, *Sutton, Ommaney, & Rendall; Haynes & Claremont.*

Chan. Div.
Buckley, J. } Feb. 18.

In re ABRAHAMS & SONS (LIMITED). (*b.*)

Company—Debentures—Registration—Extension of time —Winding up—Companies Act, 1900 (63 *&* 64 *Vict. c.* 48), *ss.* 14, 15.

An order under section 15 *of the Companies Act,* 1900, *extending the time for the registration of debentures should be made without prejudice to rights acquired prior to the actual time of registration.*

In re Joplin Brewery Co. (Limited), ante, *p.* 75, [1902] 1 *Ch.* 79, *and* In re Spiral Globe (Limited), ante, *p.* 187, *followed.*

Semble, *the order will, except under very exceptional circumstances, always be made in this form.*

In October, 1898, this company was incorporated, and on the 4th of November following the directors passed a resolution sanctioning the issue of fifty-five debentures of £100 each. Fifty of these debentures were issued prior to the 1st of January, 1901, but the remaining five were not issued to the applicant, Mr. Edgar Davis, until July, 1901. These five debentures were never registered in accordance with section 14 of the Companies Act, 1900.

On the 16th of October, 1901, the company passed an extraordinary resolution for a voluntary winding up. This summons was taken out under section 15 of the Act on the 21st of November, 1901. It appeared that the applicant had not originally registered his debentures owing to a misapprehension of the meaning of the Act of 1900, having been (as it proved, wrongly) advised that these debentures formed part of a series issued in accordance with a resolution which was the only thing to be registered, and that, as that resolution was passed in 1898, there was nothing that required registration under the Act.

Peterson, for the applicant.

Stewart Smith, for the liquidator, was not called upon.

BUCKLEY, J., said that this charge was created in July, 1901, and as it had never been registered under section 14 of the Act of 1900, was as against creditors and the liquidator void. The applicant now desired to have the time for registration extended, and asked that such registration might operate retrospectively as from a date prior to the winding-up resolution, and that the order might be made without the insertion of the condition imposed in the *Joplin Brewery case, ante,* p. 75, [1902] 1 Ch. 79, and in the *Spiral Globe case, ante,* p. 187.

If the registration were allowed in the form asked the rights both of the holders of the other fifty debentures and of the unsecured creditors would be prejudiced, and the court ought not to make the order in such a form as to prejudice their rights. The wording of section 15 of the 1900 Act was wider than that of the corresponding section of the Bills of Sale Act, and although the omission to register in this case was neither accidental nor due to inadvertence, it was due to the "other sufficient cause" that the applicant had been advised that registration was unnecessary, and therefore fell within this section. He considered that the case was entirely governed by the principle laid down in the two cases of *Crew* v. *Cummings,* 36 W. R. 908, 21 Q. B. D. 420, and *In re Parsons,* 41 W. R. 468, [1893] 2 Q. B. 122, decided under the corresponding section of the Bills of Sale Act, and followed in the *Spiral Globe case.* On the liquidation the rights of all creditors attached, and he could upon no principle take away their strict rights. An innocent creditor who has neglected to complete his security cannot be allowed to take away the rights of other innocent creditors.

He would add that except under very exceptional circumstances the order would always follow the form adopted in the *Joplin Brewery case,* and that in a case where the winding-up had commenced that could do nobody any good, and it was idle to apply for an order extending the time for registration. Under the circumstances he would make no order, and the applicant must pay the costs.

Solicitors, *R. Barnes; Close & Co.*

(*a.*) Reported by J. F. CARR, Esq., Barrister-at-Law.

(*b.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

Chan. Div. } Joyce, J. } Dec. 12, 17, 18.

In re HELYAR.
HELYAR *v.* BECKETT. (*a.*)

Infant—Tenant for life—Rents and profits—Testamentary guardian—Trustees of will—Power of sale— 12 *Car.* 2. *c.* 24, *s.* 9—*Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 42.

Trustees who are appointed trustees for the purposes of the Settled Land Acts, and, therefore, where the tenant for life is a minor, have the statutory authority to exercise on behalf of the tenant for life the power of sale vested in him under those Acts, are not, thereby, "trustees with the power of sale" under section 42 *of the Conveyancing and Law of Property Act,* 1881, *so as to entitle them to enter into possession of the land and receive the rents and profits under that section.*

This was an originating summons taken out on behalf of an infant by his next friend and guardian against the trustees of his father's will asking for a declaration that the testamentary guardian was entitled, during the minority and for the benefit of the infant, to the possession of and to receive the rents and profits of the testator's real estate.

By his will dated the 21st of February, 1900, the testator, Colonel Charles Welman Hawker Helyar, appointed the defendants to be his executors and trustees, and also appointed them to be trustees for the purposes of the Settled Land Acts, 1882-1890.

He appointed his cousin, Caroline Grace Fane Fane, to be the guardian of his children during their respective minorities and declared that she should be entitled to reside at his house, Poundisford Lodge, near Taunton, free of rent, rates, and taxes, so long as she should be acting as guardian, but so nevertheless that such dwelling-house should during her occupation be kept by her as a home for his children. He then devised Poundisford Lodge and all his real estate in the parish of Pitminster to his trustees to the use of his eldest son Vincent during his life with divers remainders over in strict settlement. The will then proceeded: "If my trustees shall enter into possession of the said hereditaments or any undivided share thereof during the infancy of a tenant for life or tenant in tail, under this my will, and such tenant for life or tenant in tail shall die during infancy, then, and in such case, the accumulations (if any) arising during such infancy shall be held upon such trusts as the same would be held upon if the same were capital arising from the sale of the said hereditaments under the Settled Land Acts."

The testator died in July, 1900, and left surviving him five children, including the eldest son Vincent, all of whom were infants.

The defendants entered into possession of the rents and profits of the estate.

Mrs. Fane, however, as guardian of the eldest son Vincent, claimed to be entitled during his minority to receive the rents and profits for his benefit under section 9 of 12 Car. 2, c. 24. The trustees refusing to account to her, this summons was taken out.

Hughes, K.C., and *H. W. Horne,* for the plaintiff.—Mrs. Fane is entitled, under 12 Car. 2, c. 24, s. 9, to receive the rents and profits of the estate during the minority of the eldest son as a person to whom the custody of such child or children hath been or shall be so disposed or devised who shall and may take into his or their custody to the use of such child or children the profits of all lands, tenements, and hereditaments of such child or children . . . till their respective age of one-and-twenty years, or any lesser time, according to such disposition aforesaid." She has been appointed testamentary guardian under the will, and she is entitled to possession.

Younger, K.C., and *W. H. Cozens-Hardy,* for the trustees and executors.—The defendants have been appointed trustees for the purposes of the Settled Land Acts, they therefore are "trustees of the settlement," and under section 60 of the Settled Land Act, 1882, may exercise the powers of the tenant for life during his minority; this includes the power of sale vested in the tenant for life, they are therefore "trustees with power of sale of the settled land" under section 42 of the Conveyancing Act, 1881, and are entitled to the possession of the land and the receipt of rents and profits under that section. Under section 42 the powers of trustees are well defined, while those of testamentary guardian over the property of the infant are by no means certain: *Gardner* v. *Blane,* 1 Hare 381.

Hughes, in reply.—The statute of Car. 2 has not been repealed, and the plaintiff is undoubtedly entitled under it; the 42nd section of the Act of 1881 was not intended to displace the testamentary guardian, but only to provide a substitute where none had been appointed. The defendants have no power of sale and are therefore not within section 42.

JOYCE, J.—This is a case of the construction of a will of a testator who died in July, 1900. The will contains a specific devise of his Pitminster estates to the use of his infant son during his life with remainder to his first and other sons in tail, and the testator appoints the defendants to be the executors and trustees of his will, and also trustees for the purposes of the Settled Land Act, but not expressly for purposes of section 42 of the Conveyancing and Law of Property Act, 1881. He also appoints his cousin, the plaintiff Mrs. Fane, guardian of his infant children during their respective minorities, and declares that she shall be entitled to live at Poundisford Lodge free of rent, rates, and taxes during that period. Later in the will is contained the following clause: [His lordship read the clause set out above, and continued:] It cannot be denied that that clause would have have been an apt and proper clause to be inserted in the will if the testator had expressly appointed his trustees to be trustees for purposes of section 42 of the Conveyancing Act, 1881; it exactly fits the later sub-section of that section, and in particular I notice in sub-section 5 (iii.) that "if the infant dies while an infant . . . then where the infant was under the settlement tenant for life or by purchase tenant in tail," the trustees are to stand possessed of the accumulated fund ". . . on the trusts (if any) declared of the accumulated fund of the settlement." Now, that is exactly what this clause provides for, and I have no doubt that the draftsman of the will was under the impression that he had by the instrument appointed the trustees to be trustees for the purpose of the Conveyancing Act, 1881, s. 42, and the clause in question was probably inserted as a common form used in such cases. But the trustees were certainly not expressly appointed trustees for the purposes of the Conveyancing Act, 1881, and the mere indication of the intention of the draftsman cannot be treated as equivalent to such an appointment. The result is that these gentlemen were not appointed trustees for the purposes of section 42 of the Conveyancing Act. Then it is said that, being trustees under the Settled Land Act, 1882, they were really by virtue of section 60 of that Act trustees for the purposes of section 42 of the Conveyancing Act By section 60 of the Settled Land Act, where a tenant for

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

life or a person having the powers of a tenant for life under that Act is an infant, or an infant would, if he were of full age, be a tenant for life or have the powers of a tenant for life under the Act, the powers of the tenant for life under the Act may be exercised on his behalf by the trustees of the settlement. Now what is the meaning of the expression "the trustees of the settlement" there used? By section 2 (8) it is defined to mean the persons who are by the settlement declared to be the trustees for the purposes of the Act. The defendants are therefore trustees of the settlement under section 60. But are they "trustees with power of sale of the settled land" within section 42 of the Conveyancing Act, 1881? In my opinion, after carefully considering the sections, they are not. Under the Settled Land Act the power of sale is vested in the tenant for life, and none the less because he is an infant. All that the trustees have is the statutory authority to exercise on behalf of the tenant for life the power of sale which is vested in him. In other words, the mere fact that the trustees are trustees for the purposes of the Settled Land Act, and therefore "trustees of the settlement" under section 60, does not make them trustees for the purposes of section 42 of the Conveyancing Act, 1881. That being so I am prepared to make a declaration that the defendants are not trustees for the purposes of or under section 42, and that Mrs. Fane as guardian of the infant appointed by the will is entitled during his minority to receive the rents and profits of the property in question by virtue of the Act of Car. 2.

Solicitors, *Sismey & Cook*, for *H. B. Batten*, Yeovil; *Reed & Reed*, for *Reed & Co.*, Taunton.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 19.

PEARKS, GUNSTON, & TEE (LIMITED) (*Appellants*) v. RICHARDSON (*Respondent*). (*a.*)

Justices—Summons under the Food and Drugs Act—Service of summons—Defendant a limited company—Sale of Food and Drugs Acts—Companies Act, 1862 (25 & 26 *Vict. c.* 57), *s.* 62.

A service of a summons under the Food and Drugs Acts on a limited company is only valid if served in the manner prescribed under section 62 *of the Companies Act.*

Case stated by justices.

The appellants are a limited liability company and carry on business at 6, Bayer-street, Golden-lane, in the city of London, which is their registered office. Among the branch offices is one at 15, High-street, Canterbury. The respondent is an inspector under the Sale of Foods and Drugs Acts.

On the 1st of June, 1901, the respondent went to the appellants' shop in Canterbury and purchased a pound of butter.

He preferred against the appellants an information under section 3 of the Sale of Foods and Drugs Acts charging them with selling butter to their knowledge injurious to health.

The summons was handed to the appellants' assistant in their shop at Canterbury.

The appellants appeared by their solicitor and alleged that the summons should have been served in accordance with section 62 of the Companies Act, 1862, at the registered office of the appellants in London, and that the service at the shop in Canterbury was not a legal and proper service, and that the justices had no jurisdiction to entertain the information.

The justices overruled the objections and held that the summons had been properly served. The appellants' solicitor therefore took no further part in the proceedings.

The appellants were convicted, but a case was stated on the legality of the service.

Macmorran, K.C. (*Bonsey* and *Ricardo* with him), for the appellants—The summons was not duly served. The proper method to serve a company is under section 62 of the Companies Act. The Summary Jurisdiction Acts do not apply to service on a company. [He referred to *Newby* v. *Von Oppen*, 20 W. R. 383, L. R. 7 Q. B. 273; *Wood* v. *Anderston Foundry Co.*, 36 W. R. 918.] The invalidity of the summons was not cured by the appearance of the solicitor merely to protest.

The respondent was not legally represented.

Lord ALVERSTONE, L.C.J.—In this case I am of opinion that in the absence of any direct legislation or of any rule of practice lawfully made, the service of such a summons upon a company should be in the manner prescribed by section 62 of the Companies Act, 1862. It is not without importance that in the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), special provision is made by section 94, sub-section 4, for serving a summons or other proceeding on the society. There is no doubt that writs and other proceedings must be served on a limited company in the manner required by section 62 of the Act of 1862, and there seems to be no reason why a difference should be made in regard to criminal proceedings. Certainly in criminal matters the practice should not be more lax than in civil proceedings. I am therefore of opinion that this summons was not properly served. But then it is said that as the defendants did appear the informality was cured, and that the magistrates had jurisdiction to deal with the matter. But the defendants' solicitor merely attended to take the point that the summons was not properly served, and at once withdrew from the case when his objection was overruled. I am clearly of opinion that when a defendant merely appears in order to raise the question of the invalidity of the summons, and takes no further part in the case, that is not such an appearance as will operate as a waiver of the objection to the service.

In my opinion the magistrates had no jurisdiction to entertain the question and the conviction must be set aside.

DARLING and CHANNELL, JJ., concurred.

Conviction quashed.

Solicitors for the appellant, *Neve, Beck, & Kirby.*

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Wright, Bruce, and Darling, JJ.) — Dec. 14; Feb. 1.

REX v. JAMES AND JOHNSON. (*a.*)

Criminal law—Larceny—Indictment—Husband and wife—Wife stealing goods of husband when about to leave or desert him—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

By sections 12 *and* 16 *of the Married Women's Property Act,* 1882, *it is provided that a husband may take*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

criminal proceedings against his wife concerning property claimed by him, if such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband.

On the trial of a charge by a husband against his wife for feloniously stealing certain moneys, goods, and chattels belonging to him when she was about to leave or desert him, it is not necessary that the indictment should contain averments that she was the wife of the prosecutor, and that she had taken the articles when leaving or deserting, or about to leave or desert, her husband.

Case stated by the chairman of the Glamorganshire Quarter Sessions for the opinion of the Court for the Consideration of Crown Cases Reserved.

The prisoners, Sarah Eliza James and Thomas Johnson, were tried on an indictment the first count of which was as follows: "That Sarah Eliza James and Thomas Johnson, on the 5th of October, 1901, at the parish of Pontypridd, in the county of Glamorgan, did feloniously steal, take, and carry away, against the form of the statute in such case made, certain moneys, to wit, three pounds, and a deal box, a sewing-machine, a quilt, two sheets, a waistcoat, a cruet, two pictures, two ornaments, a table-cloth, a tray, two plates, and three glasses, of the moneys, goods, and chattels of John Thomas James." There was a second count which charged the prisoners with having received the said money, goods, and chattels, well knowing the same to have been feloniously stolen.

The prisoners severally pleaded "not guilty."

It appeared from the evidence at the trial that Sarah Eliza James was the wife of John Thomas James, and that Thomas Johnson was a lodger in his house, and that on the day in question the wife had, while her husband had been induced by Johnson to accompany him to Cardiff, removed the articles in question from her husband's house and deserted him, and subsequently joined Johnson, in whose possession the articles were found.

The female prisoner appeared as a witness and stated that she was the wife of the prosecutor.

At the close of the evidence, and before the case was put to the jury, counsel for the prisoners submitted that the indictment was insufficient against the wife for want of an averment that she was the wife of John Thomas James, and that she had taken the articles when leaving or deserting, or about to leave or desert, her husband, so as to complete the statement of an offence under the Married Women's Property Act, 1882, ss. 12 and 16.

The chairman held (1) that the allegation was not necessary to the form of the indictment, and (2) that if it was, the objection should have been taken before plea and not afterwards, and he directed the jury that it was necessary before they could find the wife guilty that they should be satisfied that the property was wrongfully taken by her when she was about to leave her husband.

The second count was withdrawn.

The jury found both prisoners guilty of larceny.

The questions for the opinion of the court were: Firstly, whether it is essential that an indictment against a married woman for stealing the goods of her husband should aver that she was his wife and wrongfully took the goods when about to leave him. Secondly, whether objection to the want of such averment can be successfully made by a wife who has pleaded to the indictment.

Lloyd Morgan, for the prisoners.—The indictment is insufficient. The question in this case arises under section 12 of the Married Women's Property Act, 1882, which section is extended by section 16. In *The Queen* v. *Streeter*, 48 W. R. 702, [1900] 2 Q. B. 601, it was held that the stealing by a woman of her husband's goods did not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but was only made criminal by the Married Women's Property Act, 1882, ss. 12 and 16. There was, therefore, a new statutory offence created, and this indictment, charging, as it does, simple larceny, is insufficient, since directly it was proved that the prisoner was the wife of the prosecutor the offence charged was disproved. The indictment ought to have stated that the prisoner was the wife of the prosecutor, and that she took the goods when leaving or deserting, or about to leave or desert, her husband. In Hales' Pleas of the Crown (1736), vol. 2, p. 170, it is laid down as follows: "An indictment grounded upon an offence made by Act of Parliament must by express words bring the offence within the substantial description made in the Act of Parliament, and those circumstances mentioned in the statute to make up the offence shall not be supplied by the general conclusion *contra formam statuti*." In this case the indictment does not bring the offence charged within the description in the Married Women's Property Act, 1882: *Steel* v. *Smith*, 1 B. & Ald. 94 (see judgment of Lord Ellenborough, C.J.).

Albert Parsons, for the prosecution.—The indictment is good. In the case of *The Queen* v. *Streeter* the point as to the sufficiency of the indictment was not taken, that case is therefore not an authority on the present case. The offence here is that of larceny, and is created by 24 & 25 Vict. c. 96. The proviso in the Married Women's Property Act, 1882, is not a definition of the offence; it merely gives an answer to the defence which might be set up that the prisoner was the wife of the prosecutor: see judgment of Lord Abinger, C.B., in *Thibault* v. *Gibson*, 12 M. & W. 88, at p. 94. [Counsel also referred to *The King* v. *Hall*, 1 T. R. 320, and to Hawkins' Pleas of the Crown, bk. 2, c. 25, s. 113.] It is not necessary to allege in the indictment that the husband and the wife were living apart at the time of the offence.

Lloyd Morgan replied.

Cur. adv. vult.

Feb. 1.—The judgment of the COURT (Lord ALVERSTONE, L.C.J., and LAWRANCE, WRIGHT, BRUCE, and DARLING, JJ.) was read by

Lord ALVERSTONE, L.C.J.—At common law a wife could not steal her husband's goods, and now she can only be convicted of larceny by virtue of the provisions of the Married Women's Property Act, 1882, ss. 12 and 16: see *Reg.* v. *Kenny*, 25 W. R. 679, 2 Q. B. D. 307. By the Married Women's Property Act, 1882, s. 12, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a *feme sole* . . . Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." By section 16, "A wife doing any act with respect to any property of her husband which, if done by the

husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."

Criminal proceedings can only be instituted by the husband against the wife if the wife and husband are not living together at the time the criminal proceedings are taken, and even then they can only be taken concerning an act done by the wife at the time when they were not living together concerning property of her husband, unless such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband. We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so, if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband. But the question to be determined is whether the conditions imposed by the proviso contained in section 12 and incorporated into section 16 are conditions which must be proved by the prosecution to exist in order to establish the offence, or whether the offence may be established without regard to the conditions, in the absence of any evidence offered by defendant of facts which would establish a ground of defence under the proviso. If compliance with the conditions is a necessary ingredient in the offence, then we think statements alleging compliance with the conditions are an essential part of the indictment.

In *Thibault* v. *Gibson* Lord Abinger, C.B., said: "I believe it is a well-established principle that in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty exempting certain cases from its operation, the declaration or information must shew that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence." In the same case Parke, B., after quoting a passage from 1 Wms. Saund. 262 (*a*), much to the same effect as the passage cited from Lord Abinger, at page 95, proceeds as follows: "In all cases of exception where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it, and I have some doubt whether the same rule does not also hold even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present."

In the case of *Rex* v. *Jarvis*, 1 East., 643, note, at p. 646, note, Lord Mansfield, C.J., says: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law it must appear in the charge that the defendant does not fall within any of them." In the same case Denison, J., at p. 647, note, says: "There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth), and those in the purview of the Act." And in the same case Foster, J., says: "Where negatives are descriptive of the offence, there they must be set forth."

In Chitty on Pleading (4th ed.), vol. 1, p. 322, the law is thus stated: "It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged. . . . Where a person is exempt from a penalty under certain circumstances by a proviso in a statute, and not in the body of it, the plaintiff need not state that the defendant is not within the exemptions, for that is merely matter of defence to be shown by the defendant; but where the exception is contained in the enacting clause, it must be negatived in the declaration, and where an Act of Parliament in the enacting clause creates an offence and gives a penalty, and in the same section there follows a proviso containing an exception which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative the exception; and in this respect there seems a material difference between a proviso and an exception."

In *Steel* v. *Smith* the head-note is to the following effect: "Where an Act of Parliament, in the enacting clause, creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration." In that case Bayley, J., said at p. 99: "I cannot say that the proviso is part of the same sentence; for if it had been omitted the preceding sentence would have been entire." In the same case Abbott, J., said: "There is a technical distinction between a proviso and an exception, which is well understood. All the cases say that if there be an exception in the enacting clause, it must be negatived, but if there be a separate proviso it need not."

It is true that the last two quotations refer to declarations in civil actions; but the principles applicable are the same, although, no doubt, the principles will be applied with greater strictness in criminal than in civil proceedings.

In Hawkins' Pleas of the Crown, bk. 2, c. 25, s. 113, (3rd ed.) vol. 2. p. 343, there is this passage: "It seems agreed that there is no need to allege in an indictment that the defendant is not within the benefit of the provisos of a statute whereon it is founded, and this hath been adjudged even as to those statutes which in their purview expressly take notice of the provisos; as by saying that none shall do the thing prohibited, otherwise than in such special cases, &c., as are expressed in this Act."

We think the substance of the authorities is this: That it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception. Thus in an indictment on a statute which enacts that if any person shall put off any milled money whatsoever unlawfully diminished, and *not cut in pieces*, for a lower rate than its nominal value, he shall be guilty of felony, it is necessary to state in the indictment that the money was not cut in pieces: *Rex* v. *Palmer*, 1 Leach, 102.

In the present case sections 12 and 16 of the Married Women's Property Act, 1882, must be read together, and the enacting clause in section 12, when read in connection with section 16, makes the wife liable to criminal proceedings by her husband, subject to the proviso contained in the latter portion of section 12. But the conditions imposed by that proviso do not affect the quality or character of the

offence. They merely introduce matters which may be pleaded by way of defence, and we think they are not matters necessary to be negatived in the indictment. For these reasons we think the indictment good, and that the conviction should be affirmed.

Conviction affirmed.

Solicitor for prisoner, *Colenso Jones*, Pontypridd.

Solicitor for prosecution, *W. T. Davies*, Porth.

Court of Appeal.

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Feb. 7, 8.

CASH (LIMITED) *v.* JOSEPH CASH. (*a.*)

Trade name—Same name—Goods of same class—Misleading the public—Injunction—Form of order.

A person cannot be absolutely restrained from carrying on business in his own name, he can only be restrained from carrying on business in his own name without taking reasonable precautions to prevent his business or goods being confounded with those of another person.

This was an appeal from a decision of Kekewich, J. The facts were these:—

In the year 1895 the plaintiff company were incorporated for the purpose of purchasing the business and goodwill of the old-established firm of Messrs. J. & J. Cash, of Coventry, manufacturers of ribbons, frillings, and other textile goods.

The defendant, Joseph Cash, was one of the vendors and became one of the directors of the company. As part of their purchase the company bought also the exclusive right to use the names of "J. & J. Cash" and "Cash's frillings," and it was agreed that the vendors should be the first directors of the company and should not be allowed to resign for five years after the incorporation of the company except by consent, and that none of the directors should, whilst director, without the consent of the other directors, either solely or jointly with any other person or company, directly or indirectly, carry on or be concerned in the business of manufacturers of ribbons, frillings, tapes, or other textile goods, or permit his name to be used in connection therewith except as a member or director of the company.

By a deed of the 1st of December, 1898, the company released the defendant, Joseph Cash, from his engagement not to resign his directorship within the five years, and the defendant thereupon resigned his directorship.

In May, 1899, the defendant commenced to form a limited company called "J. & J. Cash (Limited)," for the purpose of carrying on at Coventry a similar business. The plaintiff company thereupon protested and the defendant gave an undertaking not to proceed with the company.

Subsequently the defendant commenced to carry on the same kind of business at Coventry by himself alone, but under the name of "Joseph Cash & Co," and to sell frillings, woven names and initials under the names of "Cash's frillings," &c.

The plaintiff company thereupon brought this action for an injunction to restrain the defendant from carrying on business under the name of "Joseph Cash & Co." or under any name in which was included the word "Cash" as part thereof, or under or in any other name or manner calculated or likely to deceive the public, and for other consequential relief.

Kekewich, J., held that the defendant was not entitled to sell frillings (the article principally in dispute) as "Cash's frillings," and accordingly granted an injunction restraining the defendant from selling frillings, woven names and initials under the name of "Joseph Cash & Co.," or under the name of Cash, or under any other name so as to deceive the public into the belief that they were the goods of the plaintiff company.

The defendant appealed.

Hugo Young, K.C., and *O. Leigh Clare*, for the defendant, while submitting to an injunction, contended that the injunction as granted went too far; and that he was entitled to sell frillings, &c, as part of his business and to use in connection with those articles a name which was his own name.

They referred to *Reddaway* v. *Banham*, 44 W. R. 638, [1896] A. C. 199; *Turton* v. *Turton*, 38 W. R. 22, 42 Ch. D. 128; *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

Warrington, K.C., and *Sargant*, for the plaintiffs, contended that the defendant was not entitled to use his name in such a way as to mislead the public into the belief that his goods were the goods of the plaintiff company.

After the argument had proceeded for some time it was agreed between the parties that the injunction granted by Kekewich, J., should be varied as follows: "That the defendant Joseph Cash be restrained from selling any frillings or woven names or initials, not manufactured by the plaintiffs, as Cash's frillings or Cash's woven names or initials, and from carrying on the business of a manufacturer or seller of frillings or woven names or initials under the name of the Joseph Cash & Co. while not in partnership with any other person, and from carrying on any such business either in the name of Cash or under any style in which the name Cash appears, without taking reasonable precautions to clearly distinguish the business carried on and the frillings and woven names and initials manufactured or sold by the defendant from the business carried on and the frillings and woven names and initials manufactured by the plaintiffs; and from carrying on any such business under any name or in any manner so as to mislead or deceive the public into the belief that the business of the defendant or the frillings or woven names or initials manufactured or sold by him are the business of or the goods manufactured by the plaintiffs, or that the defendant is carrying on the business formerly carried on at Coventry by Messrs. J. & J. Cash, the vendors to and predecessors in business of the plaintiffs."

VAUGHAN WILLIAMS, L.J., said: Now that the form of injunction has been agreed upon and the matter disposed of I wish to say a few words on the case. It may be that a trade is of such a nature that the products of that trade associated with a particular trade name have become almost indissolubly connected with the business carried on by the particular manufacturer who has created that particular business. But even though that may be so, and even though the nature of the trade has to be taken into consideration in an action for an injunction, there never has been a case yet where an order has been made restraining a man altogether from carrying on in his own name a particular trade. Every decision up to the present time has been limited to restraining him from carrying on a trade which has thus become so identified with the business of another person without taking the steps which any honest man would wish to take

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

to prevent his goods from being confounded with the other person's goods which have become so identified with the name. In my judgment the order of Kekewich, J., went too far, and the order which we now make goes as far as it is possible to go.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors, *Maddocks & Colson*, for *H. Maddocks*, Coventry; *Mackrell & Co.*, for *Wragge & Co.*, Birmingham.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 4.

FITZPATRICK *v.* EVANS & CO. (LIMITED). (*a.*)

Master and servant — Employers' liability — Accident — Compensation — Contractor — Person employed by contractor in coal mine—Conditions of employment—Liability of mine owner—"Workman"—Employers and Workmen Act 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

A contractor agreed with a colliery owner to sink a shaft in a pit at a certain sum per yard. The contractor employed and paid the workmen engaged in the sinking operations. The workmen, before entering on the work, signed certain conditions prescribed by the colliery owner for the regulation of persons employed, directly or indirectly, at the colliery. One of the workmen employed by the contractor, while engaged in the work, was killed by an accident owing to the negligence of the colliery owner. In an action by the personal representative of the deceased against the colliery owner to recover damages under the Employers' Liability Act, 1880,

Held, that the signing of the conditions by the deceased did not make him a workman in the employment of the colliery owner within the Employers' Liability Act, 1880, *and that the action would not lie.*

Judgment of the Divisional Court (49 *W. R.* 491, [1901] 1 *K. B.* 756) *affirmed.*

Appeal from the judgment of a Divisional Court (Wills and Channell, JJ.), reversing the judgment of the St. Helens County Court judge: reported 49 W. R. 491, [1901] 1 K. B. 756.

The action was brought by one Terence Fitzpatrick, under the Employers' Liability Act, 1880, and Lord Campbell's Act, to recover damages from the defendants, who were colliery proprietors, for the death of his son, who was killed while engaged in sinking a shaft at one of the defendants' pits.

The defendants had entered into a contract with one Morris, a "sinker," whereby the latter agreed to sink the shaft at so much per yard, and to provide all the labour and engine winders. The deceased was employed by Morris, who paid him 6s. a day as wages. He had, before entering on the work, signed a "record book" kept by the defendants at their colliery and containing the following conditions:

"Record book of persons employed on the conditions undermentioned:

"Conditions of employment at the collieries and works of Richard Evans & Co. (Limited) . . . for all persons employed at the collieries or works, directly or indirectly.

"The owners of the said colliery and works are hereinafter called the 'employer.' . . .

"(1) The persons directly employed at the colliery are engaged for an indefinite period, determinable upon fourteen days' notice. The employed undertake to work on each working day, Saturday included (if required), and the employer undertakes to employ them on such days, except in the event of accident, repairs, breakdown, or bad trade. The wages to be paid weekly.

"(2) This contract shall remain in force and operate as a contract between the workman and the owner for the time being of the colliery so long as the workman continues to be employed at the colliery, notwithstanding any change in the members for the time being constituting the employer's firm.

"(3) All usual and customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed at the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workman or other persons employed.

"For miners and contractors only:

"(4) Every miner and contractor employed at the colliery shall, upon engaging any drawer, workman, or other person to work under him, require such drawer, workman, or other person to obtain a copy of these conditions from the officer whose duty it is to provide such copies, and inform such drawer, workman, or other person that they are the conditions under which persons are employed at the colliery, and such miner, drawer, or workman, or other persons respectively shall be bound by such conditions.

"For drawers and persons working under contractors only:

"(5) Every drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman, or other person shall in consideration of being employed at the works be bound, both as between himself and the miner or contractor and between himself and the owner, by the terms of these conditions."

At the trial Morris said in his evidence that if the certificated manager of the mine had given him an order relating to the work he would have obeyed it, and would have expected his own workmen to do so. The deceased was killed by an explosion caused by an escape of gas. It was objected on behalf of the defendants that there was no evidence that the deceased was a "workman" in their employment within the meaning of the Employers' Liability Act, 1880. The county court judge left the question to the jury, who found that the deceased was a workman in the employment of the defendants, and that the defendants were guilty of negligence causing his death, and they found a verdict for the plaintiff. The county court judge entered judgment for the plaintiff. The Divisional Court held that there was no evidence that the deceased was in the employment of the defendants, and entered judgment for them. The plaintiff appealed by leave, but died since the service of the notice of appeal, and by an order of the court the appeal proceeded in the name of the plaintiff's legal personal representative.

Montague Lush, for the appellant.—The test whether the relation of master and servant exists between two persons is whether the power of control over the workman is vested in the person alleged to be the master: *Donovan* v. *Laing, Wharton, & Down Syndicate*, 41 W. R. 455, [1893] 1 Q. B. 629. The questions who pays the wages, who hired the workman, and

(*a.*) Reported by W. F. BARRY, Esq., Barrister-Law.

who can dismiss him, are mere elements in considering who has the real control. The jury here were entitled to say upon the conditions of employment issued by the defendants that the deceased was in the employment of the defendants as their servant. It is a question of fact in each case, and there was evidence upon which the jury could reasonably find as they did. The case comes within *Brown* v. *Butterley Coal Co.*, 53 L. T. Rep. 964, 34 W. R. Dig. 118 In *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.*, [1898] 2 Q B. 588, 47 W. R. Dig. 125, the control over the workman was given by statute and not by contract, as in the present case. Rigby, L.J., left open the question of contractual control: see p. 605. Further, the evidence given by Morris as to his workmen and himself obeying the orders of the manager of the mine was evidence upon which the jury could find that the defendants exercised the real control over the workmen engaged by Morris, and that therefore the deceased was in their employment.

He also referred to *Ruth* v. *Surrey Commercial Dock Co.*, 8 Times L. R. 116.

Ruegg, K.C., and *S. H. Leonard*, for the defendants, were not called upon.

COLLINS, M R.—In my opinion the decision of the Divisonal Court is right. We have to decide whether there is any evidence that the deceased was a workman in the employ of the defendants. It is clear that Morris, who employed the deceased, was an independent contractor. That in itself distinguishes this case from *Brown* v. *Butterley Coal Co.*, where, as far as can be gathered from the report and as was pointed out in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.*, the court seemed to have based their judgment upon the ground that the "butty" man was not an independent contractor, and that therefore the men engaged by him were not in his employment as distinguished from the employment of the colliery owners. The evidence in the present case makes it clear that Morris was an independent contractor who had undertaken to sink the shaft, and who had employed men for that work. Those men, no doubt, were to look for guidance in certain matters to the defendants. There were certain conditions prescribed by the defendants in force in the colliery. Those conditions created privity of contract between the men working in the mine and the defendants, but they were only in regard to certain specified matters, and did not convert the employment of the men by Morris into an employment by the defendants. The result is that the deceased was employed by an independent contractor, and at the same time he came under certain obligations to the defendants, which, however, did not make him their servant. The cases upon the question run somewhat fine, and it is often difficult to say that there is no evidence to go to the jury of the existence of the relation of master and servant. But one must look at the facts fairly, and it does not do to say that a mere scintilla of evidence is sufficient to allow the case to go to the jury. The fact that in this case there was for some purposes privity of contract between the deceased and the defendants is not of itself evidence to go to the jury that he was in the defendants' employment. There may be a number of important facts which, when taken together, would amount to evidence of the existence of the relation of master and servant, but it may not be equally true that one of those facts, taken by itself, would amount to such evidence. This case seems to me to be covered by the decision in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* An attempt was made to distinguish that case upon the ground that the conditions there were imposed by statute. But where conditions for the regulation of those working in a mine are well known, and a workman comes and works in the mine under them, he is bound by them, and if he thereby enters into relations with the mine owner which involve some control by the mine owner over him while so working, the case is just the same as if he were working under conditions to which he expressed his assent by signing them. I can see no distinction between the two cases. Each case of this class must be decided upon its own facts. In the present case I can see no evidence which could properly have been left to the jury to show that the deceased was a workman in the employment of the defendants. I will only add that the evidence given by Morris that he would have obeyed an order relating to the work given to him by the manager of the mine, and that he would have expected his workmen to do so also, does not carry the case further, and does not amount to evidence that the deceased was in the employment of the defendants. The appeal must therefore be dismissed.

ROMER, L.J.—I am of the same opinion for the reasons given by the Divisional Court and by the Master of the Rolls.

MATHEW, L.J.—I am of the same opinion. There was, no doubt, a contract between the deceased and the defendants by reason whereof the deceased came under an obligation to obey the defendants' directions in certain cases. That in itself, in the circumstances of this case, was no evidence that the deceased was in the employment of the defendants. It is a question of fact in each case, and in this case there was no evidence to go to the jury that the relation of master and servant existed between the defendants and the deceased. I cannot think that the piece of evidence given at the trial by Morris, and referred to by the Master of the Rolls, amounted to any evidence at all of that relation.

Appeal dismissed.

Solicitors for the plaintiff, *Charles Russell & Co.*, for *H. L. Riley*, St. Helens.

Solicitors for the defendants, *W. Norton Ellen*, for *Edwin Peace*, Liverpool.

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Jan. 23.

HUNT *v.* LUCK. (*a.*)

Vendor and purchaser—Possession of tenant—Notice of lessor's title—Reasonable inquiry—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.

Possession of land by a tenant affects a purchaser with knowledge only of the tenant's rights, and not with knowledge of the lessor's title.

An inquiry of the tenant to whom the rent is paid is not an inquiry which ought reasonably to be made by a purchaser, so that, by reason of his omission to make such inquiry, he is not affected either by virtue of section 3 of the Conveyancing Act. 1882, *or of the law as it stood before the passing of that Act, with constructive notice of anything he might have learned if such inquiry had been made.*

Decision of Farwell, J. (49 *W. R.* 155, [1901] 1 *Ch.* 45), *affirmed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal from a decision of Farwell, J. (reported 49 W. R. 155, [1901] 1 Ch. 45).

The plaintiff's husband, Dr. Hunt, was the owner of certain freehold property at Wimbledon, consisting of twenty-seven cottages, twenty-five of which were let to weekly tenants, and two to yearly ones. In the year 1896 he resided at Hastings, and was on terms of intimacy with one W. M. Gilbert. Dr. Hunt was an old man in feeble health, but the court found as a fact that he was not insane, and was capable of managing his affairs.

By a deed dated the 31st of March, 1896, and made between Hunt of the first part, and Gilbert of the second part, Hunt conveyed part of this cottage property to Gilbert by way of gift.

By another deed dated the 10th of October, 1896, and made between the same parties, in consideration of the sum of £12,000 (the receipt of which Hunt thereby acknowledged), Hunt conveyed the whole of this cottage property to Gilbert.

There was no evidence that the money was, as a matter of fact, paid, but Hunt continued to receive the rents of the property up to the time of his death, and his widow, the plaintiff, continued to receive them after his death.

The rents were paid by the tenants to Woodrow, a house agent at Wimbledon, who remitted them to the landlord. Gilbert subsequently mortgaged the property to the defendants, Sayer, Slater, & Hodgson, and on the mortgage, the title deeds, which had been deposited by Gilbert at his bankers to secure an overdraft, were handed over to the defendants.

While negotiating the mortgages the defendants Sayer, Slater, & Hodgson employed a valuer named Woodhams to value the property. When doing so, it was alleged that he inquired of the tenants to whom they paid their rents, and was told that it was to Woodrow; he, however, did not see Woodrow, nor inquire of him on whose behalf he collected the rents.

Hunt died on the 10th of June, 1898, and letters of administration with the will annexed were granted to the plaintiff.

Gilbert died on the 6th of September, 1898. By his will the defendant Luck was the executrix of his will and also his residuary legatee and devisee.

The plaintiff did not deny the genuineness of the two mortgages, but claimed that Dr. Hunt's signatures to the two deeds of the 31st of March and the 10th of October, 1896, were forgeries, or that Dr. Hunt, if he signed the deeds, did not understand what he was doing.

By section 3 of the Conveyancing Act, 1882: "(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

Farwell, J., held that, even if the alleged fraud had been committed, the mortgagees were not affected with either actual or constructive notice of Dr. Hunt's title, and being purchasers for value without notice, their title must prevail, and the action must be dismissed.

The plaintiff appealed.

W. F. Webster (*Upjohn, K.C.*, with him), for the appellant.—A purchaser is affected with notice if he neglects to make reasonable searches and inquiries which he ought to make in his own interest. An inquiry to whom the tenants pay their rents is a reasonable inquiry, and the omission to make it affects the purchaser with notice of all he would have learned if it had been made. It must be assumed that the inquiry would have been truly answered, and the mortgagees would therefore in the present instance have learned that the rents were paid to Woodrow who received them as agent for Hunt. [STIRLING, L.J.—No such inquiry is recommended either in Dart's Vendors and Purchasers or in Lord St. Leonards' book on Vendors and Purchasers.] Preston on Abstracts, vol. 3, p. 400, advises an inquiry to whom tenants pay rent.

In the course of the argument the following cases were cited: *Ogilvie* v. *Jeaffreson*, 8 W. R. 745, 2 Giff. 353; *Mumford* v. *Stohwasser*, 22 W. R. 833, L. R. 18 Eq. 556; *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18; *Bailey* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25; *In re Alms Corn Charity*, [1901] 2 Ch. 750.

Hughes, K.C., Rufus Isaacs, K.C., and *Church*, for the respondent, were not called upon.

VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of Farwell, J., was quite right. Farwell, J., dealt with the case without reference to the provisions of the Conveyancing Act, 1882, as far as I can see. But he does make a statement of the law as established by decisions prior to the Conveyancing Act.

I wish to say, speaking for myself, that if one is to determine the question here to-day with reference to old law, then I think that the conclusion of Farwell, J., was quite right. Farwell, J., after quoting the older authorities, says: "The right established by these two cases may be stated thus: (1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights." Here I do not understand that anyone suggests, and, if it is suggested, in my opinion the suggestion is ill founded, that there was actual knowledge that the rents were paid by the tenants to some person whose receipt is inconsistent with the title of the mortgagor Gilbert. That is not suggested, in fact, and therefore we have to go back to the first of these rules. Now that rule means this, that if there is a purchaser or a mortgagee, and he has notice that the vendor or mortgagor is not in possession he must make inquiries of the person in possession—of the tenant in possession, and find out from him what his, the tenant's, rights are, and that if he does not choose to do so, then whatever title he gets as purchaser or mortgagee that title will be subject to the title of the tenant in possession.

Now that I believe to be a true statement of the law, and the only matter that I need allude to further is the case to which the attention of Farwell, J., was called after he had delivered his judgment in court, by the reporter, and that is the case of *Mumford* v. *Stohwasser*. Farwell, J., gave an explanation which comes to this, that in his judgment the passage in *Mumford* v. *Stohwasser* which seems to favour the idea that notice of the tenancy is notice of the title of the lessor was, if Sir G. Jessel said so, a slip of memory on his part. Sir G. Jessel did not profess to be laying down any law, he professed to be reciting the old-established and unquestioned law, and it is impossible to affirm that the proposition in this passage is right unless we are prepared to disregard the authorities, including the authority of the Privy Council, which show that notice of the

tenancy has no operation whatever as affecting the question of notice of the title of the lessor of the tenant in possession. Of course, if you do make inquiries and get information, then you are affected by notice but not otherwise.

Now I propose just to say a word or two as to the Conveyancing Act, 1882. One has to look first at the definition clause. There you have in the definition clause, section 1, sub-section (ii.), "purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for property." Now, the reason why it is necessary to quote that definition is because it is suggested that a purchaser for valuable consideration could only set up that he was without notice in the case where his vendor was in possession. The definition shows that under the Conveyancing Act that is not so, and I have my doubts whether it was ever so, although a decision of Lord Eldon's was cited which was said to favour that view.

Now, passing from that, section 3 deals with the question of notice. [His lordship read the section down to the end of clause (i.), and continued:] In my judgment the only inquiry which ought reasonably to have been made here by the intending mortgagee was an inquiry to protect himself against any right which the tenant would have in the subject-matter of the mortgage. I do not think that there is, for the purpose of ascertaining the title of the vendor, any obligation whatever to make these inquiries of the tenant for any other purpose but protection against the rights of the tenant. I only wish to add beyond that, that in my judgment on the facts of this case I do not think that, if this inquiry had been made, these matters as to the equitable title of Dr. Hunt and Mrs. Hunt would have come to the knowledge of the intending mortgagee. All that he would have learned, if he had made inquiries of the tenant, would have been that the tenant paid the rent to Mr. Woodrow, a local agent. In my judgment it is not right to say that the facts as to the equitable title of Dr. Hunt and Mrs. Hunt would have come to his knowledge by making those inquiries.

I have now looked sufficiently into the facts to see how far this matter really was carried out by the mortgagees personally or by their solicitors. In so far as it was carried out by their solicitors, the second clause of sub-section 1 of section 3 applies. [His lordship read the clause, and continued:] Here again nobody suggests that there was actual notice, and the observations I have already made apply with reference to what inquiries ought reasonably to have been made, with this addition, that really when one comes to deal with the question of what inquiries ought reasonably to have been made by the solicitor or other agent it does seem to me that it would be a very strong thing to say that an inquiry ought reasonably to have been made by the solicitor or other agent which is not advised in any of the standard text-books, and which is inconsistent with the decisions prior to the Conveyancing Act, and has no countenance from any decision subsequent to the Conveyancing Act.

I only wish to call attention further to sub-section 3 of section 3: "A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted." I only call attention to that for the purpose of vouching what has been said in the course of the argument, that so far as this section 3 is concerned the practical result is that the law prior to the Conveyancing Act can only be used as a shield, and not as anything extending the law beyond the code-like definition in section 3.

STIRLING, L.J.—I am of the same opinion, and I have really nothing to add to the reasons which have been given by Farwell, J., and by my brother.

COZENS-HARDY, L.J.—I entirely agree. I cannot bring myself to hold that an inquiry ought reasonably to have been made, which is not usual, which has not, so far as we are aware, ever been recommended by any single text-book writer, and which has not even been suggested by any judge, except in that one passage of Sir George Jessel in *Mumford* v. *Stohwasser*. I think the decision is perfectly right and that the appeal ought to be dismissed with costs.

Solicitors, *Henry H. Fanshawe; Leslie & Hardy*, for *Sayer & Colt*, Hastings.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Jan. 22.

YATES v. TERRY. (*a*.)

Practice—Assignment of debt—Garnishee summons—Second garnishee summons—Intervening right of assignee.

The defendant, being indebted to H. in the sum of £50 1s. 6d., was served with a garnishee summons attaching all debts due from him to H. to answer a judgment obtained against H. in the county court for £37 18s. 4d. H. then assigned to the plaintiff the sum of £16 17s. 8d. due to him from the defendant, and the plaintiff gave due notice of the assignment to the defendant. Subsequently the defendant was served with another garnishee summons in respect of a judgment obtained against H. in the same county court by another creditor for £21 4s. 7d. Thereupon the defendant paid into court the whole sum of £50 1s. 6d., appropriating the sum of £37 18s 4d. to the first judgment creditor, and the balance of £12 3s. 2d. to the second judgment creditor.

Held, that the defendant, after satisfying the first attachment, held the balance for the plaintiff, and had no right to appropriate the balance to the second attachment.

Judgment of Lawrance *and* Kennedy, JJ. (49 *W. R.* 112, [1901] 1 *K. B.* 102), *reversed.*

Appeal from a judgment of a Divisional Court (Lawrance and Kennedy, JJ.) on an appeal from the Liverpool County Court: 49 W. R. 112, [1901] 1 K. B. 102.

The defendant Terry was the receiver and manager of a company in liquidation.

On the 20th of February, 1900, an order was made upon him by the Palatine Court of Liverpool to pay to one Henderson the sum of £50 1s. 6d.

On the next day a garnishee summons was served upon him in an action in the Liverpool County Court brought by one Jones against Henderson, in which Jones had recovered judgment for £37 18s. 4d. The garnishee summons was in the ordinary county court form. It called upon Terry to "show cause why an order should not be made upon you for the payment of the amount of the said judgment, or so much thereof as shall equal the amount of the debts due and accruing from you to the said William Henderson. And take notice that, from and after the service of the summons upon you, all such debts are attached to answer the said judgment, and that if you pay the said debts to the said William Henderson or otherwise dispose of them you will be liable to be committed for contempt."

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

On the 27th of February, 1900, Henderson assigned to the plaintiff Yates the sum of £16 17s. 8d., due to him from the defendant, and on the next day Yates gave the defendant due and proper notice of this assignment.

The defendant, considering himself bound by the garnishee summons, did not pay any money to the plaintiff.

On the 15th of March another garnishee summons was served upon the defendant in respect of a sum of £21 4s. 7d. by one Bielby, who had recovered judgment against Henderson in the same county court for that amount. Thereupon the defendant paid into court the sum of £50 1s. 6d., which he had in his hands, appropriating the sum of £37 18s. 4d. to the first garnishee, and the balance—viz., £12 3s. 2d. to the second garnishee. The two garnishees received out of court the sums appropriated to them respectively.

The plaintiff then brought this action on the assignment to recover the said balance of £12 3s. 2d.

The county court judge gave judgment for the plaintiff.

The Divisional Court reversed the judgment of the county court judge and gave judgment for the defendant, on the ground that the first garnishee summons attached the whole of the moneys in the hands of the defendant due to the judgment debtor, and that the assignment by the debtor was invalid.

The plaintiff appealed.

Whitty, for the plaintiff.

Cuthbert Smith, for the defendant.

COLLINS, M.R.—In this case judgment was entered for the plaintiff in the county court, but this was reversed by the Divisional Court, who gave judgment for the defendant. The plaintiff was the assignee of a debt which was due from the defendant to one Henderson. Prior to the assignment a garnishee summons had been served on the defendant attaching in his hands all debts due from him to Henderson to answer a judgment which had been obtained in the county court by one Jones against Henderson. After the service of that garnishee summons, and before the service of a second garnishee summons, the assignment which I have mentioned took place, and due notice of it was given by the plaintiff to the defendant. Then came the service of the second garnishee summons, which had been obtained by another judgment creditor. Thereupon the defendant paid into court the whole amount of the debt in his hands due to Henderson, and he appropriated a portion of that amount to satisfy the debt of the first garnishee creditor, and the remainder to satisfy the debt of the second garnishee creditor. It is clear that that was an appropriation which altogether ignored the intervening rights of the assignee. The county court judge held that the plaintiff was entitled to sue the defendant on his assignment, and to recover to the extent of the balance after the first judgment creditor had been satisfied. I think that decision is right.

It is argued on the part of the defendant that the first garnishee summons attached in his hands all moneys owing from him to Henderson, and that, while that attachment subsisted, it would have been wrong for him to appropriate any part of the fund in his hands except to satisfy that attachment, and that therefore the defendant was protected from an action by the plaintiff. That argument might have been tenable if the facts had been otherwise. But the defendant in fact dealt with the whole of the fund which was in his hands, appropriating part to answer the first attachment and the rest to answer the second attachment. In my opinion the defendant, after satisfying the first attachment, held the balance for the assignee, and he had no business to appropriate the balance as he did. He therefore remains under liability to the plaintiff. I think that the judgment of the Divisional Court should be set aside, and the judgment of the county court judge restored.

ROMER and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Field, Roscoe, & Co.*, for *Yates & Co.*, Liverpool.

Solicitors for the defendant, *Abbott & Co.*, for *Bielby & Welby*, Liverpool.

High Court of Justice.

Chan. Div. } Jan. 15, 21; Feb. 14.
Byrne, J. }

In re WESTON.
BARTHOLEMEW *v.* MENZIES. (*a.*)

Donatio mortis causâ—*Subject-matter—Post Office Savings Bank deposit book.*

A Post Office Savings Bank deposit book is capable of being given so as to create a donatio mortis causâ.

Originating summons.

This case involved the decision as to whether a Post Office Savings Bank deposit book could be given by way of *donatio mortis causâ.*

In February, 1901, Thomas Weston, who had been a butler in domestic service, was ill in a London hospital. He was at the time possessed of certain shares in a building society, and also of about £130 placed on deposit in the Post Office Savings Bank. He gave the key of a drawer in his bedroom to the defendant, Miss Menzies, to whom he had for many years been engaged, and asked her to get the certificates of the shares and his Post Office Savings Bank deposit book, and told her to keep them. She accordingly got the certificates and the bank book. Weston subsequently repeated his wish to the defendant that she should keep them. He died on the 1st of May, 1901, intestate, and letters of administration to his estate were granted to the plaintiff.

Miss Menzies claimed the shares and the money at the bank, and this summons was taken out for the purpose of obtaining the decision of the court upon her claim.

His lordship held upon the evidence that there was a gift of the certificates and the book if they could be validly given by way of *donatio mortis causâ.*

J. A. Hay, for the plaintiff.

Lyttelton Chubb, for the defendant, submitted that there was a valid gift of both the shares and the deposited money.

J. H. Jackson, for the next-of-kin, referred to *Ward* v. *Turner*, 2 Ves. sen. 431, and *Moore* v. *Moore*, 22 W. R. 729, L. R. 18 Eq. 474, as showing that the share certificates were not a valid gift.

The cases referred to in argument upon the question of the gift of the bank book appear in the judgment.

Cur. adv. vult.

BYRNE, J., held that the share certificates could not be the subject of a *donatio mortis causâ.*

As regards the savings bank book his lordship gave

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

judgment as follows: Since *In re Dillon*, 38 W. R. 369, 44 Ch. D. 76, it is well established that a banker's deposit receipt in a form showing the terms of the contract and being more than an acknowledgment for the receipt of money, is a good subject for a *donatio mortis causâ*. The question had not previously come before a Court of Appeal in England, although there had been, as stated by Cotton, L.J., in the last-mentioned case, a current of decisions in courts of first instance in England in favour of that view, and a decision of the Court of Appeal in Ireland, *Cassidy* v. *Belfast Banking Co.*, 22 L. R. Ir. 68, 36 W. R. Dig. 88, to a similar effect. In the present case the question arises in reference to a Post Office Savings Bank deposit book, and, in considering whether or not this is a good subject of a *donatio mortis causâ*, the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held and shows what the contract between the parties is: see *Moore* v. *Darton*, 4 De G. & Sm. 517, and the judgment of Cotton, L.J., in *In re Dillon*. An examination of the savings bank book in the present case appears to me to show a fulfilment of the test; and, although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere receipt. It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the Savings Bank Department. Apart from authority pointing the other way, I should have considered it impossible after comparing the terms of the deposit receipts in the cases of *In re Dillon* and *Moore* v. *Darton* with the savings bank book to hold that the latter is not a good subject for *donatio mortis causâ*. The case in Ireland of *M'Gonnell* v. *Murray*, 3 Ir. R. Eq. 460 (which appears to be the only reported case dealing with a savings bank book), was relied upon as an authority to the contrary, and since the argument I have referred also to the case of *Duckworth* v. *Lee*, [1899] 1 Ir. R. 405, in the Court of Appeal in Ireland. The latter case dealt with the gift of an I.O.U., and had no reference to a savings bank book, and, consequently, the actual decision in *M'Gonnell* v. *Murray* did not come in question; but the general reasoning in *M'Gonnell* v. *Murray*, including an expression of disagreement with a *dictum* of Lord Romilly's in *Hewitt* v. *Kaye*, 16 W. R. 835, L. R. 6 Eq. 198, appears to have been treated with approval by some of the judges, and the Lord Chancellor of Ireland expressly states that he sees nothing in the case of *In re Dillon* to shake the authority of *M'Gonnell* v. *Murray*. It is necessary, therefore, to consider carefully what the decision in *M'Gonnell* v. *Murray* actually was. It was not necessary to decide the point in the view the Master of the Rolls took of the facts; but it was, in fact, decided that the savings bank book in question in that case was not capable of being given *mortis causâ* so as to confer a right upon the donee to the amount of the deposit. The point there arose, not as to the book of a depositor under the Post Office Saving Bank Act, 1861 (24 Vict. c. 14), but as to the book of a depositor in a private savings bank governed by the provisions of the Savings Bank Act of 1863 (26 & 27 Vict. c. 87), Acts which differ considerably in their terms. The only rules of the savings bank apparently relied on in *M'Gonnell* v. *Murray* are those set out at p. 463 of the report, and I do not find that it was part of the contract, as it was in the present case, that the book must be produced whenever any money is deposited or withdrawn, nor does it appear that there was any stipulation corresponding with that in the Post Office Savings Bank book to the effect that every deposit must be immediately entered by the postmaster or other person receiving it in the depositor's book, and that the postmaster or other person receiving the deposit must affix his signature and the stamp of his office to each entry. In *M'Gonnell* v, *Murray* the Master of the Rolls says that he does not find in the Savings Bank Act (meaning, according to the reference in the report, the Act 26 & 27 Vict. c. 87) anything to distinguish a savings bank pass-book from an ordinary banker's pass-book; and he also takes the view that the book did not embody the terms of the contract between the depositor and the bank, and, further, that it was merely evidence of, or a voucher for, a debt. It appears to me that the book in *M'Gonnell* v. *Murray* was, in the view taken of it by the court, of a different nature from that with which I have to deal. I am quite unable to say that the Post Office Savings Bank book is not distinguishable from an ordinary banker's pass-book, and I think it is clearly more than evidence of, or a voucher for, the debt. I do not see how I can consistently with the cases of *Moore* v. *Darton* and *In re Dillon*, do otherwise than hold the book to be capable of being well given, so as to create a *donatia mortis causâ*.

Solicitors, *Paterson, Candler, & Sykes*, for *A. J. Ellis*, Maidstone; *W. W. Young, Son, & Ward.*

Chan. Div. } Nov. 27, 28, 29; Dec. 3;
Farwell, J. } Jan. 18.

BOND v. BARROW HÆMATITE STEEL CO. (LIMITED). (*a.*)

Company — Articles of association — Construction— Preference shares—"Net profits"—Reserve fund— Discretion of directors — "Interest" — Depreciation fund.

In an action by preference shareholders in a company claiming that they were entitled by contract to be paid a preferential dividend out of the balance to the credit of the profit and loss account in each year before the appropriation of any part of such balance to a reserve fund or any carrying over,

Held, that such a question, as well as that of a depreciation fund, is to be answered according to the circumstances of each particular case, the nature of the company and the evidence of competent witnesses.

In the present case, special resolutions creating the preference shares were to be read as subject to the provisions of the original articles of association, and a provision for the payment of "net profits" towards arrears of dividend due on such preference shares was not sufficient to rescind the articles relating to declaration of dividends and formation of reserve fund.

Per Farwell, J.: "*Interest is compensation for delay in payment, and is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of such profits.*"

"*There is no hard and fast rule by which the court can determine what is capital and what is profit.*"

The court is unlikely to compel directors of a company to pay dividends when they have expressed their opinion that the state of the accounts does not admit of any such payment.

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

Witness action, to determine the rights of preference shareholders.

The defendant company was incorporated in 1864 with a capital of £150,000, divided into 1,500 shares of £100 each.

The objects for which the company was formed (as altered by special resolution confirmed by an order of the court, dated the 19th of June, 1897) were (*inter alia*) the purchasing, leasing, or otherwise acquiring of coal mines or any other mines, mining ground, or minerals, and the searching for and getting and smelting and making merchantable, and selling and disposing of coal, ironstone, and all ores, metals, and metallic minerals whatsoever.

The capital of the company had been altered from time to time and now stood at £1,528,275, divided into 150,000 ordinary shares of £7 10s. each, 377 eight per cent. preference shares of £75 each, and 50,000 six per cent. preference shares of £7 10s. each, all of which had been issued, and the preference shares were fully paid.

The company had issued five per cent. debenture stock, of which there was £538,530 outstanding on the 31st of December, 1900. The 377 eight per cent. preference shares of £75 each were created by special resolutions passed and confirmed at extraordinary general meetings of the company, held respectively on the 7th of November and the 3rd of December, 1872, by the terms of which such shares were to bear interest at 8 per cent. per annum in perpetuity, and the holders were to be entitled to attend the general meetings of the company, but not in virtue of such shares to vote or interfere in any way in the company's proceedings.

The 50,000 six per cent. preference shares of £7 10s. each were created by special resolutions passed and confirmed at extraordinary general meetings of the company, held respectively on the 30th of March, and the 15th of April, 1876, by the terms of which the holders of such shares were to be entitled to a fixed dividend of 6 per cent. per annum on the amount paid thereon after the payment of the interest payable on the mortgage and bond or debenture debts of the company, and after payment of a dividend of 8 per cent. per annum on the 377 eight per cent. preference shares, "and in case in any year the net profits of the company are not sufficient for the payment in full of the dividends on the 50,000 preference shares, the net profits of any subsequent year are (after payment of the interest and dividends above mentioned) to be applied in payment to the holders of the 50,000 preference shares of the arrears of dividend, and the holders of such shares are entitled to attend the general meetings of the company, but not to vote or interfere in any way in the company's proceedings."

The following articles of association of the company were material to the questions which had arisen as to the rights of the preference shareholders, viz.:

43. "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital, except that it shall be lawful for the company in general meeting, by special resolution . . . to direct that the new shares shall have such priority in respect of dividends as it shall deem expedient."

95 empowered the directors to declare a dividend with the consent of the company in general meeting.

96. "No dividend shall be payable exept out of the profits arising from the business of the company."

97. "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the buildings and premises connected with the business of the company."

106 (10). "The directors have power to set aside out of the profits of the company before recommending any dividend such sums as they think proper as a reserve fund to meet contingencies or for equalizing dividends or for repairing, renewing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their discretion think conducive to the interests of the company, and to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments and dispose of all or any part thereof for the benefit of the company, and to divide that reserve fund into such special funds as they may think fit, and to employ the reserve fund or any part thereof in the business of the company, and that without being bound to keep the same separate from the other assets."

112. "Subject to the earlier provisions, the profits of the company shall be divisible among the members holding ordinary shares in proportion to the number of ordinary shares held by them respectively."

113. "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members according to their rights and interest in the profits."

114. "No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend."

115. "No dividend shall be payable except out of the profits of the company."

116. "The declaration of the directors as to the amount of the profits of the company shall be conclusive."

The plaintiffs were holders of 25 of the eight per cent. preference shares and of 640 of the six per cent. preference shares. They claimed a declaration that by the terms upon which the preference shares were subscribed and issued and under the provisions of the articles of association the amount standing to the credit of the profit and loss account of the company as on the 31st of December, 1900, ought to be applied in payment to the holders of the eight per cent. preference shares of interest thereon as from the 31st of December, 1898, and subject thereto, in payment to the holders of the six per cent. preference shares of an accumulative dividend thereon as from the 31st of of December, 1896, and that the company might be ordered to apply the said profits, or a competent part thereof, in occordance with such declaration.

The facts as to the profits and losses of the company and the action of the directors will be found in the judgment below.

No evidence was given on behalf of the plaintiffs, but Sir David Dale, a director, and accountants and engineers were called on behalf of the company.

C. E. E. Jenkins, K.C., and *A. R. Kirby*, for the plaintiffs.—We are entitled to the dividends on the eight per cent. preference shares for the years 1898 and 1899, and for those on the six per cent. preference shares for 1897, 1898, 1899, and 1900. The action taken by the directors was *ultra vires*; *Dovey* v. *Cory*, *ante*, p. 65, [1901] A. C. 477; *Fisher* v. *Black and White Publishing Co.*, 49 W. R. 310, [1901] 1 Ch. 174; *Lee* v. *Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1; *Bolton* v. *Natal Land and Colonization Co.*, [1892] 2 Ch. 124, 40 W. R. Dig. 37; *Lubbock* v. *British Bank of South America*, 41 W. R. 103, [1892] 2 Ch. 198;

Verner v. *General and Commercial Investment Trust*, 38 SOLICITORS' JOURNAL, 384, [1894] 2 Ch. 239; *Wilmer* v. *McNamara & Co.*, 43 W. R. 519, [1895] 2 Ch. 245; *In re The National Bank of Wales*, 48 W. R. 99, [1899] 2 Ch. 629.

J. G. Butcher, K.C., and *F. Cassel*, for the company.—On the true construction of the articles of association the directors have a discretion to set aside a reserve or to carry forward some credit, and there is nothing illegal in such a contract. Assuming its legality, "net profits," if indeed the words are so clear as to force their meaning on the court, means "net divisible profits," as in *Lee* v. *Neuchatel Asphalte Co.* The contention of the plaintiffs involves that the company deprives itself of a most important power of management which is usually found in companies, for where a profit has been earned it may be vital to the company's future existence and power of competing that it should be employed in adopting some new improvement. [*In re Severn, &c., Railway Co.*, 44 W. R. 347, [1896] 1 Ch. 559; *In re Sharp, In re Bennett*, 40 W. R. 241, [1892] 1 Ch. 154; and *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 315, relied on; and *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson*, 31 W. R. 330, 23 Ch. D. 1, and *Bank of Hindustan, China, and Japan* v. *Alison*, 19 W. R. 505, L. R. 6 C. P. 222, distinguished.] It is the resolutions creating the preference shares which would be *ultra vires*, if they are to bear the construction put upon them by the plaintiffs.

C. E. E. Jenkins, K.C., in reply.

Cur. adv. vult.

FARWELL, J.—The defendant company was incorporated in the year 1864 with a capital of £150,000, which has since been first increased and subsequently reduced and now stands at £1,528,275, divided into 150,000 ordinary shares of £7 10s. each, 377 eight per cent. preference shares of £75 each, and 50,000 preference shares of £7 10s. each. The plaintiffs are holders of some of each of these classes of preference shares, and they claim on behalf of themselves, and all other holders of preference shares, to be paid the dividends and arrears of dividends on their shares out of the profits which they allege that the company has made in the years 1898, 1899, and 1900. No dividend has been paid on the 8 per cent. preference shares since 1898, or on the 6 per cent. preference shares since 1896. The preference shareholders have no vote in respect of these shares. The profit and loss account for 1898 shows a balance described as "net profits for the year 1898" of £65,803 7s. 3d., and of this £20,000 was carried to reserve account, making it £40,000, and £10,418 10s. was carried forward. The profit and loss account for the year 1899 shows a balance described as "net profit for the year 1899" of £89,018 17s. 6d., and this was carried forward pending the decision of the court on an application for the reduction of the capital of the company to which I will refer presently. The profit and loss account for the year 1900 shows a balance of £157, 605 12s. 11d. which is provisionally brought forward. The report for the year 1898 contains the following statement: "The shareholders are aware, both from the balance sheets themselves and the auditors' certificates which have accompanied them, that for some years past no depreciation has been written off the amounts at debit of land, buildings, works, fixed plant, and mining leases. The directors have carefully considered the matter, and, having regard to the fact that many of these assets are more or less of a wasting character, they are of opinion that the time has arrived when a careful revision of their value should be made. It is, however, a subject which in all its bearings requires most mature consideration, and the deliberations of the directors are not sufficiently advanced at the present time for them to submit any recommendation to the shareholders." Accordingly, in the year 1899 special resolutions were passed for the reduction of the capital of the company. The petition for the confirmation of these resolutions came before the court in August, 1900, and was opposed by some of the preference shareholders, and the petition was dismissed by Cozens-Hardy, J., and his order was confirmed by the Court of Appeal: *In re Barrow Hæmatite Steel Co. (Limited)*, [1900] 2 Ch. 846, 49 W. R. Dig. 24; on appeal, *ante*, p. 71, [1901] 2 Ch. 746. Some, but not all, of the present plaintiffs appeared and opposed this petition and the petition was dismissed on the ground that the alleged loss had not been proved to the satisfaction of the court, and also by Cozens-Hardy, J., on the ground that the amount standing to the credit of the reserve fund and the £89,018 17s. 6d. profit for the year 1899 were applicable to make good loss of capital so far as they would extend. The plaintiffs in the present action are now claiming that these sums and the balance to the credit of profit and loss account in 1900 are not so applicable, but belong to them by contract, and it is argued on behalf of the defendants that Cozens-Hardy, J.'s, order creates an estoppel, and this may possibly be correct so far as regards any of the plaintiffs who appeared and opposed the petition. But this is not pleaded, and as there are other plaintiffs who did not appear on the petition, and who could sue on behalf of themselves and all other preference shareholders who did not oppose the petition, I do not think it necessary to express any conclusive opinion on this point. Nor can I regard Cozens-Hardy, J.'s, decision as a precedent disposing of this case, for the points argued before me were not before him, and that by no fault of the plaintiffs, because the contentions that they now raise could not have been put forward by them in support of their opposition to the petition, but were adverse to such opposition, and should, if urged at all, have been urged by the company.

The contention of the plaintiffs in this action is that they are entitled by contract to be paid a preferential dividend out of the balance to the credit of the profit and loss account in each year, and that the company cannot appropriate any part of such balance to reserve or carry over one shilling until they have been paid in full. There is no suggestion of want of *bona fides* on the part of the directors or of the company. The defendants contend that this is not the true construction of the special resolutions creating the preference shares, and that, if it is, the balance to the credit of profit and loss for any year is not necessarily such profits of the company as are properly applicable to dividend, but that if the court is satisfied by the evidence that there have been ascertained losses and depreciations of capital assets exceeding the amount of the balances, these losses must be made good before any dividend can be paid. The first point depends on the construction of the original articles and the special resolutions creating the preference shares, for it is not contended that if the preference shareholders have such contractual rights as they claim, the company can by subsequent special resolutions deprive them of such rights or of any part thereof. Article 43 provides as follows: "Any capital raised by the creation of new shares shall be considered as part of the original capital and shall be subject to the same provisions with reference to the payment of calls, the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital, except that it shall be

lawful for the company in general meeting, by special resolution as aforesaid, to direct that the new shares shall have such priority in respect of dividends as it shall deem expedient." This article, in my opinion, provides that all new shares shall be subject in all respects to all the provisions of the articles, except only that dividends payable on new shares may rank in priority to, instead of *pari passu* with, ordinary shares. For this purpose it is necessary only to introduce modifying words in article 95, and then the whole *fasciculus* of clauses relating to dividends (95 to 101) apply. It is argued that the provisions as to the declaration of a dividend do not apply to shares on which a fixed preferential dividend is payable. In my opinion this is not so. The necessity for the declaration of a dividend as a condition precedent to an action to recover is stated in general terms in Lindley on Companies (5th ed., p. 437), and, where the reserve fund article applies, it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company, but the preference shareholders came in on these terms and this argument does not carry much weight in an action such as this where *bona fides* is conceded. The opposite conclusion might enable the preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance. Granted that it is a hardship to go without dividends for a time, this hardship presses more heavily on the ordinary shareholders who have to wait until the preference shareholders have received all arrears before they can get anything. It was urged that article 97 providing for the reserve fund cannot apply to preference shares, because one of its objects is to equalize dividends, but I cannot see that the mention of one object which is not applicable is any reason for excluding those objects which are applicable, and which are really for the benefit of all the shareholders. On the articles as they stand, I have no doubt that the true construction is that which I have stated.

But it is contended that the special resolutions have created larger rights, and it was, in my opinion, competent to the company by such resolution to alter article 43. Now the 8 per cent. preference shares are created by resolutions of 1872 in these terms: "(1) This company will agree to purchase from the Barrow Rolling Mills Co. (Limited) the two furnaces erected by that company, and the land purchased by them, and any other property of which the Rolling Mills Co. may be possessed. (2) The consideration for the purchase shall be the sum of £37,700 in preference shares of this company, bearing interest at 8 per cent. per annum from the 1st of January last, such preference shares to be issued to the present shareholders in the Rolling Mills Co. in proportion to their holdings. (3) The directors are authorized to issue preference shares to the amount of £37,700, bearing interest of 8 per cent. per annum in perpetuity, for the purpose of carrying out the about arrangement. (4) The holders of the above-mentioned preference shares shall be entitled to attend the general meetings of this company, but they shall not be entitled in virtue of such shares to vote, or to interfere in any way in the company's proceedings, nor shall they, in virtue of such shares, be eligible as directors of the company." In my opinion there is nothing whatever in this to alter any of the articles as I have construed them. Stress has been laid on the word "interest"; but in my opinion that word has slipped in *per incuriam*, and should be read as "dividend," as indeed is done when this resolution is referred to in the special resolution of 1876, to which I shall have to refer presently. Interest is not an apt word to express the return to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance. Interest is compensation for delay in payment and is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of such profits. It is impossible, in my opinion, to give to the word used as it is in this case so pregnant a meaning as the plaintiffs derive, reading it as equivalent to an alteration of the articles and as creating a right overriding the valuable and possibly essential article providing for reserve funds.

The 6 per cent. preference shares present more difficulty. They were created by resolutions of 1876 as follows: "(1) The capital of the company shall be and is hereby increased by the addition thereto of 50,000 preference shares of £10 each, entitling the holder to a fixed dividend at the rate of £6 per centum per annum on the amount for the time being paid up in respect of such shares. (3) The holders of the said new preference shares shall be entitled to a dividend thereon only after payment of the interest from time to time payable in respect of the mortgage and bond or debenture debts of the company, and after payment of a dividend at the rate of £8 per centum per annum on the preference shares of the company, amounting to £37,700, created by special resolutions passed and confirmed at extraordinary general meetings of the company in the year 1872; and in case in any year the net profits of the company shall not be sufficient for the payment in full of the dividends on such new preference shares, the net profits of any subsequent year shall (after payment thereout of interest on the mortgage bond or debenture debts of the company, and of dividends of the said £8 per cent. preference shares) be applied in payment to the holders of the said new preference shares of the amount by which the dividends of any previous year or years may have fallen short of the fixed rate of £6 per cent." The third resolution is not very happily worded, but I have come to the conclusion that this and the first resolution read together are merely a verbose statement of a bargain that the holders of the 6 per cent. shares are to have a fixed 6 per cent. cumulative preferential dividend, subject to the rights of the debenture-holders and the 8 per cent. preference shareholders. I think that the words "only after payment, &c.," in No. (3) are restrictive words, equivalent to "subject to," and do not create new rights by rescinding the articles relating to declaration of dividends, creation of reserve fund, and the like. The only difficulty that I have felt has been created by the latter part of No. (3), beginning "the net profits of any such year." I feel the difficulty of limiting the generality of the term "net profits," but, on the other hand, it is only the arrears to which this provision applies, and it would be strange that the preference shareholders should have to allow a reserve fund to be formed so far as their current year's dividend was concerned, but should be entitled to sweep up everything in respect of past arrears. I have come to the conclusion that the use of the words "net profits" is not sufficient to rescind the articles to which I have referred, but that the resolution must be read as subject to the provisions of those articles. For the reasons that I have stated the plaintiffs' case fails.

But another point has been taken by the defendants, and, as evidence has been adduced and considerable argument has been addressed to it, I feel bound to state

the conclusion at which I have arrived with respect to it. The construction is that, even if the plaintiffs were right in their construction of the articles, the company could not legally pay them the dividends that they claim because there are no profits properly so called out of which they can be paid, and that any such payment, if made, would be made out of the capital. It has been proved to my satisfaction (and indeed Mr. Jenkins very properly admitted that he could not dispute that the result of the evidence was) that the company has sustained an actual ascertained and realized loss of capital to an amount exceeding £200,000, and has also lost capital by estimate and valuation to an amount exceeding £50,000. The various sums claimed by the plaintiffs as available to pay their dividends amount to about £240,000. If, therefore, these ascertained and estimated losses have to be made good before any dividend can properly be paid, there are obviously no funds out of which to pay dividends. The defendants allege and the plaintiffs deny that the company are bound to make good these losses before paying any dividend. The question is one of very considerable difficulty on the authorities, but the result of these authorities is, in my opinion, that there is no hard and fast rule by which the court can determine what is capital and what is profit. "The mode and manner in which a business is carried on and what is usual or the reverse may have a considerable influence in determining the question what may be treated as profits and what as capital": *per* the Lord Chancellor in *Dovey* v. *Cory*, [1901] A. C. at p. 486. "It may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinion of honest and competent men will differ. There is no hard and fast legal rule on the subject": *per* Lindley, L.J., in *In re National Bank of Wales*, [1899] 2 Ch. at p. 670. It is, however, necessary to bear in mind that the two propositions—(1) that dividends must not be paid out of capital, and (2) that dividends may only be paid out of profits—are not identical, but diverse. The first is the requirement of the statutes, and cannot be dispensed with; the latter is in Table A in the articles of the particular company, and is one of the regulations of the company which has to be construed. A company which has a balance to the credit of its profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account or to reserve, and if the assets subsequently increase in value the amount neither has been nor will be part of the capital. If, therefore, a part of such balance is used in paying dividends, such dividend is not paid out of capital, because the sum has never become capital, although it still remains a question whether it has been paid out of profits or not. It has been pointed out by Lindley, L.J., in *Lee* v. *Neuchatel Asphalte Co.*, that there is nothing in the statutes requiring a company to keep up the value of its capital assets to the level of its nominal capital. The requirement is merely negative, that dividends shall not be paid out of capital, and the balance to the credit of profit and loss account does not automatically become part of the capital assets because the value of the actual capital assets has depreciated to an amount equal to or exceeding such balance.

The real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses. There is no single definition of the word "profits" which will fit all cases. Take for instance Professor Marshall's definition (Economics, ed. of 1883, p. 142): "The excess of the receipts from the business during the year over the outlay for the business, the difference between the value of the stock and plant at the end and at the beginning of the year being taken as part of the receipts or as part of the outlay according as there has been an increase or decrease of value." I am precluded from adopting this in its entirety by authorities which are binding on me, because in the definition "stock and plant" obviously include both fixed and circulating capital as defined at p. 134 of the same treatise. See, for instance, Lord Lindley's judgment in *Verner* v *General and Commercial Investment Trust*, where he says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up." I do not understand his lordship to be laying down a general and universal rule that in every company fixed capital may be sunk and lost, but that there are companies in which that may be the case. All the authorities, however, agree, I think, that circulating capital must be kept up. Now in the present case the £200,000 realized loss arises by the surrender of the leases of certain mines, by the pulling down of certain furnaces, and on the sale of certain cottages. The company is a smelting company on a very large scale, and for the convenience of its works and by way of economy they acquired the leases of the surrendered mines in order to supply themselves with their own ore instead of buying it as required. The ore was used exclusively for the purposes of the company's works. The mines were drowned out and the cost of pumping them out was prohibitive. The company therefore surrendered the leases, pulled down the blast furnaces, and sold the cottages connected therewith. Now the evidence before me is all on one side. The plaintiffs called none, and Sir David Dale and the defendants' other witnesses all agree that in a company of this nature these items ought to come into the account before any profit can be said to be earned, and my own opinion coincides with theirs, inasmuch as I think that the money invested in those items is properly regarded in this company as circulating capital. Suppose the company had bought enormous stocks of ore sufficient to last for ten years, it could hardly be said that the true value of so much of this as remained from time to time ought not to be brought into the balance-sheet, and I can see no difference for the purpose of the account between ore *in situ* and ore so bought in advance. The blast furnaces and cottages are mere accessories to the ore, and resemble a building for burning the stores bought in advance already mentioned. There is more difficulty about the remaining £50,000. I think that the onus is on the plaintis to show that it is fixed capital and that in a company of this nature such fixed capital may be sunk or lost. They have not done this, and the evidence, so far as it goes, is the other way. But this is not an actual loss, but depreciation by estimate. The plaintiffs really relied on *Lee* v. *Neuchatel Asphalte Co.* as an authority for this proposition as a universal negative—viz., "that no company owning wasting property need ever create a depreciation fund." In my opinion that is not the true result of the decision. It must be remembered that in that case there had been no loss of assets. The company's assets were larger than at its formation, and the court decided nothing more than the particular proposition that some companies with wasting

assets need have no depreciation fund. For instance, I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent and distribute the whole of the receipts in respect thereof as profits without replacing the capital expended in purchase. It is for the court to determine in each case on evidence whether the particular company ought, or ought not, to have such a fund. There is no doubt as to the opinion of the witnesses in this case, and, further, the opinion of the directors cannot be altogether disregarded. The courts have, no doubt, in many cases, overruled directors who proposed to pay dividends, but I am not aware of any case in which the court has compelled them to pay when they have expressed their opinion that the state of the accounts do not admit of any such payment. In a matter depending on evidence and expert opinion it would be a very strong measure for the court to override the directors in such a manner. I have made no distinction between the realized loss and the estimated loss, because the witnesses declined to recognize any any such distinction, and also because the decided cases deal only with the distinction between floating and fixed capital, and do not distinguish between realized and estimated loss, and it would serve no useful purpose for me to express any opinion on the subject. The result is that the action fails, and must be dismissed with costs.

Solicitors, *F. Walker & Pettitt*; *Currey, Holland, & Currey.*

Chan. Div. } Buckley, J. } Feb. 18.

In re THE SOUTH-WESTERN OF VENEZUELA RAILWAY CO. (*a.*)

Company — Winding up — Proof in winding up — Directors—Remuneration as receivers and managers—Remuneration as directors.

Two directors of a company who had been appointed by the court receivers and managers for the debenture-holders were allowed to prove in a voluntary winding-up for their remuneration as directors during the period for which they had acted and been paid as such receivers and managers.

On the 20th of September, 1899, Messrs. Comfort and Allen, two of the directors of the above company, were appointed by the court receivers and managers of the company's railway in a debenture-holders' action, and were paid salaries in that capacity.

On the 19th of April, 1901, the company passed a resolution for voluntary liquidation with a view to reconstruction.

Article 90 of the company's articles provided that the remuneration of the directors should be at the rate of £1,000 a year, and in fact the chairman had always received £300, and the other directors £175 each, annually, and these sums had been paid by monthly instalments.

This was a summons on behalf of four directors who claimed arrears of remuneration from the 30th of June, 1898, to the 19th of April, 1901; the argument was confined to the right of Messrs. Comfort and Allen to be paid their remuneration as directors while acting as receivers and managers in the debenture-holders' action.

Danckwerts, K.C., and *Martelli*, for the four directors.

Jenkins, K.C., and *Howard Wright*, for the liquidator.

BUCKLEY, J.—The directors are entitled to remuneration for carrying on the company's business as long as there is any business to carry on, and they are no less entitled to their remuneration because by doing certain work as receivers and managers, for which they are paid as receivers and managers, they lighten their work as directors.

Solicitors, *Maddisons*; *Stephenson, Harwood, & Co.*

K. B. Div. (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) } Nov. 15; Dec. 16.

HERDMAN *v.* WHEELER. (*a.*)

Bill of exchange—Promissory note—Fraud of third party—Holder in due course—"Negotiated"—Bills of Exchange Act, 1882 (45 & 46 *Vict.* c. 61), *ss.* 20, 29.

The defendant applied to A. for a loan of £15. At A.'s request the defendant, on promise of the loan, signed a blank paper bearing a 9d. stamp, and gave A. authority to fill it up as a promissory note for £15 payable to A. Subsequently A. applied to the plaintiff for a loan of £25, and offered in exchange to give the plaintiff the defendant's promissory note for £30. This was agreed to, and A. filled up the signed and stamped paper as a promissory note for £30 payable to the plaintiff, who received it in ignorance of the true facts, giving in exchange his cheque for £25 payable to the order of the defendant. A. having forged the defendant's signature to the plaintiff's cheque obtained payment for the same.

Held, that, although a payee might be a "holder in due course" within section 29 of the Bills of Exchange Act, 1882, *yet the delivery here to the plaintiff did not "negotiate" the note within the proviso to section* 20 *of that Act, and therefore, as the note was not filled up by A. strictly in accordance with the authority given him by the defendant, the plaintiff could not recover on the note.*

Lewis *v* Clay, 46 *W. R.* 319, 77 *L. T. Rep.* 653, *considered.*

Appeal by the plaintiff in the action from a decision of the learned judge of the Newcastle-upon-Tyne County Court in favour of the defendant.

The action was brought on a promissory note under circumstances which fully appear from the considered judgment of the court.

Arthur Powell, for the plaintiff.—My client is a holder of the bill in due course within the proviso to section 20 of the Bills of Exchange Act, 1882, and therefore, although the note was not filled up strictly in accordance with the authority given to Anderson, he is nevertheless entitled to recover on it.

Bruce Williams, for the defendant.—The plaintiff here became a party to the note before its completion, and therefore, being himself the payee on the face of the bill, he is not a "holder in due course" within section 29 of the Act, and the delivery of the bill to him was not a negotiation of it. That being so, the plaintiff is not protected by the proviso to section 20, which applies only when any instrument within that section is "negotiated" to the holder in due course. The county court judge was therefore right in deciding for the defendant, and this appeal should fail.

Cur. adv. vult.

CHANNELL, J., who read the judgment of the court, said: This is an appeal from a judgment of the judge

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

of the Newcastle County Court given for the defendant in action by the payee against the maker of a promissory note for £30, and the principal point involved is the construction of the 20th section of the Bills of Exchange Act, 1882. The facts are not in dispute. The conduct of each of the parties in the action appears to have been quite straightforward and honest, and the evidence of each of them has been accepted as true. The difficulties which arose were occasioned by the fraud of one Anderson, who is now dead. The facts are as follows: Mr. Wheeler, the defendant, was a curate at Sunderland, and being about to remove to Norfolk, he required a temporary loan of £15 to pay the expenses of removing. He applied to Anderson to lend him the money, and Anderson promised to do so. The defendant, however, seems to have understood that Anderson proposed to get the money from someone else, and the name of the plaintiff Hurdman was mentioned as a person who would lend it, but the defendant objected to borrowing the money himself direct from the plaintiff. The defendant gave to Anderson a promissory note payable to Anderson for £15, and expected to get the money from Anderson the next day. We think he must have expected that Anderson would have borrowed the money, and probably from the plaintiff If he knew anything of business he must have understood that his promissory note would be indorsed by Anderson to the lender of the money. On the next day Anderson saw him, and did not give him the money, but informed him that the promissory note was in some way wrongly made out, and gave it back to him and it was burnt. In lieu of it the defendant gave to Anderson his signature on paper stamped with a 9d. stamp, which would be sufficient for a note for £75. This was done in a restaurant when the defendant was in a hurry, and he trusted Anderson to fill it up, but only authorized him to do so as a promissory note payable to himself and for £15 only. Anderson promised to send the £15. He did subsequently send a cheque of his own for £15, which, however, was dishonoured. Anderson, having got the defendant's signature and the note in blank, communicated by telephone with the plaintiff and asked him if he was willing to lend the defendant £25 upon his promissory note for £30 at a month. He represented that the defendant was in urgent need of the money and was willing to pay the £5 for the accommodation, but he further stipulated that if the money was repaid in a week £2 only should be charged instead of £5. The plaintiff agreed to the proposal, and it was arranged that Anderson should bring or send the note and receive the money. The plaintiff, having to go out, wrote a cheque for the £25 payable to the order of the defendant and left it with his wife to be exchanged for the promissory note. Anderson then sent the promissory note by a clerk, and received the cheque from the plaintiff's wife. The note, when received by the plaintiff's wife, was filled up as a promissory note for £30, with the plaintiff's name inserted as payee. It was on the face of it complete and regular in all respects, and the plaintiff had no notice that it had been signed in blank, or that Anderson had in any way acted without authority. The plaintiff's cheque for £25 was presented at the bank on which it was drawn, with an indorsement purporting to be the defendant's, but which was not his, and the indorsement appears to have been forged by Anderson. The defendant appears to have got cash from someone for Anderson's cheque for £15, but when it was dishonoured he had to take it up. In the result, therefore, he got no part of the proceeds of the promissory note. When the week elapsed the plaintiff wrote to the defendant on the matter, and then some correspondence took place, in which the plaintiff and defendant each stated the facts as far as they knew them. The defendant, upon receiving the plaintiff's letter, had some communication with Anderson, who promised to settle the matter, and gave him a receipt purporting to be a discharge of his liability, but Anderson did not settle with the plaintiff, and died within a few days and before the note became due. The judge on these facts gave judgment for the defendant.

The liability of the defendant appears to depend upon whether the case comes within the proviso at the end of the 20th section of the Bills of Exchange Act—that is, whether in this case the note was within the meaning of the words as used in that section: "After completion negotiated to a holder in due course." On the part of the defendant it was not denied in argument before us that the plaintiff was a holder in due course, but it was said that the note was not negotiated to him, and that, if it was, it was not negotiated after completion. Since the arguments we have been referred by counsel for the defendant to the case of *Lewis* v. *Clay*, 46 W. R. 319, 77 L. T. Rep. 653; as an authority that the plaintiff was not in that case a holder in due course. On the argument it was further said that section 84 shows that the note was incomplete until the delivery to the plaintiff, and consequently, if it could be said to be "negotiated" to him at all, it was not "after completion," but either before or, at most, simultaneously with completion; but it was further said, and this we think is the substantial argument for the defendant, that it was never negotiated to the plaintiff, as he was the payee, and an original party to the contract contained in the note, and did not become a party by transfer. It is contended that a bill or note is only "negotiated" when it is transferred from one holder to another, and for this section 31 is referred to. In substance the argument for the defendant and the judgment of the county court judge in his favour come to this—that the proviso in section 20 can have no application as between the immediate parties to a note or bill. If this is the necessary meaning of the words used in the proviso, we must, of course, give effect to it and affirm the judgment for the defendant, for the Bills of Exchange Act is now the code of law on the subject, and in cases where it differs from the old law it prevails over the old law. But if the words used in the Act are fairly capable of being construed as meaning the same as the words used by judges previously to the Act in stating the law, it would be right to give them that meaning, in the absence of anything to indicate a clear intention of the Legislature to alter the previous law. Further, by section 97, sub-section 2, the rules of the law merchant are to continue to apply to bills and notes, except so far as they are inconsistent with the provisions of the Act. It is, therefore, material to see what light the law on this subject before the Act throws on the case before us. We find Bowen, J., stating the law thus in *Garrard* v. *Lewis*, 31 W. R. 475 at p. 476, 10 Q. B. D. 30: "I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration of the marginal figure, even if it be fraudulent or unauthorized, vitiates the bill as a bill for the full amount inserted in the body when the bill reaches the hands of a holder who is unaware that the marginal figure has been improperly altered." Of course, a case like the present, where there was no marginal figure, but only verbal instruction to fill in £15 as the amount, is an *a fortiori* case. It will be observed that the words "when the bill reaches the

hands of a holder" are wide enough to cover the case of the payee, unless it could be contended that a payee was not a holder. Again, Lord Selborne, in *France* v. *Clarke*, 31 W. R. 374, 26 Ch. D. 257, expresses the rule thus: "The person who has signed a negotiable instrument in blank or with blank spaces is (on account of the negotiable character of the instrument) estopped by the law merchant from disputing any alteration made in the document after it has left his hands by filling up blanks or otherwise (not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice, but it has repeatedly been explained that this estoppel is in favour only of such *bonâ fide* holder." This statement would appear to include the case where the name of the person who became *bonâ fide* holder had been inserted as payee. The reported cases in which a holder who had given value for a bill after it had become complete and regular on the face of it has been held entitled to recover, notwithstanding that the bill had been signed by the defendant in blank and had been filled up otherwise than in accordance with the defendant's authority, will, we believe, be found to be all cases where the holder was indorsee and not payee; but it is obvious that cases such as the present, where the payee's name was inserted without his knowing of the bill having been in blank would be rare. The language of the judges seems wide enough to cover the case of the payee as well as the case actually before them, but that is all that can be said. There are cases where the payee's name has been inserted by himself and where he has been entitled to recover, as *Crutchly* v. *Mann*, 5 Taunton 529, *Harvey* v. *Cane*, 24 W. R. 400, 34 L. T. Rep. 64, and *Lard* v. *Jackson*, 34 L. T. Rep. 65, but in these it seems there had been nothing done in excess of the defendants' authority except the mere putting of the payee's name. In *Harvey* v. *Cane* it was said that "anybody who gets the bill (*i.e.*, one with the payee's name omitted) fairly may put his own name as payee," and if this wide statement is correct, it would seem that a payee stands in as good a position as an indorsee when he *bonâ fide* gives value for the bill; but in *Harvey* v. *Cane* the court also seems to have come to the conclusion that what was done came substantially within the defendant's authority. The cases *Awde* v. *Dixon*, 6 Exch. 869, and *Scholfield* v. *Earl of Londesborough*, 45 W. R. 24, [1896] A. C. 514, cited by the defendant on the argument, do not appear to help him very much; but, on the other hand, the investigation of the law before the Bills of Exchange Act appears to show that there is no case which would be a distinct authority in favour of the plaintiff if the law were still as before the Act. We therefore approach the consideration of the words used in the Act without any very clear guide from the previous state of the law, but we do rather expect to find the *bonâ fide* holder for value without notice, or the holder in due course, as he is now called, fully protected. Passing now to the words of section 20 of the Act, the first sub-section of that section shows that Anderson had a *primâ facie* authority to fill up this note, but that in this case is hardly important. The second sub-section shows that, unless the case comes within the proviso at the end, the note is not enforceable against the defendant, because it was not filled up strictly in accordance with the authority given. If in the present case Anderson, instead of communicating through the telephone with the plaintiff, had brought the stamped paper signed by the defendant with him, and had filled it up in the plaintiff's presence, the plaintiff would certainly have been put on inquiry as to Anderson's authority, and by reason of the first part of the 2nd sub-section could only have recovered if Anderson was acting strictly within his authority. So in all cases where the plaintiff has been allowed to recover on a bill in which he had inserted his own name as payee he would, I think, now have to show that this was within the authority given by the defendant. Then comes the important proviso, "Provided that if any such instrument" (that is, an instrument which has been either a simple signature on stamped paper or a bill wanting in any material particular) "after completion is negotiated." Now, it seems to us that completion here refers to completing the form of the bill or supplying the wanting "material particular." It is after it has been made complete and regular on the face of it, to take the words of section 29 defining holder in due course. We do not think "completion" as used in this proviso includes delivery. It is the form of the instrument which is being referred to, and not its ceasing to be inchoate and revocable and becoming an operative instrument which is the matter referred to in the 84th section. But, even if the bill could not be said to be completed unless delivered to some one, here it was delivered to the plaintiff, and, if what happened on his giving his cheque for it and becoming the holder for value is "negotiating it to a holder in due course," it may, I think, be said to be "negotiated after completion." The real question is, does "negotiated to a holder in due course" cover what was done in this case? The plaintiff undoubtedly became the holder of the bill for value when it was handed to his wife and she gave over his cheque in exchange. This brings us to the important words, "negotiated to a holder in due course," and it is necessary to consider the case of *Lewis* v. *Clay*. In that case the late Lord Chief Justice said in an action brought by the payee of a promissory note, "Further, an examination of sections 20, 21, 29, 30, and 38, relating expressly to bills, and sections 83, 84, 88, relating to promissory notes, will make it clear that a holder in due course is a person to whom after its completion by and as between the immediate parties the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the note, and is, therefore, one of the immediate parties. The notes have, in fact, never been negotiated within the meaning of the Act. I desire to say here that, even if the plaintiff were 'holder in due course,' it would, in my judgment, make no difference in the result." The Chief Justice thus gave his judgment really on the same ground as *Foster* v. *Mackinnon*, 17 W. R. 1105, L. R. 4 C. P. 704. It is quite clear, therefore, that the expression of opinion of the late Chief Justice that a payee was never a holder in due course was a *dictum* only. In section 2, there is this definition: "'Holder' means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore, in section 29 it is necessary to read holder as including payee as well as indorsee, and to read it, "a holder in due course is a payee or indorsee," &c. That being so, the only words in section 29 which can be said to indicate that a payee cannot be a holder in due course are those in sub-section 1, "and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." But, if the word "payee" had been expressed in the earlier part of the section, it would be clear that this means "if negotiated to him he had at the time no notice," &c. On the whole, therefore, we are not prepared to hold that a payee of a note can never be a holder in due course, but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice in the case before him.

The real point in the present case, after all, is, can we

hold that this note was "negotiated" to the plaintiff within the meaning with which the words are used in the proviso to the 20th section, and as to this we certainly have the opinion of the late Lord Chief Justice that a delivery to a payee for value is not a "negotiating" within the meaning of the Act? In the 31st section it is said, "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." Does this mean only from one person who is holder to another, or may the person transferring be an agent in possession of the bill otherwise than a holder, whose delivery constitutes the receiver or holder? And even if that cannot be the meaning of the 31st section, may it not be possible to say that on the 20th section "negotiated to a holder in due course" means no more than delivered to a person in such a way that he thereupon becomes a holder in due course? This is the argument of Mr. Arthur Powell for the plaintiff. On the other hand we have to deal with the points raised by Mr. Bruce Williamson in his argument for the defendant, that the issuing of a bill or note to the first holder stands on a different footing altogether from the transfer of it from one holder to another, because when the first takes it it has not become part of the mercantile currency of the country, to use an expression found in some of the cases. Even if the payee of a note may be a holder in due course, the question whether he is so or not depends upon the actual state of facts as between him and the maker of the note; and the contract between the payee and the maker of the note, though it has some incidents written into it by the law merchant, yet is governed more by the ordinary law of contracts than by the law merchant, and in particular that the element of negotiability in no way enters into the contract between the maker and the payee. There is much to support this argument in the Bills of Exchange Act. In the present case the delivery of the note to the plaintiff must, in order to enable him to recover, be under the authority of the defendant. It certainly was not so delivered by the defendant's actual authority and can only be said to have been delivered under his authority by reason of the ostensible authority with which Anderson had been clothed by the signature in blank. Mere possession of a promissory note, complete and regular on the face of it and payable to a named payee, would not be conclusive evidence that the maker had given authority to the person in whose possession it was to deliver it to the maker. Anderson, if agent of the defendant at all, was only agent to fill up the paper, and if the question were to be determined altogether apart from the law merchant and the Bills of Exchange Act, we should have to say that there was here no binding contract at common law, whereby the defendant promised the plaintiff that if the plaintiff would give £25 to Anderson for the defendant the defendant would pay £30 to the plaintiff in a month. We have been very reluctant to come to the conclusion that the judgment in favour of the defendant in this case was right, but after carefully considering the matter we have come to the conclusion that we should be unfairly straining the words if we did not hold that "negotiated" in the proviso at the end of section 20 means transferred by one holder to another. We think the present case might possibly have been decided in the plaintiff's favour before the Act was passed. We think that the appeal must be dismissed.

Solicitors for the plaintiff, *Francis Miller & Steele*, for *Dickinson, Miller, & Dickinson*, Newcastle-on-Tyne.

Solicitors for the defendant, *Criddle & Criddle*, Newcastle-on-Tyne.

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Wright, Bruce, and Darling, JJ.) — Dec. 14.

REX v. LINES. (a.)

Criminal law—Indictment—Game—Night poaching—Previous convictions—Night Poaching Act, 1828 (9 *Geo.* 4, *c.* 69), *ss.* 1, 9.

By section 1 *of the Night Poaching Act,* 1828, *it is enacted that if any person shall by night unlawfully enter or be in any land with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, for the first and second offences, be liable, on summary conviction, to certain terms of imprisonment, "and in case such person shall so offend a third time he shall be guilty of a misdemeanour." By section* 9 *of the same Act it is enacted that if any persons, to the number of three or more, shall by night unlawfully enter or be in any land for the purpose of taking or destroying game. "any of such persons being armed with any gun, crossbow, fire-arms, bludgeon, or any other offensive weapon," such persons shall be guilty of a misdemeanour.*

Held, that a count of an indictment for a third offence against section 1 *of entering by night upon land with a gun for the purpose of taking or destroying game, which shows that one of the two alleged previous convictions was a conviction of an offence against section* 9, *is bad, as it does not show that such person has "so" offended a third time within the meaning of section* 1.

Case stated by the deputy-chairman of the Bedfordshire Quarter Sessions.

At the general quarter sessions of the peace for the county of Bedford, holden at Bedford, on the 30th of October, 1901, John Lines was tried on the following count of an indictment:—"That John Lines, on the 27th day of January, in the year of our Lord 1879, was in due form of law convicted on a certain indictment for that he, the said John Lines, with three other persons, in the night of the 11th day of November, in the year of our Lord 1878, together being then by night respectively armed with bludgeons, did there together by night, armed as aforesaid, unlawfully enter certain lands in the occupation of Lord Brownlow for the purpose therein of taking and destroying game contrary to the statute in that behalf, and the said John Lines being then so convicted as aforesaid was then and there adjudged and sentenced to a term of penal servitude for five years." And that after the said John Lines had been so convicted as aforesaid, to wit on the 17th day of November, in the year of our Lord 1886, the said John Lines was duly convicted, for that he, the said John Lines, in the night of the 16th day of November, in the year of our Lord 1886, did then by night then and there unlawfully enter land, in the occupation of the Right Hon. Earl Brownlow, with a gun, for the purpose then and there of taking and destroying game contrary to the statute in that behalf, and the same being his second offence in that behalf the said John Lines was for such last-mentioned offence committed to prison for a term of six calendar months, there to be kept to hard labour, and was then and there further ordered at the expiration of such last-named sentence to find sureties by recognizance, himself in £20, and two sureties in £10 each, or one surety in £20, for his not so offending again for the space of two years then next following, and in default of such sureties to be imprisoned and kept

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

to hard labour for a further term of six calendar months. And that the said John Lines afterwards and after he had been so twice convicted as aforesaid, to wit on the 19th day of December, in the year of our Lord 1899, by night, to wit about the hour of 5.30 in the night of the same day, did unlawfully enter certain land, in the occupation of Arthur Macnamara, and was then by night unlawfully in the said land with a certain gun, for the purpose by night as aforesaid of therein taking and destroying game against the form of the statute in such case made and provided, and against the peace of our lord the king, his crown, and dignity."

It was objected by counsel (Mr. C. E. Dyer) for the defendant that the said count was bad, inasmuch as it disclosed no identical offence; that the offence for which the defendant stood indicted being an offence against section 1 of 9 Geo. 4, c. 69, an indictment for such offence would only lie in the case of a person who 'so offended' a third time; that the first of the previous convictions named in the count showed on the face of it that it was an offence against section 9 of the said statute and not against section 1; that the punishment for the third offence under section 1 of the statute was of a cumulative nature, and that liability to indictment under section 1 was dependent on the fact of the defendant having been dealt with for his previous offences summarily in the manner provided by section 1; whereas, for an offence under section 9, a defendant expiates his offence by the punishment awarded, and owes nothing further to the law.

The deputy-chairman of the quarter sessions held that under the authority of *Rex* v. *William Ball*, 1 Moody C. C. R. 330, the offence for which the defendant was convicted under section 9 was also an offence under section 1, although, from the circumstances of aggravation which accompanied it, it was punishable under section 9, and that the power to indict under section 1 was dependent upon the offence being a third offence, and that, if the first and second offences were, in fact, offences against section 1, it did not matter under what section the defendant had been convicted or before what tribunal he had been tried. He also held that the point raised by counsel for the defence as to the punishment which the defendant had suffered in respect of his first offence did not affect the validity of the indictment, but might properly be urged on the question of the punishment to be awarded him for his present offence. The jury found the defendant guilty on the count above referred to, and the previous convictions were duly proved. The deputy-chairman respited judgment until the decision of the Court for Crown Cases Reserved should be known. The prisoner, being unable to find bail, remained in custody.

The question for the opinion of the court was whether the first of the previous convictions stated in the count referred to could be treated as a first conviction for the purpose of the indictment.

By the Night Poaching Act, 1828 (9 Geo. 4, c. 69), it is provided as follows: "Section 1.—If any person shall . . . by night unlawfully enter or be in any land . . . with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall upon conviction thereof before two justices of the peace be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance . . . himself in £10, and two sureties in £5 each, or one surety in £10, for his not so offending again for the space of one year next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of six calendar months unless such sureties are sooner found; and in case such person shall so offend a second time, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance . . . himself in £20, and two sureties in £10 each, or one surety in £20, for his not so offending again for the space of two years next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year unless such sureties are sooner found, and in case such person shall so offend a third time he shall be guilty of a misdemeanour. . . ."

"Section 9.—If any persons to the number of three or more together shall by night unlawfully enter or be in any land . . . for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour. . . ."

No one appeared on behalf of the prisoner.

Lord Coleridge, K.C. (*Stimson* with him), for the prosecution.—The decision of the deputy-chairman was right, and the prisoner was rightly convicted. In the case of *Rex* v. *William Ball*, 1 Moody C. C. R. 330, it was held that what is punishable as an offence under section 9 of the Act is nevertheless an offence under section 1, though the circumstances of aggravation made it liable to a heinous punishment. Notwithstanding that in section 1 the Legislature contemplated two previous summary convictions, nevertheless it is quite sufficient, in order to give the court jurisdiction to deal with the prisoner as for a third offence under section 1, to prove one previous summary conviction and one previous conviction under section 9.

Lord ALVERSTONE, L.C.J.—In this case the point which has been reserved, and which we have to decide, is whether the previous proceedings against this prisoner are sufficient to make him guilty of an offence within the meaning of the words "shall so offend for a third time" in section 1 of the Night Poaching Act, 1828. It has been contended on behalf of the prosecution that a conviction for an offence under section 9 of this Act includes a conviction for an offence under section 1 because a conviction for the greater offence includes a conviction for the lesser offence, and that the prisoner having been convicted under section 9 of having, together with three other persons armed with bludgeons, unlawfully entered by night certain lands for the purpose of taking and destroying game, that conviction must be taken as being a conviction under section 1 of unlawfully entering by night "any land with any gun, net, engine, or other instrument for the purpose of taking or destroying game." It is quite true that in section 9, as also in section 1, the words "unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game" occur, but I think that when the words "or any other offensive weapon" in section 9 are taken into consideration, the essence of the offence under section 9 is the being armed with offensive weapons, and that those words do not refer to weapons for taking or destroying game but for committing serious assaults.

Section 1 provides that "in case such person shall so offend a third time he shall be guilty of a misdemeanour." In my opinion these words "so offend" refer to a repetition of an offence against section 1. In the present case it seems to me there

is no evidence of two previous convictions under section 1.

In my opinion the case of *Rex* v. *Ball*, upon which the deputy-chairman of quarter sessions relied, is not an authority for the purpose for which it has been cited by counsel for the prosecution. In that case the question arose as to the power to apprehend poachers under section 2 of the Night Poaching Act, 1828, and it was held that there was power to apprehend persons committing an offence under section 9, although the power to apprehend given by section 2 related to an offence under section 1, inasmuch as the poachers in that case had been guilty of an offence under section 1 as well as under section 9. In my opinion that decision is not an authority for the contention that we ought to treat a conviction for an offence under section 9 as a conviction for an offence under section 1 for the purpose of showing a third offence under section 1.

I therefore think that this conviction must be quashed.

LAWRANCE, WRIGHT, BRUCE, and DARLING, JJ., concurred.

Conviction quashed.

Solicitors for prosecution, *Austin & Austin*, for *W. Austin*, Luton.

House of Lords.

From C. A. (England). Dec. 17.

NOAKES & CO. *v.* RICE. (*a.*)

Mortgage—Redemption—Public-house—"Tied house"—Clogging redemption—"Once a mortgage always a mortgage"—Covenant to continue after redemption.

A covenant in a mortgage of a leasehold public-house that the mortgagor shall during the continuance of the term, whether or not any principal money or interest is still owing on the security, buy his beer only from the mortgagees, is a clog on the equity of redemption, as it prevents the mortgagor getting back the property unimpaired after payment of principal moneys and interest due on the security.

He is therefore entitled on redemption to an assignment of the premises free from the covenant.

Decision of the Court of Appeal (48 *W. R.* 629, [1900] 2 *Ch.* 445) *affirmed.*

Santley *v.* Wilde, 48 *W. R.* 90, [1899] 2 *Ch.* 474, *disapproved by* Lord Macnaghten *and* Lord Davey.

In 1897 the respondent purchased the lease of the King's Arms, Camberwell, from the second mortgagees.

In order to carry this out, the appellants, who were brewers and first mortgagees under a mortgage which contained provisions almost identical with those of the mortgage mentioned below, released their security, and advanced respondent part of the purchase-money, taking a first mortgage as security for the advance.

By the mortgage deed, dated the 7th of October, 1897, the respondent demised the leasehold premises and fixtures and the goodwill to the appellants subject to the proviso of redemption, and the same indenture contained the following covenant: "And for the considerations aforesaid the mortgagor, so as to charge the premises hereinbefore expressed to be hereby demised into whosoever possession the same may come, whether by act of the party or by operation of law, or by any other ways or means howsoever, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell or permit to be used or sold in, upon, or about the said demised premises any malt liquors, except such as shall be *bonâ fide* purchased by the mortgagor of the company; and, further, that if and whenever there shall be a breach of the said covenant he, the mortgagor, shall and will pay to the company the sum of £1,000 as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him."

On the 24th of March, 1898, the respondent gave notice to the appellants of his intention to pay off the moneys secured by the said indenture of the 7th of October, 1897.

The appellants, however, though willing on payment to reconvey or transfer the property, refused to release or assign the covenant, so the present action was brought by the respondent for a declaration that he was entitled, not only to a reconveyance or transfer of the property, but also to a release or reassignment of the covenant.

Cozens-Hardy, J., held that the "tie," though valid during the continuance of the security, could not be maintained after payment of all moneys due on the security, and granted the declaration asked for, 48 W. R. 110, [1900] 1 Ch. 213.

The Court of Appeal (48 W. R. 629, [1900] 2 Ch. 445, Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) affirmed this order.

The present appellants again appealed.

Haldane, K.C., and *Eve, K.C.* (*Stanley Fisher* with them), for the appellants.—The doctrines against clogging the equity of redemption have been modified. The intention of the parties as expressed in their contract should be carried out. Here the mortgagee has contracted for a collateral advantage, and only if it be oppressive the court will not enforce it: *Potter* v. *Edwards*, 5 W. R. 407; *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126; *Teevan* v. *Smith*, 30 W. R. 716, 20 Ch. D. 724; *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307; *Santley* v. *Wilde*, 48 W. R. 90, [1899] 2 Ch. 474; *Carritt* v. *Bradley*, 49 W. R. 593, [1901] 2 K. B. 550. *Salt* v. *Marquis of Northampton*, 40 W. R. 529, [1892] A. C. 1, turned upon the true construction of the document.

Astbury, K.C., and *Edward Beaumont*, for the respondents.—In this case we have a clog on the equity of redemption. No brewer would make advances on premises tied to a competing house. *Salt* v. *Marquis of Northampton* is in point.

Haldane, K.C., replied.

THE HOUSE took time for consideration.

Earl OF HALSBURY, L.C.—In this case it is suggested that great differences of judicial opinion are apparent upon many of the decisions which are germane to the present appeal. For my own part, I very much doubt whether it is quite accurate so to describe the differences of judicial opinion. In many of the cases, and indeed, I think, in most of the cases, to which our attention has been drawn, the court has not been in any doubt or difficulty as to the rule, which has been established in the courts of equity so firmly that nothing could shake it now, but only as

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

to the application of that rule to different sets of facts.

It is to my mind a very remarkable corroboration of the criticism which I am now making that in that case upon which doubt appears to have been thrown —namely, *Santley* v. *Wilde*—Lord Lindley's judgment is in these terms—and I do not know that there has been a more authoritative exposition of the rule which arises now than what he there laid down: "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this, that 'once a mortgage always a mortgage'; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule."

I cite that case because it appears to me that that lays down the rule; and the differences which are supposed to prevail from time to time appear to me to be only differences of fact, or of the modes in which the various courts have regarded the fact, as to whether a case came within that rule or not. But I do not believe that there is any portion of that which Lord Lindley laid down in the case which I have cited that has been the subject of doubt or difficulty in any court whatever.

I find that the same question has arisen, and has been very learnedly discussed, in the Irish courts lately in the case of *Browne* v. *Ryan*, [1901] 2 Ir. R. 653, and certainly the case is extremely relevant to the question which this House is now discussing, because, in truth, it arose upon what practically are the facts of this case, and the learned judges in the Court of Appeal have arrived at the same conclusion as that at which I invite this House to arrive. FitzGibbon, L.J., in his judgment (and also Holmes, L.J.), in referring to the case which I have just cited, appear to consider that that case is inconsistent with the rule which they themselves lay down. I confess I am unable to find any inconsistency. It may be that Lord Lindley took a different view of the facts in the case to which he was then referring to that which they would have taken, but that is not a difference in the law; and in this case it appears to me, as in the case which was argued in the Court of Appeal in Ireland, it is almost impossible—if the rule laid down by Lord Lindley there is the rule upon which the courts must act—to deny that there is a fetter or clog, or whatever figurative word may be used, to prevent that which, according to the known state of the law, is to be enforced—namely, that the person who has pledged his estate for the payment of a debt shall, upon redemption, be entitled to have that estate back again unfettered and unclogged by anything that shall prevent his exercising the right which the law insists upon his being permitted to have. Under these circumstances, it is and must be in each case a question of the particular thing which is advanced as a clog or a fetter, and in some cases it may seem to come very near the line. Whatever rule is laid down, one can reduce it to something like an absurdity by taking an extreme case.

But, taking this case, it appears to me that undoubtedly this was a mortgage, and that the equity of redemption is clogged and fettered here by the continuance of an obligation which would render this house less valuable in the hands of its owner during the whole period, and beyond the whole period, of the term, apart from the realization of the security. Under those circumstances, as a matter of the merest and simplest reasoning, I am wholly unable to come to any other conclusion than that there is a clog and fetter here which the law will not permit. That seems to me to be the whole of this case; and, apart from the attempt to determine the sources from which this rule of law or equity was arrived at, it seems to me that this case is capable of being disposed of very summarily in that way. I care not what the sources of the rule were. I care not what difference of fact there may have been in other cases. What I say is, here is a case strictly within the rule, and, looking at the facts of this case, and applying to it one's ordinary knowledge of what would be the effect of the covenant upon the property which was made the pledge, and which has to be restored, free and unfettered, to its owner, I cannot entertain a doubt that it did, and did intentionally, place a clog and fetter upon the right of redemption which it is the policy of the law, as declared by the courts of equity, to insist shall not be taken away by anything in the nature of a mortgage.

Under these circumstances I move that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of opinion that the judgment of Cozens-Hardy, J., affirmed by the Court of Appeal, is perfectly right.

Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself; and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off, the land itself, and the owner of the land in the use and enjoyment of it, must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security.

In the present case it is hardly necessary to appeal to this principle, because the mortgage deed under consideration expressly and in terms provides that, on repayment of the money advanced, the mortgagees are to reconvey the mortgaged premises to the mortgagor, or as he shall direct. That, of course, means that the land is to be reconveyed freed and discharged from all burthen and liability in respect of or arising out of the contract under which the advance was made.

Counsel for the appellants, in his reply, felt the difficulty of his position so much that he was driven to contend that the subject of the security was a "tied" public-house, and that therefore the mortgagor could only get back his property subject to that "tie" in favour of the mortgagees, the brewers. But to this, as was pointed out in the Court of Appeal, there are two answers. In the first place, the argument has no foundation in fact. Nothing can be plainer than this, that it was the object and intention of all parties that the property should be set free from the old "tie" attached to it, or attempted to be attached, in the hands of its former owner, and that it should be mortgaged to the appellants as a free public-house. In the next place, if the tie is invalid after redemption now, the tie could not have subsisted after the old mortgage was paid off.

Since the argument, my attention has been called to the case of *Browne* v. *Ryan*, recently decided by the

Court of Appeal in Ireland. There a farmer mortgaged his holding to secure £200 and interest; and as part of the mortgage transaction it was stipulated that the mortgagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, or pay him the like commission if the conduct of the sale was given to anyone else. The Court of Appeal held, and in my judgment rightly held, that the stipulation had no effect after redemption. The judgments of the learned judges in the Court of Appeal seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Court of Appeal in *Santley* v. *Wilde*, and they expressed their disapproval of the conclusion at which the English Court of Appeal arrived. Speaking for myself, with all deference to Lord Lindley, I cannot help sharing that view. I do not in the least dissent from the propositions laid down by Lord Lindley, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money, with a superadded obligation offending against the settled principles of equity in that it rendered redemption impossible. It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that, after full payment of principal, interest, and costs, he should continue to receive, for a definite or indefinite period, a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created. Nor can I agree with the President of the Probate Division, who seems to have thought that *Santley* v. *Wilde* was covered by the decision in *Biggs* v. *Hoddinott*—a decision to which, as it seems to me, no objection can be taken.

If there is an expression in Cozens-Hardy, J.'s, judgment to which I do not cordially assent, it is one in the last paragraph of his judgment, where the learned judge seems to refer to this tie as "an equity attached to the property," or as an "equitable burden." I rather doubt whether such an obligation can be made to run with the land, or can be imposed on the owner in respect of the property except as between lessor and lessee, or, in the case of a mortgage, during the continuance of the security.

I concur in thinking that the judgment should be affirmed.

Lord SHAND.—I am of the same opinion. For the reasons stated by Cozens-Hardy, J., by the Court of Appeal, and in this House, I am of opinion that the appeal should be dismissed.

Lord DAVEY.—There are three doctrines of the courts of equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer is expressed in the maxim, "Once a mortgage always a mortgage." The second is, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is, that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void.

The first maxim presents no difficulty; it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In the case of *Salt* v. *Marquis of Northampton* the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed.

The second doctrine to which I refer—namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract—was established long ago when the usury laws were in force. The court of equity went beyond the usury laws, and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collateral advantage which made its total remuneration for the loan indirectly exceed the legal interest. I think it will be found that every case under this head of equity was decided either on this ground or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view the court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think the case of *Biggs* v. *Hoddinott* was rightly decided.

The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: "Once a mortgage always a mortgage, and nothing but a mortgage." The meaning of that is, that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest, and costs from getting back his mortgaged property on the condition on which he parted with it. I do not dissent from the opinion expressed by Lord Lindley when Master of the Rolls in the case of *Santley* v. *Wilde*. He says: "A 'clog' or 'fetter' is something which is inconsistent with the idea of 'security'; a clog or fetter is in the nature of a repugnant condition." But I ask "security" for what? I think it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage—first, security for the money advanced; and secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess I should have decided the case of *Santley* v. *Wilde* differently from the way in which it was dealt with in the Court of Appeal. After the payment of principal and interest and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. The principle is this, that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can for any other recurring payment, such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption.

By the Conveyancing Act a mortgagee may now be required to transfer his mortgage on payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog within the meaning of the rule.

Now, applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemption; and secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void.

I only desire to add that, with Lord Macnaghten, I cannot assent altogether to the assumption made by Cozens-Hardy, J., that the covenant constituted, or might constitute, a good charge upon the property by virtue of the operation of the doctrine in *Tulk* v. *Moxhay*. I should hesitate some time before I assented to that proposition, but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge on the property would render it void.

Upon these grounds I agree that the appeal should be dismissed.

Lord BRAMPTON.—I am so satisfied in my own mind with the judgment pronounced by Cozens-Hardy, J., and by the Court of Appeal, and the judgment already proposed to this House, that I think I should be wasting time if I were to add anything to them beyond expressing my concurrence.

Lord ROBERTSON.—I concur.

Lord LINDLEY.—I agree in thinking that the covenant contained in this mortgage, by which the mortgagees have attempted to convert the house mortgaged from a free public-house into a tied public-house, even after redemption, is invalid. I see no answer to the objection taken to it that upon payment off of the mortgage-money the mortgagor cannot get back what he mortgaged—namely, a free public-house. The attempt to strengthen the tie by stipulating for liquidated damages and charging them on the property certainly does not mend matters, but makes them worse.

The case before us is not like the case of a mortgage of wasting property—for example, a lease which, owing to its nature, cannot be given back on redemption in the state in which it was mortgaged. Here the mortgage contains a covenant the object of which is to disentitle the mortgagor on redemption from having back the property unfettered by that covenant. This is inconsistent with the settled law of mortgage.

I regard the mortgage deed in this case as another unsuccessful attempt to lay a new burden on land not warranted by law or by the doctrine laid down by *Tulk* v. *Moxhay*, which has often lately been relied upon as going much further than it does.

The conclusion thus arrived at is not inconsistent with *Santley* v. *Wilde*, on which the appellants so strongly rely. Some of this House think that case went too far. I do not think so myself; but I will not trouble to consider its details, which were complicated. The principle on which the Court of Appeal decided the case was, I still think, sound. Whether it was properly applied in that case is now of no importance. I believe the true principle applicable to these cases to be that expounded by the Court of Appeal in *Biggs* v. *Hoddinott* and *Santley* v. *Wilde*. That principle is perfectly consistent with a real pledge and with the maxim, "Once a mortgage always a mortgage"; but it will not render valid the covenant which your lordships have to consider in the present case.

I agree that this appeal ought to be dismissed with costs.

As regards the recent case of *Browne* v. *Ryan* in Ireland, I am satisfied that the Court of Appeal did not go too far in holding that the plaintiff's action for damages could not be sustained.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *Fishers*.

Solicitors for the respondent, *Sandilands & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Jan. 21.

MICHAEL v. HART & CO. (*a*.)

Stock exchange—Damages—Measure of—Closing account—Breach of contract.

Defendants, who were brokers on the London Stock Exchange, agreed with the plaintiff, for whom they had bought certain shares for a particular settlement, to carry over the shares to the next settlement, and entered into the necessary arrangements with jobbers for that purpose. Before the settlement the defendants, in breach of their agreement, closed the account by selling the shares against him, and gave him notice thereof, the plaintiff insisting upon the defendants performing the contract upon the day fixed for its performance. In an action to recover damages for the breach of contract,

Held, that the plaintiff was not bound to treat the contract as finally determined on the day the account was closed, and to measure his damages upon the prices of the shares ruling on that day, but that he was entitled to have his damages assessed upon the prices ruling on the next settling day, the day fixed for the performance of the contract.

Quære, *whether, as held by* Wills, J. (ante, p. 154, [1901] 2 *K. B.* 867), *the damages should be assessed upon the highest prices ruling between the date when the account was wrongfully closed and the settling day.*

Appeal from the judgment of Wills, J., on further consideration: reported *ante*, p. 154; [1901] 2 K. B. 867.

The action was brought against a firm of stockbrokers to recover damages for breach of contract in not carrying over certain shares. The plaintiff's case was that he agreed with the defendants as his stockbrokers, on the 11th and 13th of May, 1901, that certain stocks and shares which they had purchased for him for the mid-May settlement should be carried over by the defendants for the end of May settlement. He had previously deposited with them 100 bank shares to secure any balance that might be due from him to them. The defendants made arrangements with jobbers to carry over the shares. The plaintiff complained that in breach of their contract the defendants on the 14th, 15th, and 16th of May wrongfully closed the account and sold

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

against him the stocks and shares at prices greatly to his detriment. The defendants denied that they agreed to carry over any stocks and shares belonging to the plaintiff except upon the express condition that he should pay the defendants all differences due upon his account in excess of £1,000, and in the meantime providing further cover should the condition of the market require it. Their case was that on the 14th of May, 1901, they gave notice to the plaintiff that unless he complied with the condition by providing further cover at or before 2 p.m. on that day they would close the account, and, as he did not do so, they closed the account. It appeared that in answer to the notice above mentioned, the plaintiff's solicitors at once wrote, before the settling day, that the plaintiff insisted upon the defendants performing the contract.

At the trial the jury returned a verdict for the plaintiff. The defendants applied for a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence, but the court (consisting of the Master of the Rolls, Stirling and Mathew, L.JJ.) refused to grant a new trial, Mathew, L.J., dissenting. It appeared that the prices of the shares on the day of the closing of the account were such that the damages, if assessed upon the basis of the prices on that day, were nominal. The prices of the shares rose after that date, but subsequently fell a little, and at the date of the end of May settlement the prices were below the highest prices during the account.

Upon further consideration Wills, J., held that the measure of damages was the highest prices of the shares between the date of the wrongful closing of the account and the settling day.

The defendants appealed.

J. Lawson Walton, K.C., and *Herbert Reed, K.C.* (*H. Kisch* with them), for the defendants.—When the defendants gave the plaintiff notice that they were going to sell the shares and close the account unless further cover was provided, and upon further cover not being provided, sold the shares, the contract was finally determined. By the sale of the shares the defendants released the jobbers from their obligation under the contract, and the contract with all its incidents was gone. There was at that time a final breach of the contract, and the plaintiff was bound to assess his damages upon the basis of the prices of the shares at that date. If this basis were taken, there would be no damages. Secondly, if the defendants' contention was wrong upon that, the settling day was the date for ascertaining the damages. The plaintiff was entitled to have the shares delivered to him on that day. If the plaintiff elected to treat the contract as still alive, it was alive for all purposes, including the obligation to give the defendants instructions to sell the shares at an intermediate date. Not having done so he could not claim damages on the basis of the highest prices ruling during the period in question, but could only claim damages on the basis of the prices on the settling day when the shares should have been delivered. It was not like the case of a continuous obligation to deliver shares.

Rufus Isaacs, K.C., and *A. J. David* (*W. Carnelley* with him), for the plaintiff, were not called upon on the first point.*

* Upon the second point an agreement as to the amount of damages was arrived at between the parties, without prejudice to the right of the defendants to appeal to the House of Lords, both upon the question whether there should not be a new trial, and also upon the question whether the damages should not be assessed upon the basis of the first contention of the defendants above set out.

COLLINS, M.R.—This is an action brought by a client against a firm of stockbrokers alleging that the defendants had agreed to carry over certain shares, which they had bought for him on the London Stock Exchange, from the mid-May to the end of May settlement, and that the defendants had broken that agreement by wrongfully selling the shares and thus closing the account before the end of May settlement. The defendants denied the agreement and the breach. The jury returned a verdict for the plaintiff, and this court refused to grant a new trial, my brother Mathew dissenting. Then comes this appeal before us from the decision of Wills, J., as to the proper measure of damages.

The points argued before Wills, J., were, I suppose, the same as those which have been argued before us. It was contended that the defendants having without instructions closed the account a day or two after they had agreed to carry over the shares, that was a final breach by the defendants of their undertaking; and that, inasmuch as the breach resulted in releasing the jobbers, with whom they had contracted, from the obligation to buy or sell the shares, that for some reason or other altered the right of the plaintiff to elect whether he would or would not treat the repudiation as a final breach, and as the only breach of which he was entitled to take advantage. In other words, the argument was that the plaintiff had no option to say that he would wait until the date fixed for performance of the contract, but that the damages must be assessed upon the footing that the contract was rescinded on the day of the wrongful sale.

The general rule of law in regard to what has been called an anticipatory breach of contract going to the whole consideration for the contract is this: An announcement by one party to a contract that he will not perform it—that is, a declaration by him, so so far as he is concerned, of his intention then and there to rescind it, does not of itself amount to a breach of contract or a rescission of it. The two parties must rescind. But the effect of the wrongful repudiation is to entitle the other party to adopt that repudiation, and to treat the contract as at an end, except for the purpose of bringing an action upon it to recover damages for the breach. He may, however, treat the notice of intention as inoperative, and may hold the other party to the contract. Unless he elects to treat the contract as rescinded he can call upon the other party to perform it. That rule was stated by Cockburn, C.J., in *Frost* v. *Knight*, 20 W. R. 471, L. R. 7 Ex. 111, and by Keating, J., in *Roper* v. *Johnson*, 21 W. R. 384, L. R. 8 C. P. 167, as well as by Lord Esher in *Johnstone* v. *Milling*, 34 W. R. 238, 16 Q. B. D. 460, at p. 467. In *Roper* v. *Johnson* the point arose because the plaintiff, by bringing the action before the expiration of the time for the performance of the contract must be taken to have tied himself to the repudiation as a final determination of the contract. The rule does not apply where the plaintiff has not so tied himself. In the present case the action was not brought until after the day fixed for the performance of the contract, and upon the defendants giving the plaintiff notice that they were going to close the account the plaintiff's solicitors wrote to the defendants insisting upon their performing the contract on the date fixed for performance. In my opinion the contention that the plaintiff must measure his damages on the date of the wrongful closing of the account, and that on that basis the plaintiff would only be entitled to nominal damages, cannot, upon the decisions above referred to, be sustained.

There was a contention put forward by the plaintiff, which was adopted by Wills, J., that, as the

plaintiff had a right at any time to call upon the defendants to sell the shares during the account, the measure of damages must be based upon the highest prices of the shares between the wrongful closing of the account and the end of May settlement. The defendants had an alternative contention, on the assumption that they were wrong upon the first point—namely, that the prices ruling on the day when the contract ought to have been performed was the proper measure of damages. As between these two contentions a compromise has been arrived at. We think that the first point taken for the defendants is bad, and we give our decision upon that point only. We have accordingly only to give judgment for the damages to be assessed in accordance with the agreement arrived at between the parties.

ROMER and MATHEW, L.JJ., concurred.

Solicitors for the plaintiff, *W. H. Martin & Co.*

Solicitors for the defendants, *Beyfus & Beyfus.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Nov. 18.

BARTELL *v.* W. GRAY & CO (*a.*)

Master and servant—Employers' liability—Accident—Compensation—"Factory"—Painting ship in dock——"Undertakers"—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The respondents contracted with shipowners to do the painting and plumbing work on one of their ships which was lying in a wet dock, and which was being fitted out for a voyage. The applicant, who was in the employment of the respondents, was sent with other men to do the work, and was engaged on the painting work when he was injured by an accident. The shipowners were in charge of the ship with part of the crew on board, but the respondents were in possession of the ship as far as was necessary for the work to be done. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, *the county court judge made an award in favour of the applicant.*

Held, that there was evidence upon which the county court judge could find that the applicant was injured while employed in a factory, in respect of which the respondents were the undertakers, and that therefore he was entitled to compensation.

Appeal from an award of the judge of the Bow County Court under the Workmen's Compensation Act, 1897.

The applicant for compensation was a ship painter, and was in the employment of Gray & Co. The steamship *Tongariro*, belonging to the New Zealand Shipping Co., was lying at a wharf in the Royal Albert Docks and was being fitted up as a transport. Gray & Co., who were contractors for the line for painting and plumbing, had contracted to do the painting and plumbing work in the ship, and they sent their men with the materials to the dock to do the work on board the ship. They did not hire any part of the dock for this purpose. It was stated in evidence that the shipping company were in charge of the ship with part of the crew on board, and that Gray & Co. were in possession of the ship as far as was necessary for the work to be done. The applicant was injured by an accident while painting the booby hatch.

The county court judge made an award in favour of the applicant for 17s. 6d. a week.

The employers appealed.

A. Powell, for the employers.—"Undertakers" in respect of a factory must, by section 7 of the Workmen's Compensation Act, 1897, be the occupiers thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895, and by section 23 of the Act of 1895 the person having the actual use or occupation of a dock, quay, or wharf is to be deemed the occupier of a factory. A person having the actual use or occupation of a ship in a dock or at a wharf may be the "undertakers": *Raine* v. *Jobson*, 49 W. R. 705, [1901] A. C. 404. There can however, be only one person having the "actual use or occupation" of a factory. He is the person who is liable to the provisions of the Factory Acts as to penalties and other matters. It is not necessary to say that exclusive use or occupation is essential; the general control will do. The appellants had not the general control of the ship; the shipowners had the general control by having their crew on board. The appellants were merely the contractors for painting the ship, and had not the general control of the ship so as to make them the occupiers of a factory. In *Merrill* v. *Wilson*, 49 W. R. 161, [1901] 1 K. B. 35, and *Raine* v. *Jobson* the undertakers had the general control of the ship or dock. The appellants were, therefore, not liable.

He also referred to *Low* v. *Abernethy & Co.*, 2 Ct. Sess. Cas., 5th series, 722; *Francis* v. *Turner Brothers*, 48 W. R. 228, [1900] 1 Q. B. 478.

Ruegg, K.C., and *Chester Jones*, for the applicant.—There was evidence upon which the county court judge was justified in finding that the appellants had the actual use or occupation of the ship for the purpose of carrying out their work. It is clear that the use or occupation need not be exclusive. *Raine* v. *Jobson* is in point.

They also referred to *Aberdeen Steam Trawling and Fishing Co.* v. *Peters*, 1 Ct. Sess. Cas., 5th series, 786.

A. Powell replied.

COLLINS, M.R.—I am of opinion that this appeal should be dismissed. The county court judge has found that the applicant was entitled to an award, and he arrived at that decision by coming to certain conclusions of fact, two of which must have been that the deceased man was injured in a "factory," and that the employers were the "undertakers" in respect thereof. It was contended that the award cannot stand, because there was no evidence that the employers were the occupiers of a factory, and that therefore they were the undertakers. The questions, therefore, accordingly are whether the place can be described as a factory, and, if so, whether the employers can be called the undertakers in respect of it? If there was evidence upon those points we cannot disturb the award. The facts are that a transport was being made ready for a voyage, and the employers were described in the evidence as doing the painting and plumbing work, and as "contractors for the line for painting and plumbing." They had contracted to do the painting and plumbing work on the ship on the occasion in question. That seems to point to a contract on a large scale to do all the painting and plumbing work in the ship. The applicant was employed at the time in painting the booby hatch, and was injured by an accident while so employed. There is nothing to suggest that the contract which the employers undertook was confined to the painting of the booby hatch. I understand that it was a contract to paint the whole of the ship, and the painting of the booby hatch

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

was part of the work included in the contract. The ship was in a dock, and therefore the person in occupation of the ship would be in occupation of the dock, or of a part thereof capable of being limited and defined in regard to space. He would therefore be the occupier of a "factory" within the meaning of the Workmen's Compensation Act, 1897. By section 23 of the Factory and Workshop Act, 1895, the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory. That section is swept into the section of the Workmen's Compensation Act, 1897, defining "factory" and "undertakers." In dealing with a dock one must look at this section of the Act of 1895 to see if the case is brought within the Act of 1897, and if the employers are the undertakers. The words in the section "having the actual use or occupation" are followed by the words "and the person so using any such machinery," and this seems to me of some importance as showing what is the nature of the use that is sufficient. It is clear from the decision in *Raine* v. *Jobson* that a person working on a ship in a dock is working in a factory. The decision in *Flowers* v. *Chambers*, 47 W. R. 513, was overruled by *Raine* v. *Jobson*. Therefore the applicant, who was working in a ship in a dock, was working in a factory.

The next question is whether the employers were the undertakers in respect of that factory. That depends upon whether they had the actual use or occupation of the ship, and therefore of the dock, or a defined part of it. No one can say that persons who are painting a ship in a dock are not making use of the dock. There was abundant evidence that the employers had the actual use of the dock or of a defined part of it for the purpose of carrying on their operations. As was pointed out in *Merrill* v. *Wilson*, the use or occupation need not be exclusive. *Merrill* v. *Wilson* shows that in determining whether there is actual use or occupation the tribunal must look at the subject-matter with which it is dealing. It is obvious that the use or occupation of a dock or wharf may be different from the use or occupation of other subject-matters. There may be a use or occupation by others, and at the same time the special use or occupation of the particular individual is not interfered with. The decision in *Merrill* v. *Wilson* seems to me to cut the ground from under the contention of the employers, that the shipowner, by occupying the ship with his crew on board. displaced the occupation of the employers. I agree that one must first constitute the place a factory, and in determining that question, one cannot divorce from the idea of a factory all notion of a defined limit in regard to space. In this case the whole ship was handed over to the employers for certain purposes, which were not inconsistent with the use of the ship by other persons for other purposes. The employers were therefore the undertakers; at any rate there was evidence upon which the county court judge was justified in so holding. It would be a most unfortunate result if a workman employed directly by the shipowners could claim compensation, while he could not if he were employed by a contractor who had undertaken to do all the work in the ship. That would be a very refined construction to place upon the Act. The appeal therefore fails.

STIRLING, L.J.—I agree. There are two questions to be determined: first, whether the ship, which was in a dock, is a factory within the meaning of the Workmen's Compensation Act, 1897; and secondly, whether the employers are the undertakers in respect of that factory.

With reference to the first point, after the decision of the House of Lords in *Raine* v. *Jobson*, I feel no difficulty. A dock is a factory, and the ship was lying in a dock. It was pointed out by the Lord Chancellor in that case that the Act of 1897 does not intend to deal with the relation between shipowners and seamen when engaged in their ordinary occupation at sea, but he goes on to point out that it does not follow that, when a ship is brought into a dock and work is being done in the ship, and an accident happens there, the immunity given to the ship while at sea is therefore extended to the dock in which the ship is placed. The moment the ship is in a dock the liability attaches, and it is not necessary that the shipowner should be in exclusive possession of the dock, because, as was pointed out in *Merrill* v. *Wilson*, it is sufficient if there are definite premises in the dock of which the shipowner has the actual use or occupation. Therefore the ship was a factory within the Act.

Upon the second question I confess that I have felt considerable difficulty, but the case really resolves itself into this: Is there any evidence upon which the county court judge could reasonably find that the employers had the actual use or occupation of the dock or a portion thereof within the meaning of the Act. The employers were doing the painting and plumbing work in the ship necessary to fit her out as a transport. They had contracted for that work, and had sent their own workmen to the ship. They were in possession of the ship as far as was necessary for the work they had to do. The only other evidence upon this point was that the shipowners were in charge of the ship with part of the crew on board. I think that there was evidence upon which the judge could hold that the employers had such a use or occupation of the ship as made them undertakers within the meaning of the Act. For these reasons I agree that the appeal should be dismissed.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the applicant, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the employers, *W. Hurd & Son.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 14.

BUSH v. HAWES. (a.)

Master and servant—Employers' liability—Accident—Compensation—Sub-contractor—Work ancillary to the business of the undertakers—Erection of iron roof—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 4.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the respondent had contracted to build a boiler-house, and that the deceased workman was in the employment of a firm who had sub-contracted with the respondent to erect an iron roof to the boiler-house. The county court judge found, as a fact, that the erection of an iron roof was not part of the respondent's business, but, on a consideration of the character of the business as it was generally carried on, he found that such work was not merely ancillary to the respondent's business.*

Held, that the finding of the county court judge was conclusive to show that the work was merely ancillary to the respondent's business, and therefore the respondent

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

was not liable under section 4 of the Act, the case coming within the exemption contained in the last paragraph of the section.

Knight *v.* Cubitt & Co., ante, *p.* 113, [1902] 1 *K. B.* 31, *distinguished.*

Appeal from a decision of the judge of the Norwich County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a dependant of a workman who had been accidentally killed in the course of his employment.

The deceased workman was a builder's labourer, and at the time of the accident he was in the employment of Hadley & Co., who had contracted to do part of a work which had been undertaken by the respondent. The work undertaken by the respondent was the erection of a boiler-house and shaft. The work sub-contracted for by Hadley & Co. was the making and erection of an iron roof to the boiler-house. The proceedings were taken against the respondent under section 4 of the Act.

The points taken on behalf of the respondent were—first, that the building did not exceed thirty feet in height as required by section 7; secondly, that the respondent could not be made liable under section 4, because the sub-contract was for work which was "merely ancillary or incidental to" the trade or business carried on by the undertaker, within the meaning of the proviso in the last paragraph of that section.

The evidence with regard to the second point was that it was no part of the respondent's business to construct or erect such an iron roof as was put up by Hadley & Co.

The county court judge found that the building did not exceed thirty feet in height, and on that ground he held that the applicant was not entitled to compensation. But he also held, in the applicant's favour, that the case was not within the proviso to section 4. He was of opinion that, though the construction of an iron roof and placing it in position was not part of the trade or business of the respondent, he ought to take into consideration the character of the business as it was generally carried on, and on that ground he found that the putting up of the iron roof formed part of the trade or business of the respondent within the meaning of the section, and was not merely ancillary thereto.

The applicant appealed, and there was a cross-appeal by the respondent.

W. M. Thompson, for the applicant.

F. Low, for the respondent.

COLLINS, M.R.—I am of opinion that the cross-appeal should be allowed. The deceased workman was in the employment of sub-contractors, who had been employed by a builder to put an iron roof on a boiler-house which he was building. In order to make good a claim for compensation against the builder, it is necessary that the case should be brought within section 4 of the Workmen's Compensation Act, which makes the undertakers liable in the case of sub-contracts. The section, however, contains a proviso, which says that the section "shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively." The test of the undertaker's liability is whether the work is a part of or a process in his trade or business. The county court judge found as a fact that the construction of an iron roof and placing it in position was not a part of the respondent's trade or business. But then he went on to consider whether such work was generally undertaken by builders. I think that was a mistake. His finding of fact was such as to negative the application of the section. In the case of *Knight* v. *Cubitt & Co., ante*, p. 113, [1902] 1 K. B. 31, we held that the county court judge was justified on the evidence in finding that the work of demolishing a house was part of the business of the respondents, and not merely ancillary thereto. Here the county court judge, having found that the putting up an iron roof was not part of the business of the respondent, was wrong in holding that it was not merely ancillary. The respondent thus has a good answer to the claim, and it is unnecessary to consider the applicant's appeal.

STIRLING and MATHEW, L.JJ., concurred.

Cross-appeal allowed.

Solicitors for the applicant, *Pattinson & Brewer.*

Solicitors for the respondent, *Crowders, Vizard, & Oldham*, for *Mills & Reeve*, Norwich.

High Court of Justice.

Chan. Div. } Jan. 22, 28.
Byrne, J. }

In re FERGUSSON'S TRUST. (*a.*)

Will — Construction — Foreign law — Next-of-kin — Whole and half blood—Next-of-kin of a German subject.

The expression next-of-kin means, in English law, the nearest blood relations in an ascending and descending line, whether of the whole or half blood, and this construction will be placed on that expression in the will of an English testator giving a legacy to the next-of-kin of a legatee who is a subject of a foreign state, under the law of which relations of the half blood are not deemed next-of-kin.

This was a summons to determine what persons were entitled to a legacy which, in the events which had happened, had passed to persons described in the will giving the legacy, as the "next-of-kin" of a German lady.

The facts of the case were as follow:

By his will Mr. Frederick E. M. Fergusson, of 18, Gardiner's-lane, Calcutta, bequeathed certain legacies in the following words: "To Miss Adelaide Montriose, of Worthing, Essex, 4 per cent. promissory notes for rupees five thousand; to my niece Minnie Koppe, of 4, Market-street, Hamburgh, Germany, Government 4 per cent. promissory notes for rupees six thousand and five hundred, to Miss Frances Margaret Evans Cragg, of Cardiff in Wales, daughter of the late William Cragg, of Calcutta, Government 4 per cent. promissory notes for rupees three thousand. And I declare that in the case of the death of the before-named legatees in my lifetime such legacies shall not lapse, but shall be divided amongst the next-of-kin of such deceased legatee or in default of any next-of-kin, shall fall into the residue of my estate." And the testator appointed the Administrator-General of Bengal executor.

The testator died on the 1st of October, 1898, and his will was proved by his executor on the 2nd of January, 1899, at Fort William, in Bengal.

Minnie Koppe died on the 13th of June, 1897,

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

in Hamburgh, a domiciled German. Her husband, Mr. D. A. Koppe, predeceased her.

At the time of her decease Minnie Koppe's next-of-kin according to English law was her half-sister. According to German law her next-of-kin was her nephews and nieces, the children of a deceased sister. A claim was also put forward by the children of D. A. Koppe by a former marriage. The executor took the opinion of a German lawyer and the fund was paid into court.

A. H. Jessel, for the nephews and nieces of Minnie Koppe.—Next-of-kin means nearest of blood kin in German law, and only includes the whole blood. There is no direct authority, but gifts to children are analogous. If a gift is made to the children of A., a German, in this case children born out of wedlock, but legitimized by the subsequent marriage of the parent, will take: *In re Goodman's Trusts*, 28 W. R. 902, 17 Ch. D. 266; *In re Andros*, 32 W. R. 30, 24 Ch. D. 637; *In re Grey's Trusts*, 41 W. R. 60, [1892] 3 Ch. 88.

Baynes, for other parties.—The word "next-of-kin" is not a technical expression except when it is used in connection with the Statute of Distributions.

Cann, for half-sister of Minnie Koppe.—"Next-of-kin" is a technical expression. The testator must be considered to have intended to use it in its technical sense. Next-of-kin is a technical term, and includes relations both of the whole and the half blood. The cases on the word children have no application here. The will is the will of an Englishman and must be construed according to English law.

Borthwick, for the trustees of the will.

Jessel replied.

BYRNE, J.—In this case a domiciled Englishman made his will and gave to his niece Minnie Koppe a legacy, and the testator declared that in case of the death of the legatee in his lifetime that the legacy should not lapse but should be divided among the next-of-kin of the deceased legatee. Mrs. Koppe died in the testator's lifetime a domiciled German subject. The question arises as to who are her next-of-kin. German law does not recognize relations by the half blood as next-of-kin. So far as the construction of the words in the will go, the case is governed by the law of England. What, then, is the true construction of the words next-of-kin of such deceased legatee. They mean to be equally divided among the blood relations of the deceased, they taking as joint tenants, and the half blood to take equally with those of the whole blood. It is said that I must say that the words "next-of-kin" standing alone mean blood relations, and also that I must ask who are the nearest blood relations according to German law. For this view the cases *In re Goodman's Trusts* and *In re Andros* are principally relied on. These cases established that when there is a gift to children the status of the children must be determined according to the law of domicil. And it is said that in the present case, there being a gift to next-of-kin, that I must ask what persons are next-of-kin, according to German law. It is said that the question, "Who are the next-of-kin?" is one of status. Now, if the question is one of a status, it may be determined according to foreign law, and persons who may have the status of children according to that law, though not under English law, may oust the persons entitled to take under English law. I am now asked to put an interpretation on the word "next-of-kin" used by the testator. The word, however, is simply "next-of-kin." There is no reference to the Statute of Distributions. I see no reason on the authorities why I ought to construe this word "next-of-kin" according to German law. "Next-of-kin" here means the next-of-kin according to English law, and that means the nearest blood relations in an ascending and decending line, questions of legitimacy and such matters may, if necessary, be considered.

His lordship declared that the persons entitled to the legacy in the events which had happened were those who were nearest of kin to Minnie Koppe in an ascending and descending scale according to English law.

Solicitors, *Waterhouse & Co.; J. Banks; Pittman; Oppenheimer; Waterhouse & Lawford.*

Chan. Div.
Farwell, J. } Feb. 20.

WALES v. CARR. (*a.*)

Mortgage—Costs—Price of redemption—Costs of preparing mortgage deed—Costs of application.

The costs of preparing a mortgage deed, investigating title, and paying stamp duty and survey fees, which are not paid at the time of the completion of the mortgage, are not mortgagee's costs which can be added to the price of redemption. They form a simple contract debt between the mortgagor and the mortgagee.

Action without pleadings.

The plaintiffs were transferees of a second mortgage who redeemed the defendants, the first mortgagees. The costs of preparing the mortgage deed, including a survey fee and the stamp duty on the mortgage deed, amounting to £28, were not paid at the time of the execution of the mortgage. The defendants' solicitor had obtained a judgment against the mortgagor for this amount but such judgment was not satisfied.

Upon the plaintiffs seeking to redeem the defendants' mortgage the defendants claimed to add to the price of redemption these costs. The plaintiffs objected, but finally paid the money under protest and brought this action, in which they sought a declaration that the defendants were not entitled to charge or claim the above costs, and an order for the repayment of the sum to the plaintiffs. The point was raised in this way by agreement between the parties.

Earle, for the plaintiffs.—We are entitled to redeem without paying these costs, which are not ordinary mortgagees' costs. Even if the case is not covered by authority we are right on principle. These costs are not included in the list of costs payable on foreclosure in Seton on Decrees: see Fisher on Mortgages, p. 897, s. 1899. The point has seldom arisen because as a rule the mortgagee does not part with his money until these costs have been paid.

He quoted *Gregg* v. *Slater*, 4 W. R. 381, 22 Beav. 314; *Wyatt* v. *Cook*, [1868] W. N. 237; and distinguished *National Provincial Bank* v. *Games*, 34 W. R. 600, 31 Ch. D. 582; *Ex parte Firth, In re Cowburn*, 30 W. R. 529, 19 Ch. D. 419.

Cozens-Hardy, for the defendants.—When the mortgage was completed the mortgagee's solicitors' costs are a debt recoverable by the mortgagee from the mortgagor and are part of the costs recoverable under and by virtue of the mortgage. *Gregg* v. *Slater* has now been altered by the Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25). When the mortgage

(*a.*) Reported by J. F. CARR, Esq., Barrister-at-Law.

has been completed there is an implied contract by the mortgagor to indemnify the mortgagee, and that enables the mortgagee perhaps to sue the mortgagor, or at any rate to make such costs part of the price of redemption.

He referred to Cordery on Solicitors, 71; the report of *Wyatt* v. *Cook*, in 3 L. J. Notes of Cases, 237; *Nicholson* v. *Jeyes*, 1 W. R. 274, 278, 22 L. J. Ch. 833; *Ex parte Fewings, In re Sneyd*, 32 W. R. 352, 25 Ch. D. 338; Ashburner on Mortgages, 304; Robbins on Mortgages, vol. 2., 1191.

FARWELL, J.—This is an application by the transferees of a second mortgage who have redeemed the first mortgage, and must be treated as a redemption action. The costs in question, amounting to about £28, were incurred in or about the preparation of the mortgage deed. These are costs which the mortgagee would be entitled to recover from the mortgagor at common law, if and when he has paid them, by virtue of their relationship of mortgagor and mortgagee. Sir George Jessel, in *Ex parte Firth, In re Cowburn*, in the presence of two distinguished common law who would not have let it pass if incorrect, judges, and it seems to me to be perfectly correct, said: "There is a great distinction between a sum of money being advanced on the terms of the lender paying out of it a debt due by the borrower to a third person, a portion of that sum being handed back again to the lender or handed over by him to another person who is a creditor of the borrower, and a sum of money being retained for that which is not truly a debt until after the transaction itself is completed—that is, a sum of money which consists of the expenses of the transaction itself. When a mortgage is completed, the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitor for those expenses. The mortgagor is liable to pay over to the mortgagee what he pays his own solicitor, but there is no debt until the transaction is completed," 19 Ch. D., at p. 427. The Master of the Rolls is there using technical terms of the common law in their strict sense.

These are costs against which the mortgagor is liable to indemnify the mortgagee after the mortgage has been completed. These are costs in no way included in the mortgage deed itself. The mortgagee's costs properly so called, if he sued in common law or Chancery, were included in the mortgage debt. They were certain costs, the payment of which in Chancery always formed one of the terms of redemption, and the court allowed redemption only on that term among others.

Mr. Cozens-Hardy, called my attention to *Ex parte Fewings, In re Sneyd*, 32 W. R. 352, 25 Ch. D. 338. But the position in that case was quite different to bringing in these costs as part of the price of redemption, see 25 Ch. D., at p. 352, where Cotton, L J., says: "If the debtor, in his character of mortgagor, claimed to redeem the mortgage, the court would not grant him that which originally was an indulgence, a departure from the strict term of his legal right, without imposing upon him the condition of paying the mortgagee, not only the debt which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in his position as such. But that is an entirely different thing from saying that an action of debt could be maintained by the mortgagee against the mortgagor for those expenses. It is said that a mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs, but I am of opinion there is no such contract, but as a condition of redemption that a court of equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee." See also *National Provincial Bank of England* v. *Games*. The costs in those cases are those necessarily incidental to the creation of the position of the mortgagee as such, and are included in the inquiry in a foreclosure action as to what is due "under or by virtue of the mortgage security." That inquiry does not include costs due on the implied covenant of indemnity at common law. If this were not so I should be tacking a simple contract debt to the price of redemption, which has always been held inadmissible.

This question does not, in the large majority of cases, arise, because the costs in question are nearly always deducted by the mortgagee before handing over his mortgage loan. Mr. Earle relied on *Gregg* v. *Slater*, but from the report of the same case in 2 Jur. N. S. 246, it is clear that it is not a decision in point at all. If I rightly understand what was decided it was that the costs in question were not mortgagee's costs at all. [He also referred to *Wyatt* v. *Cook*, [1868] W. N. 79, 237, 3 L. J. Notes of Cases, 237. The report in the Weekly Notes is unintelligible, but from the report in 3 L. J. Notes of Cases it is clear what the point was. It was a case of a catching bargain with an expectant heir which was set aside. In the Court of Appeal the mortgagor offered to pay the costs, so that no decision was required or given on this point. Another case which was quoted, and seemed to me to have no applicability, was *Nicholson* v. *Jeyes*. That was a case of an administration suit of which the costs were to be raised by mortgage. Knight-Bruce, L.J., in that case said: "I consider the mortgagee must have all his reasonable costs to which, according to the usual practice out of court, he, as mortgagee, would be entitled." There was in fact in that case no mortgagor, the court had directed the mortgage to be executed and there could be no question of an implied contract. Turner, L.J., says: "As the order has directed that the mortgagee shall have his costs, charges, and expenses, the words 'including his reasonable and proper charges of settling the security' may be added." The Lord Justice clearly thought that costs, charges, and expenses were not necessarily sufficient, so he suggested the addition of words wide enough to cover the costs of preparation of the mortgage deed.

These costs are recoverable immediately on the execution of the mortgage deed and the distinction between these and other costs is clear. The mortgagee cannot charge against the mortgagor on his security the costs of preparing the mortgage deed which he might recover under his implied contract with the mortgagor.

Cozens-Hardy.—This is a redemption action, and the point which I have raised was not frivolous, but open to considerable argument and doubt. I, therefore, am entitled to costs. The point was raised in this way in order to save expense.

Earle.—The point was raised in this way by agreement. The defendants would not let us redeem without paying these costs, which we did under protest. I claim that I ought to have costs as I have been held right.

FARWELL, J.—The mortgagee is nearly always entitled to his costs in a redemption action. The point was here left open by agreement, and brought on cheaply and quickly, but it was still necessarily part of the redemption action, and the mortgagees are entitled to their costs.

Solicitors, *Rooks, Spiers, Wales, & Ward; Attenborough & Son.*

Chan. Div. } Jan. 13, 14, 15, 16, 20.
Joyce, J. }

IRELAND v. HART. (a.)

Company—Transfer of shares—Registration—Equitable title—Priority.

The decisions in Société Générale de Paris *v.* Walker, 34 *W. R.* 662, 11 *App. Cas.* 20, *and* Moore *v.* North-Western Bank, 40 *W. R.* 93, [1891] 2 *Ch.* 599, *establish that—where the articles of association of a company provide that the transferor shall be deemed to be the holder of such shares until the name of the transferee is entered in the register in respect thereof, and that every instrument of transfer shall be left at the office of the company for registration, accompanied by the certificate of the shares to be transferred and such other evidence as the company may require to prove the title of the transferor or his right to transfer the shares—the mere leaving of such transfer and the certificate of shares at the office of the company, before the company had notice of any prior equitable claim to the shares, is not sufficient to give the legal title to the transferee so as to oust the prior equitable owner, and is not of itself sufficient to give the transferee a "present absolute unconditional right" to the shares.*

Witness action.

The plaintiff, Lucy Eveline Ireland, a married woman, was entitled to 180 shares in a company called Samuel Kidd & Co. (Limited), as her separate estate.

In the year 1900 she transferred them into the name of her husband, the defendant H. C. Ireland, in order to give him the right to attend and vote at the meetings of the company, and he became the registered holder; this transfer was for only a nominal consideration.

The defendant H. C. Ireland, the plaintiff's husband, was a solicitor. The defendant Hart was an accountant, who for several years had audited the defendant Ireland's books, and afterwards practically kept them.

Early in 1901 the defendant Ireland was in need of money, and negotiations took place between him and Hart as to a loan, and it was eventually agreed between them that Hart should advance the defendant Ireland the sum of £500 on the security of certain shares which Ireland had in a company called "Homocea (Limited)," of certain money which was owing to the defendant Ireland, and on the shares in Samuel Kidd & Co. (Limited). Hart did not know that these shares were held by Ireland as trustee for his wife. Hart advanced a part of the money at various times before March. On the 4th of March the defendant Ireland wrote to him regarding the shares in Samuel Kidd & Co. (Limited): "I enclose blank transfer forms . . . I hope . . . you may be able to arrange on enclosed."

The transfers were executed under seal by the defendant Ireland, but the consideration and the name of the transferee were left blank. The certificates of the shares were also sent to Hart.

On the 6th of March Hart acknowledged the receipt of the transfer, and the same day paid the balance of the loan on the security of the blank transfer. The plaintiff, Mrs. Ireland, knew nothing of this transaction.

In November, 1901, Hart, not being satisfied with his security, proceeded to perfect it by registering the shares in his own name. He therefore filled in the transfer in his own name, and filled in the consideration as £100, and on the 23rd of November he sent the transfers to the company's office for registration. The articles of association of the company with regard to transfers were as follows: "Article 30. The instrument of transfer of any share should be signed by both the transferor and the transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof. Article 31. The instrument of transfer of any share is to be in writing in the usual common form, or in a following form, or as near thereto as circumstances will admit. Article 33. Every instrument of transfer shall be left at the office for registration, accompanied by the certificate of the shares to be transferred and such other evidence as the company may require to prove the title of the transferor or his right to transfer the shares." The value of these shares was about £900.

On the 26th of November, in consequence of the small consideration entered in the transfer, the managing director called on the defendant Ireland, who told him that Hart had no right to register the shares, and asked to have the registration postponed for a time. The managing director agreed to that, and on the same day the defendant Ireland wrote to him a letter containing the same request. The ordinary meeting of the directors of the company was on the 27th of November. At the meeting the managing director told the other directors what had taken place, but the transfer was not formally submitted to the board, and the register was not altered. On the same day the plaintiff Mrs. Ireland issued the writ in this action claiming a declaration that those shares which stood in the company's books in the name of the defendant Ireland were held by him in trust for her, and that the deed purporting to be a transfer of those shares by the defendant Ireland should be delivered up to be cancelled. On the same day an *interim* injunction was obtained restraining the transfer of these shares.

Hughes, K.C., and *C. T. Mitchell*, for the plaintiff.—The defendant Hart has no legal title, and the plaintiff's equitable one must prevail, for there is no legal title in the shares until registration. And Hart has not, as between himself and the company, an absolute and unconditional right to be registered as shareholder: *Société Générale de Paris* v. *Walker*, 34 W. R. 662, 11 App. Cas. 20; *Roots* v. *Williamson*, 36 W. R. 758, 38 Ch. D. 485.

S. C. M. Goodman, for the defendant.—Hart's title to these shares ousts the plaintiff's equitable title, as he had, between himself and the company, a present unconditional right to have the transfer registered. Hart had obtained the transfer, and he obtained an absolute right to have it registered when he sent it with the certificate to the company's office. This is a higher right than the plaintiff's equitable one. *Roots* v. *Williamson* is distinguishable, as there all the formalities necessary for registration had not been complied with. Here nothing has been left undone to perfect the registration except the clerical act of putting Hart's name on the register: *Moore* v. *North-Western Bank*, 40 W. R. 93, [1891] 2 Ch. 599.

Mitchell, in reply.—The plaintiff's is the prior equity and must prevail unless Hart can show that he has the legal title. This he cannot do as he has not been registered. Entry on the register is a condition precedent: *In re Florence Land and Public Works Co., Nicol's case*, 29 Ch. D. 421, 33 W. R. Dig. 40. There was no unnecessary delay on the part of the company in registering (*In re Joint Stock Discount Co., Shepherd's case*, 15 W. R. 26, L. R. 2 Ch. App. 16), and Hart had no right to compel the company to register the

(a) Reported by C. W. MEAD, Esq., Barrister-at-Law.

transfer, and when once the company had received notice of the plaintiff's title it would have been improper for them to have done so. *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424, at p. 453, 33 W. R. Dig. 44.

Cur. adv. vult.

Jan. 20.—JOYCE, J., after stating the facts, continued: Now in my opinion the board of directors were not bound to register that transfer at the meeting of the 27th. It is well settled that, although directors might have no power to refuse to register a transfer, they were entitled to have a reasonable time after the transfer was made in order to make inquiries for the purpose of finding out if the transfer was in order, but after being satisfied on this point they would be bound at their next meeting to register the transfer. But I consider that, after what had taken place on that date, the directors were not bound to pass the transfer at that meeting. At all events they did not pass the transfer. In my opinion an application made under section 35 on the 27th of November to register the transfer could not have succeeded.

The cases—*Société Generalé* v. *Walker* and *Moore* v. *North-Western Bank*—establish that where the articles are in the form in which they are in the present case, a legal title is not acquired as against an equitable owner before registration, or at all events until the date when the person seeking to register has a present absolute and unconditional right to have the transfer registered. I am not here to give the absolute meaning of that "present absolute and unconditional right," but, as it appears to me, I am not sure that anything short of registration would do except under very special circumstances. At all events, I am of opinion that in this case, prior to the date of the injunction the defendant Hart had not a present absolute and unconditional right to the registration of the transfer of these shares, and that the prior equitable right of the plaintiff, Mrs. Ireland, must prevail. And although I think the plaintiff has the equitable title, which title must prevail, under the circumstances I think each side must pay their own costs.

Solicitors, *S. J. R. Stammers; Stephen A. Jones.*

Chan. Div.
Swinfen Eady, J. } Jan. 23, 24.

In re NORRIS. (*a.*)

Solicitor—Costs—Taxation—Mortgage—Negotiating fee—General Order under Solicitors' Remuneration Act, 1881, *Schedule I., Part I., r.* 11—*Mortgagees' Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 2.

A solicitor lent a client a sum of money on mortgage of real property. Subsequently he sent the client a bill, which included a fee for negotiating the mortgage.

Held, that, the solicitor having arranged and obtained the mortgage, he was entitled to the fee.

This was a summons to vary the certificate of the taxing-master, who had disallowed a fee charged by a solicitor, Norris, for negotiating a mortgage.

It appeared that Norris had arranged for the payment up of a sum of money raised on mortgage of some property by a client, and had himself advanced the necessary sum, subsequently taking a mortgage on the property.

The taxing-master disallowed the fee for negotiating the mortgage on the ground that Norris could not negotiate with himself.

Stokes, for the plaintiff, referred to the case of *In re Macgowan*, 39 W. R. 227, [1891] 1 Ch. 105.

Gatey, for the defendant, argued that where a solicitor himself lent money as mortgagee he could not charge the negotiating fee unless he has a partner whom he negotiates with.

He quoted *In re Eley*, 36 W. R. 96, 37 Ch. D. 40.

SWINFEN EADY, J.—It has first been contended that Norris did not "arrange and obtain the loan" within the meaning of rule 11 of the General Order under the Solicitors' Remuneration Act, 1881, which states that "As to a mortgagee's solicitor it [the scale] shall only apply to cases where he arranges and obtains the loan from a person for whom he acts." For a moment let me omit the consideration of the last words "from a person for whom he acts."

The property comprised in the mortgage deed was previously mortgaged. Norris arranged for the payment of the money due under this mortgage, advanced the money for the purpose, and discussed the matter with his client.

Further, it is not disputed that the terms of the loan were correctly stated in the deed. I have therefore no difficulty in finding on the facts that Norris did "arrange and obtain" the loan.

To return to the rule, the loan must be arranged and obtained from a person for whom the solicitor acts. But since the Mortgagees' Legal Costs Act, 1895, a solicitor who negotiates a loan is entitled to the scale fee even though he advances the money himself. On this the defendant contends that the statute does not apply to the case of a solicitor not in partnership who arranges a loan with himself and obtains the loan from himself, for he cannot be said "to arrange and obtain a loan from a person for whom he acts."

In my opinion that is much too narrow a construction to put on the statute. Section 2 provides that "any solicitor to whom either alone or jointly with any other person a mortgage is made, or the firm of which such a solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor and such person had retained and employed such solicitor or firm to transact such business and do such acts."

Suppose Norris had not himself advanced the money, but had been retained by a third person to do so, would he have been entitled to charge this fee? In my opinion, from the facts before me, he would clearly be entitled to do so. And the statute says that, the mortgage being made to the solicitor alone, he is to be entitled to the remuneration he would have been paid had he been acting for a third person. It follows that he is entitled to receive the fee. Any other construction will not give effect to the words of section 2, "Either alone or jointly with any other person." For these reasons the summons to vary the certificate will be allowed with costs.

Solicitors for the plaintiff, *Norris & Norris.*

Solicitors for the defendant, *Prestons*, for *Ivor Harries*, Rhayader.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 19, 20.

WISE (*Appellant*) v. DUNNING (*Respondent*). (*a.*)

Justices—Public meetings—Insulting language—Apprehended breach of the peace—Power of justices to bind over.

The appellant had, in addressing meetings in public places, used language abusive of, and insulting to, other persons, and had threatened to hold similar meetings and use similar language in future.

Held, that the natural and probable consequence of such conduct on the part of the appellant would be to occasion breaches of the peace being committed by others, and that the justices had jurisdiction to bind over the appellant in recognizances to be of good behaviour.

This was an appeal from the decision of the stipendiary magistrate of Liverpool, binding over the present appellant George Wise to be of good behaviour for twelve months.

The information preferred by the respondent Dunning, head constable of Liverpool, stated that the said George Wise had held meetings on sundry dates in the month of May on the king's highway and sundry other places to which the public had access and that breaches of the peace had taken place in consequence, and that the said George Wise intended to hold similar meetings in future. The following facts were proved before the stipendiary: The said George Wise had held meetings in Islington-square, Liverpool, a public thoroughfare and part of the king's highway, on the 13th and 16th of May. At these meetings the said George Wise said he was prosecuting each of these meetings as a Protestant crusader. Each of the said meetings was attended by Roman Catholics as well as by supporters of the said George Wise. At that held on the 16th of May, Carver-street (a street running into the Islington-square) was completely blocked. At the meeting held on the 19th of May George Wise said that he intended to denounce the order of Jesuits. He also called them "rednecks," a term which was intended to insult and annoy them, and was well calculated to provoke a breach of the peace. At the meeting held on the 22nd the said George Wise said that he had been informed by letter that the Roman Catholics intended to bring sticks, and that he looked to his supporters to protect him, as the police had refused to do so. The said George Wise admitted the insertion by him of an advertisement in the *Liverpool Evening Express* on the 24th of May, 1901, inviting Protestants to support Mr. George Wise at a meeting to be held at Islington-square on the following Saturday, and not to allow the Romanists to triumph, but maintain their liberties. The respondent thereupon on the 25th of May lodged an information, similar to the information now in question, but the said George Wise then undertook not to hold the meeting last referred to. Nevertheless he did hold a meeting—not at Islington-square—but in front of St. George's Hall, Liverpool, on the said Saturday following. At this meeting disturbances occurred and many of the police were assaulted and knocked down. The said George Wise did not at any of his meetings commit or threaten to commit a breach of the peace. The said George Wise further stated that he intended to hold such meetings in the future, and as the said respondent Dunning was of opinion that if such meetings were held they would lead to a breach of the peace he lodged the present information against Wise.

The magistrate, at the hearing of the information, bound Wise over to be of good behaviour for twelve months.

The questions now for the opinion of the court were, first, whether the information was good—it being contended that the information did not allege that the applicant had been guilty of any offence; and, secondly, whether it was within the power of the magistrate to bind the appellant over, it being contended that he had not been guilty of any breach of the peace, nor did he intend to commit any.

F. E. Smith, for the appellant Wise.—The magistrate was wrong; Mr. Wise was always within his rights, and *Beatty* v. *Gillbanks*, 31 W. R. 277, 9 Q. B. D. 308, shows that in such a case he is not responsible if other people commit illegal acts. The decision in *Reg.* v. *Justices of Londonderry*, 28 L. R. Ir. 440, is in conflict with that of *Beatty* v. *Gillbanks*. The information discloses no offence committed by the appellants.

Pickford, K.C. (*Maxwell* with him), for the respondent.—The appellant had committed three offences. First, he had held meetings on the highway; secondly, he used language of an insulting character whereby a breach of the peace might be occasioned, thereby violating the Liverpool Improvement Act, 1842; thirdly, he had used language inciting to a breach of the peace by inviting his supporters to arm themselves. The information discloses sufficient grounds for binding over the appellant; but when the party appears a formal complaint is not necessary: see *Reg.* v. *Hughes*, 4 Q. B. D. 614, 29 W. R. Dig. 67.

F. E. Smith in reply.—There was no evidence of obstruction before the magistrates and the local Act was not even cited. The appellant was committing a lawful act, and he was not bound to assume that the natural consequence would be that others would commit unlawful acts: see Stone's Justices' Manual (33rd ed.), p. 724.

Lord ALVERSTONE, L.C.J.—This case has been extremely well argued, and everything that is possible to be said has been pressed upon us by the appellant, but I have no reason to doubt that the magistrate was perfectly right in binding over Mr. Wise to keep the peace. I do not think that it is necessary to go at great length into the various cases that have been cited before us. We have been much pressed with the case of *Beatty* v. *Gillbanks* and the supposed opposition between that case and the Irish cases, *O'Kelly* v. *Harvey*, 14 L. R. Ir. 105, 31 W. R. Dig. 100, and *Reg.* v. *Justices of Londonderry*, but the whole difficulty arises from the attempt to apply the same decision to a very different set of facts. I entirely agree with the view expressed by Field, J., in *Beatty* v. *Gillbanks*: "Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over, but the evidence set forth in the case does not support this contention." O'Brien, C.J., in *Reg.* v. *Justices of Londonderry*, said: "No act on the part of any person was proved to show that it was reasonably probable that the action of the defendants would, on the day in question, have provoked a breach of the peace." And in *Reg.* v. *Justices of Cork*, 15 Cox C. C. 78, at p. 84, 30 W. R. Dig. 106, May, C.J., said: "This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate fine or punishment."

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Again, in the second case of *Reg.* v. *Justices of Cork*, reported in the same volume, at p. 149, Fitzgerald, J., after referring to the authorities, said, at p. 155: "Without citing further authority we may assume that where it shall be made reasonably to appear to a justice of the peace that a person has incited others by acts or language to a violation of law and right, and that the delinquent is likely to persevere in that course, such justice has authority by law in the execution of preventive justice to provide for the public security by requiring the individual to give securities for good behaviour, and in default commit him to prison." I have referred to these cases, not for the purpose of deducing any new rule of law, but for the purpose of pointing out that in a number of cases the essential condition has been stated, though in different language, that there must but be an act of the defendant the natural consequences of which, if his act be not unlawful in itself, would be to produce an unlawful act by others. The present case can be put higher. There is an important local statute providing that every person who should use insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace might be occasioned, may be summoned, and on conviction fined. In addition, we have here distinct findings of fact that the appellant held a number of meetings; that the highways were blocked by thousands of persons, and that very serious breaches of the peace had arisen; and that the appellant had himself used, with respect to a large body of persons of a different religion, language which the magistrate has found to be of a most insulting character.

Magistrates are only doing their duty in making themselves acquainted with the character of the population amongst whom they have to administer justice; and in considering the natural consequence of a man's acts who has used insulting language towards the people of a particular religion the magistrates are bound to take into consideration that there is a large body of those persons in that town. It was also proved that the appellant had informed the meeting that he had received a letter stating that the Catholics were about to bring sticks, and he asked his supporters to protect him. It may be true that if this case were to be considered with reference to only one of the illegalities which it is alleged the appellant committed, further evidence might be required; but in my opinion there is ample evidence to show that in the public streets he did use language which was abusive, which did tend to bring about a breach of the peace, and which had caused an obstruction, and that he threatened to do similar acts.

The fact that the appellant had promised not to hold a meeting in one place and had held it within a quarter of a mile of that place on the same day shows that the magistrate was justified in taking precautions to prevent a repetition of his previous conduct.

Further, I think that any omission in the language of the information was cured by the evidence which was given. The appellant was represented by a solicitor and elected not to give evidence. I am of opinion that the points of law raised on behalf of the appellant fail, and that the magistrate acted quite rightly.

DARLING, J.—I am of the same opinion. The appellant calls himself a crusader in order preach a Protestant crusade; he supplies himself with a crucifix and round his neck were hung beads, in obvious imitation of the rosaries used by Roman Catholics. He admittedly made use of expressions most insulting to the Roman Catholics of Liverpool. The natural consequences of these acts was what has happened over and over again, and what must be the inevitable consequence if people, whether Protestants or Roman Catholics, are to be allowed to outrage each other's religion as the appellant outraged the religion of the Roman Catholics of Liverpool. The appellant is best described in the language of Butler. He is one of

> "That stubborn crew
> Of errant saints, whom all men grant
> To be the true Church Militant.
> A sect whose chief devotion lies
> In odd perverse antipathies."—
>
> HUDIBRAS, Part I.

I think that the natural consequence of this "crusader's" acts has been to produce illegality, and that from his acts and conduct circumstances have arisen which justified the magistrate in binding him over to keep the peace. It is said that the law in *Beatty* v. *Gillbanks* is at variance with the law in *Reg.* v. *Justices of Londonderry*. I am not sure that it is, but I have no hesitation in saying that if it is I prefer the law in *Reg.* v. *Justices of Londonderry*. If that be a right statement of the law, as I think it is, the magistrate was quite right in coming to the decision even without taking into consideration the Act of Parliament to which we have been referred. For those reasons I am of opinion that the magistrate's order was right.

CHANNELL, J.—I am of the same opinion. I agree with the appellant's counsel that the law does not, as a rule, regard an illegal act as the natural consequence of a temptation to commit it. For instance, a person who exposes goods outside his shop is often said to tempt people to steal them, but that cannot be said to be the natural consequence of his act. Again, the House of Lords has recently held that when a blank space is left in a cheque which enables a person to increase the amount by adding figures, it is not the natural consequence that somebody should be led to commit forgery by writing figures into the cheque. That proposition is correct and really familiar, but I think the cases with respect to apprehended breaches of the peace show that the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of abusive and insulting language or conduct. Possibly this may be an exception to the rule which the appellant's counsel pointed out to us; but I think it is quite clearly made out on the cases. I therefore think the decision of the magistrate was right.

Judgment for respondent.

Solicitors for appellant, *Field, Roscoe, & Co.*, for *Miller, Peel, Rutherford, & Co.*, Liverpool.

Solicitor for respondent, *F. Venn & Co.*, for *E. R. Pickmere*, Town Clerk, Liverpool.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 19.

MACDONALD (*Appellant*) v. HUGHES (*Respondent*). (a.)

Licensing law—Licensed person—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 17.

The executor of a deceased licence-holder carrying on the business is himself a licence-holder within the meaning of the Licensing Act, 1872.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The respondent Margaret Hughes was the executrix of Ann Christina Hughes, who was at the date of her death, the 1st of April, 1901, duly licensed to sell intoxicating liquors at the house known as the Green Lodge, Hoylake, in the county of Chester.

On the 11th of April, 1901, a special sessions for the transfer of licences was held, but this being within fourteen days of the death of Ann Christina Hughes no application for transfer was then made, and the next day appointed for the holding of special sessions was the 6th of June, 1901. The respondent, as executrix, remained in possession and carried on the business.

On the 27th of May several police officers visited the premises and found, as they alleged, that gaming was being carried on on the premises, and the appellant, who was a superintendent of police, accordingly preferred a charge against the respondent under section 77 of the Licensing Act, 1872.

It was contended at the hearing of the information that the respondent was not a licensed person within the meaning of the Act as no licence for the sale of intoxicating liquors had been granted to her.

The justices allowed the objection and dismissed the information, but stated a case.

R. M. Montgomery (*Honoratus Lloyd* with him), for the appellant.—The respondent held the licence as executrix of the deceased. Section 3 of the Act of 1872 provides "that no penalty shall be incurred by the heirs, executors, or administrators of any licensed person who dies before the expiration of his licence, in respect of the sale of any intoxicating liquor," if such sale take place prior to the then next ensuing special session or (if such session be holden within fourteen days next after the death of the person took place) prior to the special session holden next after such special session as aforesaid." The meaning of this is that the licence is kept alive till the next special sessions. The offences named in section 13 and 18 would not be punishable if the view of the respondent is right.

Tobin, for the respondent.—The licence is issued to the licensee as a personal grant, and as the respondent did not then hold a licence she is not within section 3. The proviso to section 3 gives to the executor protection from penalties, but does not grant him a licence; that is granted him at the special sessions. If the respondent held a licence it could only be that of the deceased, and if that licence was not determined by the death of the testatrix there would be no need for the protection given by section 3 or for the respondent to go to the court under section 14 of the Act of 1898. This is a *casus omissus*, but the respondent could have been proceeded against under the common law.

Lord ALVERSTONE, L.C.J.—In this case we have to consider some words of the Licensing Act, 1872, which have not hitherto been interpreted. The question that we have to decide is whether an executrix in occupation of a licensed house and carrying on the business of the house and selling liquors on the premises may be made subject to penalties for allowing card-playing to take place on the premises as a licensed person; meaning thereby, a person holding a licence as defined by the Licensing Act, 1872. Licence, as defined by section 74 of the Act of 1872, means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Act of 1828, and a licensed person means a person holding such licence. That clause must have been inserted with some intention and if the view suggested by Mr. Tobin is right there is not any case in which that clause was needed. In my opinion after the death of a person holding such licence, the licence continues to exist for a certain time provided that the representatives of the licensed person come to the special sessions (held more than fourteen days after the death of the licensed person) for a licence; and the effect of the interpretation clause is that the representative of the deceased licensed person is entitled to act as if she or he were holding the licence. We were much pressed by the argument that if we were to take a contrary view a large number of offences which are provided for in sections 13 to 14 of the Licensing Act, 1872, might be committed with impunity by the representatives of a licensed person. I think that that would be so. In my opinion a person holding the licence till the next special sessions after the death of the licensee is a licensed person within the meaning of the Act, and the case must therefore go back to the magistrates.

DARLING, J.—I am of the same opinion. It seems to me that the strongest argument against the respondent is the one on which the magistrates most relied on as in her favour—namely, the proviso to section 3 of the Act of 1872. The executor of a deceased licensee is not treated as being an unlicensed person. He holds the licence though he is not the grantee of it. It is important to notice that under section 14 of the Act of 1828 the executor may obtain from the special sessions a licence which is valid for the whole of the rest of the period covered by the old licence. I do not think this is a *casus omissus* at all, but it seems to me that it is clearly covered by the Act.

CHANNELL, J.—I agree that this appeal must be allowed, but I do not think that the words of the proviso are very clear. It does not say that the operation of the licence is to be extended for a certain time, but that is, I think, what the words mean. The licence continues till the special sessions, and in the meantime the executor holds the premises under the operation of the licence and is therefore a licensed person.

Solicitors for appellant, *Philpot & Morrell*, for *R. Potts*, Chester.

Solicitors for respondent, *J. E. & H. Scott*, for *Thompson, Hughes, & Mathison*, Birkenhead.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 7.

SMITH & SON (*Appellants*) v. KYLE (*Respondent*). (*a.*)

Master and servant—Shop—Young person—Hours of employment—Temporary stall—Shop Hours Act, 1892 (55 & 56 *Vict. c.* 62), *ss.* 3, 4, 9.

A temporary board on trestles is not a shop within section 4 of the Shop Hours Act so as to require a notice of the provisions of the Act; but

Semble, *it is a shop for the purposes of section 3, which regulates the hours of employment.*

Case stated by justices.

The appellants were charged by the respondent for having on the 23rd of March failed to exhibit the notices required by section 4 of the Shop Hours Act, 1892, and section 1 of the Shop Hours Act, 1895, at the parish of Merstham, in the county of Surrey.

The following facts were proved at the hearing:

One Albert Boorer, a lad under the age of eighteen years of age, was in the employ of the appellants. He was employed from 6.30 to 10 a.m. at Merstham, and for the rest of the day at Redhill, Merstham railway station being about two miles from Redhill.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

His duties while at Merstham were partly to deliver papers, and for the remainder of the time to sell papers from a temporary stall consisting of a board laid down on trestles.

No notice as required by section 4 of the Act, 1892, was posted at Merstham, but there was such a notice at Redhill.

Section 4 of the Shop Hours Act, 1892, provides as follows: "In every shop in which a young person is employed a notice shall be kept exhibited by the employer in some conspicuous place referring to the provisions of this Act, and stating the number of hours in the week during which a young person may be lawfully employed in that shop."

The appellants contended that the notice was not to be posted at Merstham, but at Redhill, and that the stall at Merstham was not a shop as defined by section 9 of the Shop Hours Act.

The respondent contended that the notice should be posted in both places, and that the lad was none the less employed at Merstham because he only spent part of his time there.

The justices convicted the appellants and imposed a nominal fine of 1s., but stated a case.

R. B. D. Acland, for the appellants.—The employment of the lad was clearly at Redhill, and not at Merstham, where he only spent two hours. The notice required by section 4 was duly displayed at Redhill, and section 4 defines "a stall as a shop unless the context otherwise requires." It is impossible to extend the words of section 4 to a temporary structure such as this. Section 4 clearly implies a permanent structure "in which young people are employed."

A. Glen, for the respondents.—Section 4 applies to this case, as the notice required could be fixed outside the board. The stall is clearly a shop within section 3 of the Act, and the wording of section 4 is not to be read as implying a permanent structure.

Lord ALVERSTONE, L.C.J.—In my opinion this conviction must be quashed. But I desire to say nothing that would give rise to the impression that this stall would not be a shop for some of the purposes of the Act. For instance, if the lad were to be employed for more than seventy-four hours, including meal times, in one week, I think, subject to any argument that may be addressed to me, that the structure would be clearly a stall, and therefore a shop, within section 3, which limits the hours of employment of young persons in or about shops. But we have to consider the meaning of the word shop in section 4, interpreted by section 9, and it is important to notice that the definition of shop in section 9 as applying to a stall is limited by the words "unless the context otherwise requires."

I think apart from the particular case that the word shop, as used in section 4, applies to structures which are in the nature of permanent structures, and not to a mere temporary erection of a board and trestles such as existed here. The boy was really employed at Redhill, his employment at Merstham only lasted from 6.30 to 10 a.m., during part of which time he was delivering papers to subscribers. In my opinion it would be a ridiculous construction of the Act if we too were to hold that for the purpose of exhibiting a notice this board and trestles constituted a stall, and therefore a shop, within the meaning of the section. I think, therefore, that this conviction should be quashed.

DARLING and CHANNELL, JJ., concurred.

Solicitors for appellants, *Burham & Co.*

Solicitors for respondent, *Harvey & Darley*, for *Weeding*, Kingston-on-Thames.

Prob. Div. & Adm. Div. Divorce. } Jan. 20.

STEDALL v. STEDALL. (a.)

Divorce—Variation of settlements—Policy payable at fixed date to husband if alive, and if not to wife—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

Where a wife had certain rights under a policy on her husband's life, and the marriage was afterwards dissolved by reason of her adultery,

The Court ordered her to settle her interests thereunder for the benefit of the petitioner and the children of the marriage.

Motion.

This was a motion to vary the registrar's report on a petition to vary settlements.

On the 25th of April, 1900, the husband obtained a decree *nisi* for the dissolution of his marriage, and on the 5th of November, 1900, that decree was made absolute.

There were two children of the marriage, the custody of whom was given to the petitioner.

In 1891 the petitioner had insured his life for £2,500, payable on the 12th of December, 1910, to the petitioner if alive, but if dead to the respondent, but if she were dead to the petitioner's executors, administrators, and assigns.

The petitioner's contention was that now that his marriage with the respondent was dissolved it was a hardship that he should continue to pay the premiums on the policy if the respondent notwithstanding the dissolution of the marriage had rights under the policy.

The insurance company were said to have given it as their opinion that if the policy was surrendered they would have to pay the wife, and they suggested that the wife should be got to assign her rights under it. This, however, she refused to do. The motion had been previously before the court when Gorell Barnes, J., adjourned the case, intimating that he did not think that the policy was a marriage settlement within the meaning of the Matrimonial Causes Acts. But he thought it first desirable that counsel's opinion should be taken as to whether or not the respondent had in fact rights under the policy.

The petitioner now moved the court to order the respondent to convey her interests thereunder, the order being asked for under section 45 of 20 & 21 Vict. c. 85.

Barnard, in support.

JEUNE, P., in giving judgment, said that he thought that the policy was certainly property belonging to the wife in reversion, and, moreover, it appeared to him that it might fall within section 5 of the Matrimonial Causes Act, 1859. It would, however, surely be a post-nuptial settlement. The court therefore thought that the wife ought to be ordered to settle her interest in the policy for the benefit of the petitioner and his children, and it further ordered that the matter should be referred to the conveyancing counsel to settle the deed. Judgment accordingly.

Solicitor, *J. T. Chapple.*

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). Dec. 16.

HANCOCK v. WATSON. (a.)

Will—Remoteness—Gift over—Splitting gift over—Cutting down absolute gift.

A testator, who died in 1852, *gave his residuary personal estate to trustees in trust for his wife (who died in* 1876) *for life, and after her death he allotted two-fifths to S. D., and he directed that the two-fifths so given should remain in trust for her during her life for her separate use, and after her death in trust for her children, who being sons should attain twenty-five, or being a daughter or daughters should attain twenty-one or marry under that age, and in default of any such issue should be divided among the children of his brother C.*

S. D. died in 1899 *without ever having any issue.*

Held, that the gift over on the death of S. D. without issue was void for remoteness, and that as the gift over failed, the original absolute gift took effect, and the two-fifths passed therefore to S. D.'s personal representatives.

Evers v. Challis, 7 *H. L. Cas.* 531, *distinguished.*

Decision of the Court of Appeal ([1901] 1 *Ch.* 482, 49 *W. R. Dig.* 203) *affirmed.*

Where you have an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity, or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be.

Appeal from an order of the Court of Appeal (Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.), affirming that of Byrne, J.

The facts are set out in Lord Davey's judgment.

Levett, K.C., and *Quin*, for the appellants.

Haldane, K.C., and *Mulligan, K.C.* (*Fawcus* with them), for the respondents other than the trustees.

P. S. Stokes, for the trustees.

THE HOUSE took time for consideration.

Dec. 16.—Lord DAVEY.—In this case Richard Hancock, by his will dated the 17th of June, 1850, gave the residue of his property to trustees upon trust to permit his wife (who died in November, 1876) to receive the income during her life for her separate use, and after her death upon trust to be divided into five equal portions, which he allotted in the manner following: To Susan Drake he gave two such portions, to his brother William one such portion, to his brother Charles one such portion, and to the sons of his late brother Sampson the remaining such portion. The will then proceeds as follows: "But it is my will and mind that the two-fifth portion allotted to the said Susan Drake shall remain in trust and that she be entitled to take only the interest and annual proceeds of the shares so bequeathed to her during her natural life, and for her sole and separate use independent of her present or any future husband, but without power of anticipation, and from and after her decease in trust for the benefit of any child or children born unto her the said Susan Drake by her present or any future husband upon his or their attaining the age of twenty-five years, if a son or sons, or if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever of these events may first happen, but in default of any such issue then and in that case the said two-fifths of my residuary estate and any accumulation of interest thereon shall go and be divided subject to the appointment of my wife among the children of my brother Charles, but if there be no such appointment then to be equally divided among such children payable if a son or sons upon their attaining the age of twenty-five years and if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever event may first happen."

Susan Drake died on the 26th of June, 1899, without ever having had any issue. The two-fifths of the testator's residuary estate allotted to her are now represented by a sum of £12,399 10s. Reduced Three per cent. Annuities.

The appellants are the children of the testator's brother Charles, and in the events which have happened they claim to be entitled to Susan Drake's two-fifths of the residuary estate under the gift over stated above. They are also next-of-kin of the testator, and if they fail on their first point they contend that the share in question is undisposed of.

It will be observed that the disposition under which the appellants claim is an executory limitation, to take effect in default of such issue as mentioned of Susan Drake—that is, her children, whether born before or after the testator's death, who shall attain the age of twenty-five years in the case of sons, and twenty-one years or be married in the case of daughters. This event may, of course, happen beyond the limits allowed by law. An executory devise is an infringement on the rules of the common law, and the conditions for its validity are well settled. So far back as the year 1787 Lord Kenyon, then Master of the Rolls, thus expresses himself in *Jee* v. *Audley*, 1 Cox Ch. Cas. 324: "The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years or nine or ten months afterwards. This has been sanctioned by the opinion of judges at all times, from the time of the Duke of Norfolk's case to the present: it has grown reverend by age, and is not now to be broken in upon." And in advising this House in *Dungannon* (*Lord*) v. *Smith*, 12 Cl. & Fin. 546, at p. 563, a case to which I shall refer again, Cresswell, J., stated the rule thus: "It is a general rule, too firmly established to be controverted, that an executory devise to be valid must vest, if at all, within a life or lives in being and twenty-one years after; it is not sufficient that it may vest within that period; it must be good in its creation; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years, and the period allowed for gestation, it is not valid, and subsequent events cannot make it so."

All this is not disputed by the appellants, and it would therefore seem that the gift over to the children of Charles in the will before the House must *primâ facie* be held void. But the appellants contend that they are entitled to look at the events which happened and to construe the event on which the gift over is to take effect as if it were two events. They say that the testator's words rightly construed is: "If Susan Drake shall have no issue, or if her children die without having fulfilled the prescribed conditions for the vesting of the property in them." In the first case they say the gift is good, and in the second only is it void.

The first observation that occurs to one is that this is not the language of the will. Counsel for the respondent pointed out grammatical difficulties in the words in that way. If one were at liberty to alter the language of the will in the manner

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

suggested, I really do not see why one should not split the event into as many contingencies as can be pointed out in which the gift over would take effect within the allowed limits. For instance, why not divide the event in the present case into at least three: First, if Susan has no children; secondly, if her children all die under twenty-one; or thirdly, if they die under twenty-five? And there may be other contingencies into which the event could be broken up. In that case what becomes of the rule that you are not to look at the event which actually happens for determining the validity of the gift? I again quote Lord Kenyon in *Jee* v. *Audley*: "Another thing pressed upon me," he says, "is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it is good in its creation; and if it were not, I cannot make it so."

But the same argument which has been pressed upon this House was addressed to the Court of Common Pleas more than a hundred years ago and overruled. In the case of *Proctor* v. *Bath and Wells* (*Bishop*), 2 H. Bl. 358, decided in the year 1794, an advowson was devised to the first or other son of Thomas Proctor that should be bred a clergyman and be in holy orders, but in case Proctor should have no such son, to one Moore in fee. There being no particular estate to support the devise as a contingent remainder, it could take effect only as an executory devise. Proctor died without having had a son, and Moore thereupon claimed to present. It was argued that the limitations in the will were alternate: if Proctor should have a son in holy orders Moore was excluded, and if he had no son he could take. It was replied that in truth there was but one contingency on which the devise to Moore was limited, and the case was distinguished from a case of *Longhead* v. *Phelps*, 2 W. Bl. 704, where two contingencies were expressed in the disjunctive, the first of which was good. The Court of Common Pleas was very clearly of opinion that the first devise to the son of Thomas Proctor was void from the uncertainty when such a son, if he had any, might take orders, and that the devise over to Moore, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided.

Again, in *Dungannon* (*Lord*) v. *Smith* a testator bequeathed leaseholds for years to trustees on trust for B. for life, and after his death to permit such person who for the time being would take by descent as heir male of the body of B., to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person so attaining that age. It will be observed that there was no gift of the *corpus* of the estate except in the direction to convey, and the event upon which that was to take place might exceed the limits allowed by law. At the death of B. his son and heir had attained twenty-one. It was argued on his behalf that you might split the gift into two parts, and construe it as a direction to convey to the first heir male on his attaining twenty-one, which would be good, and in default of his doing so to the successive heirs male. This argument was in principle and substance precisely that put forward by the appellant in the present case. I will quote only the opinion of Maule, J., one of the learned judges who advised the House. He says: "With respect to this argument it may be observed that the words of the testator are clear and unambiguous: there is no difficulty in dealing with them as they stand in the will, unless it be sought to evade the rule against perpetuity. There is no such rule of construction as that any words which point out the same course of devolution" (I pause to add, "or describe the same events") "as those used by the testator may, in construing a will, be substituted for those which he has used,—a proposition which seems to be assumed in the argument in question. Such a rule would be manifestly inconsistent with the established law, that a gift to take effect on an event which may happen or may not happen within the legal limit is too remote, such a gift being always capable (consistently with the same order of devolution) of being divided into two gifts, one necessarily to take effect, if at all, within the legal time, and the other afterwards." I will not delay by quoting what was said by the noble and learned lords to the same effect in giving judgment, because I do not find the point more clearly put than it was by Maule, J.

The appellants, however, rely on another case in this House—*Evers* v. *Challis*, 7 H. L. Cas. 531. On a superficial view of this case it appears to lend some support to their argument, but on a careful examination it will be found to have been decided on a totally different point, which has no application to the present case. The will in *Evers* v. *Challis* contained a very complicated series of devises of a freehold estate. It is sufficient for the present purpose to say that there was a devise to the testator's daughter Ann for life, with remainder to her children, if sons living to attain twenty-three, and if daughters living to attain twenty-one, with a gift over under which the appellant claimed, Ann having died childless. As an executory devise, the gift over was admittedly too remote, but it was argued that it took effect immediately on Ann's death as a contingent remainder. It is a familiar principle of English real property law that if a devise can take effect as a remainder it shall do so, and it was accordingly held in this House that the gift over, in the event which had happened, operated and took effect as a contingent remainder, and the question of remoteness therefore did not affect it. That this was the point decided is clear from the opinion of the judges who were called in to assist this House, delivered by Wightman, J., as well as from the judgments delivered by the noble and learned lords who heard the case. Wightman, J., said: "No case or authority has been cited to show that when a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may not be divided, though included in one expression; and our opinion does not at all conflict with the authority of the cases of *Proctor* v. *Bath and Wells* (*Bishop*) and *Jee* v. *Audley*, in neither of which cases was it possible for the limitation over to operate as a remainder." Lord Cranworth said: "I think that the gift over to the children of John and Sarah on the death of Ann without issue in 1847 took effect as a contingent remainder and not as an executory devise, and so was good; because when the particular estate determined, the contingency on which the remainder was to take effect had happened." And he supports his opinion by reference to a case of *Gulliver* v. *Wickett*, 1 Wils. 105, which he discusses at some length. Lord Brougham said: "As to the cases, of which there are several, I need not go into them. One of them is *Proctor* v. *Bath and Wells* (*Bishop*). In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise." On these grounds this House reversed the decision of the Exchequer Chamber, and restored that of the Queen's Bench. It is apparent that the authority of *Proctor* v. *Bath and Wells* (*Bishop*) is untouched by anything decided or said in *Evers* v. *Challis*.

I am therefore of opinion that the appellant fails on

his first point. Some minds may be disposed to sympathize with Sir William Grant when he says, in *Leake* v. *Robinson*, 2 Mer. 363, "Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained." But the law is what it is.

The appellant's second point is that the two-fifths allotted to Susan Drake, on failure of the gift over goes to the next-of-kin of the testator, and not to Susan's representatives, as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin, as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney*, 1 Mac. & G. 551, if the terms of the gift are ambiguous you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Drake was in terms an absolute gift to her. The testator uses the words "I give," and speaks of the shares subsequently as "allotted" to her. Counsel for the appellants contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said; he has directed that during her life she shall have only the income of her share for her separate use without power of anticipation. That is quite consistent with a power to dispose of the capital after her death so far as it should not be exhausted by the trusts declared of it, and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only.

I am of opinion the appeal should be dismissed with costs, and I move accordingly.

Lord SHAND.—I have had an opportunity of fully considering in print the opinion of Lord Davey, and I concur in the judgment and in all that his lordship has said. I shall only add that on the points raised in the appellants' argument the authorities to which my noble and learned friend has referred seem to me to be conclusive against the appellants' argument in all its bearings.

Lord BRAMPTON and Lord ROBERTSON concurred.

Earl of HALSBURY, L.C.—I concur; and I have only to say that I think that on both points the matters argued by this House are so fully covered by the authorities that I do not think it necessary to add anything to what Lord Davey has said.

Order appealed from affirmed, and appeal dismissed.

Solicitors for the appellants, *Wadeson & Malleson.*

Solicitors for the respondents, *Bone & Heppell.*

Court of Appeal.

Appeal.
(Lord Alverstone, L.C.J., Collins, M.R., and Mathew, L.J.) — Jan. 23, 24; Feb. 8.

HOLDEN (LIMITED) v. BOSTOCK & CO. (LIMITED). (a.)

Damages—Measure of—Sale of goods—Contract to supply invert sugar for brewing—Sugar contaminated with poisonous matter—Beer destroyed.

The measure of damages, apart from special circumstances, which the manufacturer of an article that has had to be destroyed by the fault of another is entitled to recover, is the price which he could have sold it for on the day that it had to be destroyed.

Held, therefore, that although the plaintiffs were brewers they were entitled to recover the full selling value of the beer in their cellars, which had by the fault of the defendants to be thrown away, and not merely such a sum as they themselves must have expended in order to brew an equal amount of beer of the same quality to replace it.

Appeal by the defendants asking that the damages entered against them at the trial of the action, which took place at the Manchester Assizes in February, 1901, before Bigham, J., without a jury, might be reduced by £350.

The facts were these: The plaintiffs, Messrs. Richard Holden (Limited), were a firm of brewers at Blackburn, and they had purchased from the defendants, Bostock & Co., sugar refiners at Liverpool, invert sugar, an article which until lately was very largely used all over the country in the manufacture of beer. A parcel of this invert sugar turned out to contain arsenic, having been made with impure sulphuric acid. The fact was not discovered until after the plaintiffs had used it, and consequently a very large quantity of beer had to be thrown away. The action was brought claiming damages for the beer thus spoiled and for other expenses and loss of business; the damages were set out under various heads in the statement of claim and in the particulars delivered by the plaintiffs. At the trial Bigham, J., entered judgment for the plaintiffs with damages, amounting in the aggregate to £1,980.

The defendants appealed, and contended that two of the heads of damages had been improperly allowed, and they asked by this appeal that as regarded these two items judgment should be entered for them. The first was a sum of £50 which the plaintiffs had paid away after the fact had been discovered that the beer was contaminated with arsenic, for printing and advertising that all such beer had been thrown away, and that in future they would not brew with invert sugar at all. But the real ground of the appeal was to obtain a ruling as to the principle on which brewers seeking damages for beer which they had been compelled to destroy were to be compensated, it being stated during the argument that several other actions by other brewers who had been supplied with bad invert sugar had been brought against the defendants, but stood over pending the result of this appeal.

It was not disputed by the defendants that where the brewer in order to at once supply beer to take the place of beer which had to be thrown away, had purchased on the market, the defendants were liable to pay him the full price that such beer had cost.

The plaintiffs had in this case purchased a certain quantity of beer in order to be able at once to go on

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

supplying customers in their tap-room, and as to that item of damage there was no appeal.

At the trial, however, Bigham, J., had allowed the plaintiffs in respect of all the beer destroyed, which had not been replaced by the purchase mentioned above, such a sum as would have enabled them to replace that amount also by purchase in the market—in short, the full stock or selling value of the beer.

The defendants contended that this was calculated on a wrong basis, because the plaintiffs, being the manufacturers of the article lost, were only entitled to be repaid such a sum as they themselves would have to expend to rebrew that quantity of beer.

During the trial Mr. Fletcher Moulton, K.C., who appeared for the plaintiffs, made an admission to the effect that the difference between the net cost of the beer to the brewers and the price they would have sold the same quantity for would in this instance have been £300.

The defendants, for the purposes of this appeal, accepted that figure, and said this head of damage should be reduced by that amount.

The plaintiffs said that if the judgment was so varied, and only the net cost of production allowed, the brewer would have to brew twice for one profit, and assuming that it took a month to brew 28,000 gallons, one month of the life of the brewery was thrown away, for they would have to brew twice for one profit.

On the other hand, the defendants said if the actual selling price were allowed to the brewer for the beer destroyed he would make a profit twice over.

To this argument the plaintiffs replied: "If the net value of the beer destroyed was £1,000 to the brewer, and that sum alone were paid him, he could not buy on the market for £1,000 beer which he could sell for £1,300, nor could he sell the cheque for that sum. Therefore, as defendants cannot replace the beer in the plaintiffs' vats, which, when sold, would fetch £1,300, the payment of £1,000 did not truly represent the loss the brewer had sustained."

Horridge, K.C., and *Greer*, for the defendants.

Fletcher Moulton, K.C., Shee, K.C., and *E. Sutton*, for the plaintiffs.

Cur. adv. vult.

COLLINS, M.R., read the following judgment, which had been prepared by the Lord Chief Justice, and was the judgment of the court: This is an appeal from a judgment of Bigham, J., in a case heard before him without a jury at the Manchester Assizes in the month of February, 1901. The action was brought by the plaintiffs, who are brewers, against the defendants in respect of the supply by the defendants to the plaintiffs of sugar for use in the manufacture of beer, which was found to contain poisonous matter, in consequence of which large quantities of beer, which had been previously brewed by the plaintiffs, and in which the sugar supplied by the defendants had been used, had to be destroyed. The only questions argued upon the appeal were whether the plaintiffs were entitled to recover as part of their damages two items—(1) £50 cost of printing and advertising notices as to the change of brewing materials; (2) a sum of £300 being the amount of profits which the plaintiffs would have realized by the sale of the beer which they had in stock and which had to be thrown away.

As regards the item of £50, we are clearly of opinion that it was properly included. The general principle is that the plaintiff is entitled to any damages which, in the opinion of the jury, were the natural consequences of the breach of contract. The measure of damages must in each case depend upon the facts of the case. No damages for general loss of business were given, but we think that in such a trade as the plaintiffs on the happening of such an occurrence—namely, their having sent out to various customers beer which had to be destroyed—to advertise so as to minimize any possible loss of business, was a reasonable step, the cost of which, having been *bonâ fide* incurred by the plaintiffs with that object, they are entitled to recover from the defendants.

We are also of opinion that the judgment of Bigham, J., upon the other point—namely, the £300—is right, and that the plaintiffs are entitled to recover that amount as representing the measure of damage caused to the plaintiffs by the breach of contract of the defendants. The facts which gave rise to the question depend upon certain admissions made at the trial. It was ultimately agreed that the value of the beer destroyed in the hands of the plaintiffs for the purpose of sale was the sum of £1,800, of which the cost of production of the beer was agreed to be £1,500, and £300 the profits which the plaintiffs would have made on sale. It was contended on behalf of the defendants that inasmuch as the beer to which these figures relate, and which was destroyed, had not been sold, but was in stock in the plaintiffs' brewery at the time of the discovery of its poisonous character, plaintiffs' damage must be limited to £1,500, on the ground that that was the cost to them of replacing the beer, and they would earn £300 on its sale. It was contended on behalf of the plaintiffs that *primâ facie*, under ordinary circumstances, the damage to the plaintiffs was the value in the market of the beer which would have to be purchased to replace that rendered useless by the defendants' breach of contract. We are of opinion, upon the facts proved before the learned judge, that the contention of the plaintiffs is right. The measure of damages to a plaintiff under such circumstances is not the mere money which he would have to spend in order to reproduce the spoiled article, but the value to him of that article, as he possessed it, on the day when it had to be destroyed, and in the absence of special circumstances, of which there is no evidence in this case, the ordinary measure of that damage is the market price at which it could be replaced, or, in other words, the market value of the beer in his cellars. Mr. Horridge, for the defendants, contended that although in many cases that was the true measure, and had in fact been recognized as being the true measure in this case—as regards beer which had to be purchased to supply the place of the plaintiffs' beer already delivered which had to be destroyed—yet that, as the plaintiffs were the makers of the article, they were only entitled to claim such sum as damages as it would cost them to replace the beer in their cellars, including, if necessary, items for interest on capital, use of brewery, &c. We do not express any opinion as to whether under the special circumstances of some particular case, plaintiffs or defendants would be entitled to put forward such a measure of damages, which might be either greater or less than the market price, according to the particular facts of any individual case, but we are clearly of opinion that in the absence of any such special circumstances, the ordinary and proper measure of damages is the market price of the article lost on the day on which it had to be replaced. In this case, according to the learned judge's note, which is confirmed by his own recollection, the £1,500 represented the bare cost of replacing the beer, and the £300 the difference between the cost price and its value to the plaintiffs. Under these circumstances we are of opinion that the appeal on this point fails also, and that the appeal should be dismissed, with costs.

Solicitors, *Field, Roscoe, & Co.; Woodcock, Ryland, & Parker.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) Jan. 31.

SAUNDERS v. WHITE.
BIGGS, *Claimant.* (a.)

Bill of sale—Statutory form—Two grantors—Chattels belonging to each grantor in severalty—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Schedule.*

A bill of sale given by two grantors of goods of which they are not joint owners, but some of which belong to one of them and the rest to the other, is void under section 9 *of the Bills of Sale Act*, 1882, *as not being in accordance with the form in the schedule.*

Judgment of the Divisional Court (49 *W. R.* 127, [1901] 1 *K. B.* 70) *affirmed.*

Appeal from a judgment of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy, J.) on an appeal from the decision of the judge of the Wandsworth County Court on an interpleader issue: 49 W. R. 127, [1901] 1 K. B. 70.

The interpleader issue was directed to be tried between the execution creditor of Joseph William White and Samuel Thomas Biggs, who claimed as the holder of a bill of sale given by White and his wife.

The bill of sale in question was dated the 3rd of May, 1900, and was made by Joseph William White, builder, and Emily, his wife, as grantors, to Samuel Thomas Biggs, a solicitor, as grantee, in consideration of the sum of £80 lent by Biggs to the two grantors. The security given was an assignment of furniture, some of which belonged to the husband and the remainder to the wife. The bill of sale witnessed that the grantors "do, and each of them doth," grant the furniture in question. It did not specify to which of them the various articles respectively belonged. It contained covenants by the husband and wife, and each of them, that they would punctually pay the principal together with interest by four equal monthly payments of £20 each. It also contained a proviso, in accordance with the form in the Bills of Sale Act of 1882, that the chattels should not be liable to seizure for any cause other than those specified in section 7.

The county court judge decided in favour of the execution creditor on the ground, *inter alia*, that the bill of sale was void as not being in accordance with the form annexed to the statute.

The Divisional Court affirmed the decision of the county court judge.

The claimant appealed.

Mattinson, K.C., and *Firminger*, for the claimant.—The question is whether a bill of sale made by two grantors is necessarily void by section 9 of the Bills of Sale Act, 1882, as being not in accordance with the form in the schedule. The Divisional Court have held that it is void. But this bill of sale is in accordance with the form. The form describes the grantor as A. B. in the singular, but by the Interpretation Act, 1889, the singular includes the plural. It is immaterial that the goods in this case are not the joint property of the two grantors. On the face of it the bill of sale is a joint bill, and was given to secure one debt. There is no reason why such a bill of sale should not be allowed to be good. No one is deceived, and where a husband and wife desire to borrow money on the security of their furniture, and there is a doubt as to which of them is the owner of some of the articles, this is the only way in which the transaction can be carried out.

They cited *Heseltine* v. *Simmons*, 41 W. R. 67, [1892] 2 Q. B. 547; *Ex parte Popplewell*, 31 W. R. 35, 21 Ch. D. 73; *Ex parte Barnett, In re Tamplin & Son*, 38 W. R. 351, 62 L. T. Rep. 264; *Ex parte Parsons, In re Townsend*, 34 W. R. 329, 16 Q. B. D. 532.

Duke, K.C., and *J. R. Atkin*, for the execution creditor.—This is a document containing two several bills of sale, a bill of sale by the husband of his several goods, and a bill of sale by the wife of her several goods. Such a combination of two bills of sale cannot be brought within the form in the schedule. There can be only one entity of a grantor, though possibly that entity may consist of two or more individuals. In reading the form the words "the grantor" may be read for "A. B." No doubt by the Interpretation Act "grantor" may be read as meaning "grantor or grantors." But it cannot be read as meaning "grantor or grantors or either of the grantors." The form in the schedule relates to one transaction—*i.e.*, to a dealing with one set of goods whether by one person or by a group of persons, to secure one debt.

They cited *Kelly* v. *Kellond*, 36 W. R. 363, 20 Q. B. D. 569, *sub. nom. Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506; *Melville* v. *Stringer*, 32 W. R. 890, 13 Q. B. D. 392.

Cur. adv. vult.

Jan. 31.—COLLINS, M.R., read the following judgment: The question on this appeal is as to the validity of a bill of sale. The Divisional Court, affirming the decision of the county court judge, have held that it was bad under the Bills of Sale Act of 1882. The question arose upon an interpleader issue between the grantee under the bill of sale and an execution creditor of one of the grantors. The bill of sale purports to be made between Joseph William White and Emily White, his wife, of the one part, and Samuel Thomas Biggs of the other part, whereby it is witnessed that in consideration of the sum of £80 then paid to Joseph William White and Emily White by the said Samuel Thomas Biggs, the receipt of which Joseph William White and Emily White do, and each of them doth, hereby acknowledge, they, the said Joseph William White and Emily White, do, and each of them doth hereby assign to Samuel Thomas Biggs, his executors, administrators, and assigns, all and singular the several chattels and things, specifically described in the schedule hereto annexed, by way of security for payment of £80 and interest thereon at the rate of 15 per cent. per annum; and the said Joseph William White and Emily White do, and each of them doth, further agree and declare that they will duly pay to the said Samuel Thomas Biggs the principal sum aforesaid, together with the interest then due, by four equal monthly payments of £20 each on days therein named and do, and each of them doth, agree with Samuel Thomas Biggs to insure and produce the policy and receipts. Then follow covenants as to which no question arises. Then follows the schedule, in which a number of articles of furniture are specifically described. The facts, as found by the county court judge, are that none of the chattels named were jointly owned by the two grantors, but some of them belonged to the husband and some to the wife. There was no evidence of any agreement between the grantors altering the property as between themselves. Indeed, the bill was originally prepared by the grantee on the footing that the loan was made to the husband and that the goods belonged to him solely, and it was not until he went to prepare the schedule that he ascertained that some only belonged to the husband

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

and the rest to the wife. He then altered the bill to its present form. The schedule, though it named the goods, did not distinguish which of them belonged to the husband and which of them to the wife; the result is that this bill of sale operates, if at all, as two separate grants of separate portions of furniture, which are not distinguished as belonging to either of the grantors. The court below have held that such an arrangement cannot be brought into the form prescribed by the Act of 1882, and is, therefore, void under section 9. They also held that it was bad under section 5 by reason of the fact that the husband was not the true owner of the wife's furniture, nor the wife of the husband's at the time of the grant, and that, as to these chattels respectively the bill of sale was void against either of them.

I am of opinion that the decision of the Divisional Court was right. The transaction which it was sought to carry out by this bill of sale cannot stand apart from the document which purports to describe it—viz., the bill of sale. Indeed, it was not contended that it could be supported *aliunde*: see per Bowen, L.J., in *Ex parte Hubbard, In re Hardwick*, 35 W. R. 2, 17 Q. B. D. 690. It seems to me, therefore, that the question is —Can such a transaction, if stated according to the truth, be brought within the statutory form, that is, can it be framed in accordance with the form in the schedule according to the interpretation put on those words by the decisions in this court and in the House of Lords? See *Ex parte Stanford, In re Barber*, 34 W. R. 507, 17 Q. B. D. 259, and *Thomas* v. *Kelly* In *Ex parte Parsons, In re Townsend*, Lord Esher says: "If they (the Legislature) have forbidden every such document except one which is made in a particular form, we are bound to give to their legislation the ordinary meaning of language. It seems to me that the words of section 9 strike at all documents which give a security upon goods for the payment of money, and I take it the Legislature intended to say—If you cannot make your agreement by a document in the form specified in the schedule, you shall not be able to make it by any document at all." And it was there held that, the transaction being one which, from its nature, it was impossible to carry out in the statutory form, the document describing it was void as substantially deviating from the prescribed form. In *Thomas* v. *Kelly* the present Lord Chancellor says: "I think that section 9 must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate." And further on he says: "The form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed." The judgment of Lord Fitzgerald seems to me to be on the same lines, and though Lord Macnaghten says of section 9, "This section seems to me to deal with form and form only," I do not think he meant to lay down anything inconsistent with the passages I have cited from the judgment of the Lord Chancellor. Indeed, it seems to me to follow from the fact that the Legislature has prescribed a particular form in which alone a valid bill of sale can be shaped that it thereby excluded from documentary validity all transactions which, if described according to the true facts could not be brought substantially within the form. I say documentary validity, for, as pointed out particularly by Bowen and Fry, L.JJ., in many cases, a transaction may stand apart from the document which embodies it. But where it has to seek support from the document it must stand or fall with it. I cannot, therefore, accept the argument that, if a document be so framed as to make it possible to construe it in such a way as not to be incompatible with the form, it cannot be impeached, although if construed as describing the real transaction it would be outside the form. In this case the document can be construed in accordance with the facts only by reading the joint words of grant as superfluous and confining the effect of the grant to two separate grants by the husband of his chattels and by the wife of hers. I do not think that it would be possible to claim protection for a transaction incapable of being described according to the facts in the statutory form by misdescribing it in the form so as to bring it apparently within the schedule, and I think the authorities I have cited are conclusive to this effect: see also per Fry, L.J., in *Beckett* v. *Tower Assets Co.*, 39 W. R. 438, [1891] 1 Q. B. 638, at p. 644. The learned Lord Justice there says: "Upon principle—that is to say, on the plain construction of the statute—it seems to me clear that, in considering whether the Bills of Sale Act applies, the court not only may but must inquire into the real nature of the transaction. . . . Again, the real truth of the transaction must be applied to the construction of documents for the purposes of the Act, and if a document construed according to the true nature of the transaction be not within the Act, then it will not be protected by its form." Does, then, the schedule contemplate and cover two separate grants by two grantors of separate sets of chattels not so described as to be capable of being referred specifically to either grant? If it covers two grants, why not three or more? And where is the line to be drawn, and what is the object of the provision for specific description of the chattels if in such a case the bill and the schedule together do not show to which section of the things granted, each grant is applicable? It seems to me that to hold that two or more separate grants could be brought within the terms of the schedule would involve such an extension of the symbol A. B., which is used to describe the grantor in the schedule, as to involve a departure from the statutory form in something which, in the language of Lord Macnaghten in *Thomas* v. *Kelly*, "is a characteristic of that form," and to introduce inadmissible complications. I think the reasoning of Bowen, L.J., in *Melville* v. *Stringer* covers this case: "If one examines the form a substantial part of it is, as it seems to me, that property must be assigned to the person who finds the money, and that to such person repayment is to be made of the money borrowed; and therefore I do not think that a bill of sale is within the Act if the money is lent by one person and made repayable to another person, or if the property is assigned by it to one person and the repayment is to be to another, nor if the assignment of the property is to one person to secure repayment to another. Mr. French has contended that that construction would exclude from the Act the case of a trustee to whom property has been assigned for securing the repayment of money for those beneficially interested therein. My answer is that that is an illustration of what is struck at by this section 9, which section is against any substantial variation of the form. If that is what that section means, can it be said that an assignment to parties who are not joint creditors when the repayment is not to be of the sum secured to those creditors jointly, but only of portions of such sum to each of them separately, is in accordance with the form in the schedule? So far from it being such, I think it is inconsistent with that form, and is therefore invalid." If the form were capable of being extended so as to cover several separate grants by separate grantors and covenants incident thereto, I do not see why it could not be extended to cover all the transactions negatived

as admissible by Bowen, L.J., in the passage above cited. I think it is clear on the face of the schedule that only one grant is contemplated, though it may be, but it is not necessary to decide it, that the grant might be made by two or more joint owners, and I think the same complication in the case of several separate grantees which was held to avoid the bill of sale in *Melville* v. *Stringer*, would arise in the case of several separate grantors, and, for the reasons pointed out by all the judges in that case be, on that ground outside the schedule. There would in point of fact be two separate bills of sale in one document, and the subject-matters of the bill would be undefined by the instrument itself so as to be incapable of being specifically referred to either of them. This would surely be to sin against that simplicity and certainty which is said to have been the main object of the Legislature: see per Lord Esher, M.R., in *Melville* v. *Stringer*, and per Lord Fitzgerald in *Thomas* v. *Kelly*. I find nothing in *Heseltine* v. *Simmons* inconsistent with the views above stated. There the objection was treated as going to the truth of the consideration only, which is the subject of a special section. The larger question of whether it would have been possible to state the true consideration without departing from the statutory form was not raised or discussed. It was decided after *Melville* v. *Stringer* and *Ex parte Parsons*, to both of which cases Lord Esher, who was a member of the court that decided it, had been a party. It cannot, therefore, I think, have been meant to decide anything inconsistent with the principles laid down in those cases. As in my opinion the bill of sale is bad on the grounds above stated, it is not necessary to consider the point taken under section 5.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the claimant, *Biggs, Roche, Sawyer, & Co.*

Solicitors for the execution creditor, *Willett & Sandford.*

High Court of Justice.

Chan. Div. } Dec. 18, 19.
Joyce, J. }

In re SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY'S POLICY. (*a*)

Insurance—Life—Policy taken out in name of a stranger—Intention—Resulting trust.

A person took out a policy of insurance on his own life "for the behoof of" his wife's sister. After his wife's death he went through the form of marriage with her. She predeceased him. He always held the policy, and paid the premiums himself both before and after her death.

Held, that though her legal personal representatives were the persons entitled to receive the money at law and give a receipt for it, in equity the money belonged to the legal personal representatives of the person who had taken out the policy and paid the premiums, there being no proof that it was intended for her benefit.

Summons taken out by the executors of William Sanderson to determine to whom should be paid a certain sum of £790 17s. 4d. paid into court.

In 1850 Sanderson effected a policy of insurance with the Scottish Equitable Life Assurance Society for the sum of £400 on his own life "for the behoof of Miss Harriott Stiles." The policy provided that "in consideration of the premises the said William Sanderson had been duly admitted a member of the said society and the said Harriott Stiles, and her executors, administrators, and assigns, shall be certified to be entitled to receive out of the stock and funds of the society at the end of six months after the decease of the said William Sanderson the sum of £400, but which sum shall not be exigible until three months after proof of the death of the assured." The policy continued: "And it is further specifically declared and agreed that the sum or sums to become due and payable as therein mentioned shall be payable to the executors, administrators, and assigns of the said assured."

Miss Harriott Stiles was sister of Sanderson's wife.

In 1852, after the death of his wife, Sanderson went through the form of marriage with her. He, however, retained the policy in his own possession and paid the premiums thereon up to the time of his death. Miss Stiles died intestate on the 21st of September, 1890. Sanderson died in September, 1900. The question having arisen as to who was entitled to receive the insurance money, the society paid the amount due under the policy into court, and this summons was taken out by Sanderson's executors for the determination of the court whether this money belonged to them or to the legal personal representatives of Miss Stiles.

G. Lawrence, for the executors.—Apart from the statement in the policy that it was taken out "for behoof of Miss Harriott Stiles," there is no evidence to show that she is entitled to the beneficial interest in the policy money. If the legal right is in the defendant he is trustee of it for the plaintiff. In *In re Richardson, Weston* v. *Richardson*, 47 L. T. Rep. 514, 31 W. R. Dig. 110, where a policy was taken out by a father on his own life in his daughter's name, and the father paid the premiums and retained the policy in his possession, Kay, J., held the daughter entitled to the benefit on the presumption that it was an advancement. The burden is on the defendant to prove that he is beneficially entitled: *Pfleger* v. *Browne*, 28 Beav. 391; *Beecher* v. *Major*, 13 W. R. 853, 2 Dr. & Sm. 431.

R. M. Pattison, for the defendant.—*Beecher* v. *Major* is really in my favour, as here there is a clearly expressed declaration in the policy itself that it is "for the behoof of Miss Harriott Stiles." It is a complete gift, the money is to be paid to her, her executors, administrators, and assigns. This is a notice to the insurance company on the face of the policy itself. It amounts to a trust in her favour: *Milroy* v. *Lord*, 4 De G. F. & J. 264, 11 W. R. Ch. Dig. 120.

Lawrence, in reply.—The policy may be void as between Sanderson's executors and the company, but if the company do not take advantage of the illegality it has to be adjudicated on as if it were valid: *Worthington* v. *Curtis*, 24 W. R. 228, 1 Ch. D. 419. [JOYCE, J., referred to *Mortimer* v. *Davies*, cited in *Rider* v. *Kidder*, 10 Ves. 360.]

JOYCE, J.—In the leading case of *Dyer* v. *Dyer*, 1 Watk. Copy. 216 and 2 Cox Ch. 93, Eyre, L.C.B., in giving his judgment, says: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly or in the name of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advanced the purchase-

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

money"; and although the judgment goes only to real estate or to leasehold, I think the law is correctly laid down in Lewin on Trusts, p. 175, where it is stated "Not only real estate but personalty also is governed by these principles; as if a man take a bond or purchase an annuity, stock, or other chattel interest in the name of a stranger, equitable ownership results to the person from whom the consideration moved."

The case referred to with reference to a bond is the case of *Ebrand* v. *Dancer*, 2 Ch. Cas. 26, where a grandfather had taken a bond in the name of his grandchildren, their father being dead. The Lord Chancellor said: "There is a difference in the case where the father is dead and where he is alive; for where the father is dead the grandchildren are in the immediate care of grandfather"; in other words, it means that if the grandfather in that case had not been *in loco parentis* to the grandchildren in whose name the bond had been taken out, then they would have been trustees for the grandfather, who took the bond.

Then there is the case of *Rider* v. *Kidder*. There John Rider purchased Consolidated 3 per cent. Annuities, and transferred the stock into the joint names of himself and the defendant Annie Kidder, and Sir Samuel Romilly in his argument in that case cites *Mortimer* v. *Davies*, and says: "In *Mortimer* v. *Davies*, a late case at the Rolls, a man living in this way, but not married, purchased an annuity in the name of a woman with whom he cohabited. It appeared the purchase-money was his, and no consideration passed from her. She insisted that it was intended as a provision for her, but was held to be a trustee." Then that is again mentioned by Sir Samuel in his reply. He says: "In *Mortimer* v. *Davies* there were no circumstances. Upon the dry point alone that the defendant cannot produce evidence of an intention to make a provision for her this plaintiff is entitled"; and it appears from 10 Ves. (p. 360) and 12 Ves. 202, that in this particular case of *Rider* v. *Kidder* the annuities were directed to be re-transferred. Lord Eldon says, 10 Ves., at p. 366: "If the case at the Rolls was purely this, that A. bought an annuity in the name of B., A. paying for it, and B. had no proof that it was meant as a provision for her, in this court the fact of the advancement of the purchase-money as between these persons, standing in no relation to each other that would meet the presumption, raises a trust in the person vested with the interest for the benefit of the person who paid the money." And later on he says: "If, therefore, this case depended upon the mere naked circumstance of the purchase of stock in both their names, and he had died immediately without any dealing or transaction upon it, I should have thought the defendant would have been a trustee for his personal representative, as she would have been for himself." And Lord Romilly puts it quite generally in the case of *Garrick* v. *Taylor*, 9 W. R. 181, 29 Beav. 79, which was affirmed in the Court of Appeal. He says: "If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money unless the parties stand in the relation of parent and child."

Now, this case is the simple one of a policy taken out by Mr. Sanderson a great many years ago, in which the name of Miss Stiles appears as the person to whom the money is to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid, and were paid for many years after her death, by the person who took out the policy. That really is a case of taking the policy out in the name of another, that other person being a sister of his wife, and therefore not standing in the relation to him that would "meet the presumption," as Lord Eldon expressed it. It comes, really, to a case of a purchase by one in the name of another with no other circumstances at all proved. Therefore, in my opinion, although the legal personal representative of the lady in this case would be the person entitled to receive the money at law and to give a receipt for it, in equity the money belongs to the legal personal representatives of Mr. Sanderson, who took out the policy.

Solicitors, *Sole, Turner, & Knight*, for *Palmer, Wardley, & Barton*, Tonbridge.

K. B. Div. (Phillimore, J.) — Jan. 15.

Attorney-General v. The Mayor, Aldermen, and Citizens of the City of Liverpool. (a.)

Inland revenue—Stamp duty—Loan capital—Issue of stock—Date of issue—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

The Finance Act, 1899 (*which came into operation on the 20th of June*, 1899), *by section* 8, *enacts that where any local authority, corporation, company, or body of persons propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue, and every such statement shall be charged with an* ad valorem *stamp duty.*

Held, that by the time scrip certificates are issued to allottees the loan capital is issued within the meaning of section 8, *and therefore the statement should be delivered to the Inland Revenue Commissioners before scrip certificates are issued.*

Held, also, that where scrip certificates in respect of a loan to a corporation were issued to allottees before the 20th of June, 1899, *although the payment of the final instalment in respect of the loan was not due or paid until after the 20th of June*, 1899, *section* 8 *of the Act had no application.*

Special case.

Information on behalf of the Crown to recover duty under section 8 of the Finance Act, 1899, in respect of the issue of certain loan capital by the defendants.

By the Liverpool Corporation Loans Act, 1894, as amended by the Liverpool Corporation Loans Act, 1897, the mayor, aldermen, and citizens of the city of Liverpool were empowered to issue stock upon the terms and subject to the conditions and provisions contained in the said Acts.

By a resolution of the council of the city of Liverpool, duly passed in accordance with the said Acts on the 5th day of April, 1899, it was resolved that under the authority, and subject to the provisions of the said Acts, the corporation, acting by the council, did thereby in exercise of their powers create stock to be called the Liverpool Corporation 2½ per cent. Redeemable Stock.

The amount and terms and manner of the issue appear from the prospectus issued on the 8th of April, 1899, by the Bank of England on behalf of the Liverpool Corporation inviting tenders for the said stock.

The material portion of the prospectus is as follows: "The Governor and Company of the Bank of England give notice that . . . they are authorized to

(a.) Reported by E. G. Stillwell, Esq., Barrister-at-Law.

receive, on Thursday, the 13th of April, 1899, tenders for £1,000,000 of Liverpool Corporation Stock bearing interest at £2 10s. per cent. per annum, payable half-yearly at the Bank of England or at any of its country branches. . . .

"The books of the stock will be kept at the Bank of England in London, but arrangements have been entered into whereby assignments and transfers may be made at the Liverpool branch of the bank. . . .

"Tenders must be delivered at the chief cashier's office, Bank of England, before two o'clock on Thursday, the 13th of April, 1899. . . .

"A deposit of £5 per cent. on the amount of the stock tendered for must be paid at the same office at time of the delivery of the tender. . . .

"The dates at which the further payments on account of the loan will be required are as follows:

"On Monday, the 24th of April, 1899, so much of the amount tendered for each hundred pounds of stock as when added to the deposit will leave sixty pounds (sterling) to be paid.

"On Wednesday, the 24th of May, 1899, £30 per cent.

"On Wednesday, the 21st of June, 1899, £30 per cent., but the instalments may be paid in full on or after the 24th of April, 1899, under discount at the rate of £1 per cent. per annum. In case of default in the payment of any instalment at its proper date the deposits and instalments previously paid will be liable to forfeiture. Scrip certificates to bearer will be issued in exchange for the provisional receipts.

"The stock will be inscribed in the bank's books on or after the 21st of June, 1899, but scrip paid in full in anticipation may be inscribed forthwith."

On the 13th of April, 1899, tenders were received and the full amount of the stock—namely, £1,000,000—was duly allotted.

The respective further payments were duly made by the allottees in respect of the greater part of the stock at or about the dates named in the prospectus, but portions of the instalments were paid up before the latest date named for such payment, and in particular the final instalments of stock to the amount of £209,400 were paid in full prior to the 20th of June, 1899, and the inscription of £200,300, part of such last-mentioned sum, was effected and completed in the books of the Bank of England before the 20th of June, 1899.

When the amounts payable on allotment were paid provisional receipts were issued, and these receipts were exchanged for scrip certificates to bearer, and every one of the allottees received a scrip certificate to bearer in respect of the amount of stock allotted to him prior to the 20th of June, 1899.

The inscription of the stock in the books of the Bank of England was effected between the 19th of April, 1899, and the 25th of January, 1900. The amount of stock inscribed before the 20th of June, 1899, was £200,300. The amount inscribed on the 20th of June, 1899, was nil, and the amount inscribed after the 20th of June, 1899, was £799,600 and there remained the sum of £100 not yet inscribed.

The scrip certificates to bearer were dated the 24th of April, 1899, but were not, in fact, issued until the 2nd of May, 1899.

The Finance Act, 1899, came into operation on the 20th of June, 1899. No statement of the amount to be secured by the issue of the said loan capital or any part thereof was delivered to the Commissioners of Inland Revenue either before or since the issue thereof in the manner mentioned in section 8 of the Finance Act, 1899.

On the 4th of August, 1899, the Commissioners of Inland Revenue requested that a statement in respect of the nominal loan capital of the corporation issued on and after the 20th of June, 1899, might be rendered pursuant to the above section.

The corporation replied that they had not rendered a statement because they had not issued any stock on or since the 20th of June, 1899, and that the stock was issued on the 13th of April, 1899, to which the Inland Revenue replied that the date of issue of the loan must be taken to be the date on which the final payment on account thereof is made, that date in the present case being the 21st of June, 1899.

The Attorney-General contended that the whole of the loan capital, save £209,400 (being the amount on which the final instalments were paid before the coming into operation of the Finance Act) was issued after the coming into operation of the said Act, and that the duty imposed by section 8 (2) was payable in respect thereof.

The defendants contended that the whole of the loan capital was issued before the coming into operation of the said Act, and that no duty was payable on any part thereof under section 8.

The question for the opinion of the court was whether the said loan capital, other than the said £209,400, or any part of it, was issued subsequently to the coming into operation of the Finance Act, 1899.

The Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8, provides that:

"(1) Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall, before the issue thereof, deliver to the commissioners a statement of the amount proposed to be secured by the issue.

"(2) Subject to the provisions of this section, every such statement shall be charged with an *ad valorem* stamp duty of two shillings and sixpence for every hundred pounds . . . of the amount proposed to be secured by the issue . . ."

S. A. T. Rowlatt (*Sir R. B. Finlay, A.G.*, with him), for the Crown.—The Finance Act, 1899, came into operation on the 20th of June and the final payments on account of the loan were payable on the 21st of June, therefore the loan must be taken to be issued after the Act came into operation, and that being so, stamp duty is chargeable on the loan under section 8 (2) of the Act. "Loan capital" is defined by section 8 (5) as meaning "any debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known, or any capital raised by any local authority, corporation, company, or body of persons formed or established in the United Kingdom, which is borrowed or has the character of borrowed money, whether it is in the form of stock or in any other form." There is no definition of "issue" in the Act, but it must be taken that until the stock is in existence there has been no issue. The stock cannot be said to be in existence until the last instalment is actually paid and only a ministerial act remains to be done. The capital is issued as soon as the subscriber is entitled to call for his stock: *In re Imperial Rubber Co., Bush's case*, 22 W. R. 699, L. R. 9 Ch. App. 554; *In re Heaton's Steel and Iron Co., Blyth's case*, 25 W. R. 200, 4 Ch. D. 140; *In re Ambrose Lake Tin and Copper Co., Clarke's case*, 26 W. R. 601, 8 Ch. D. 635; Cockburn, L.C.J., in that case says: "Issue . . . must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire

and complete." *The South African Territories (Limited)* v. *Wallington*, 45 W. R. 467, [1897] 1 Q. B. 692, and 46 W. R. 545, [1898] A. C. 309. "Issue" was also discussed in the case of *Baring* v. *Commissioners of Inland Revenue*, 46 W. R. 98, [1898] 1 Q. B. 78.

Lawson Walton, K.C., and *Gore Brown*, for the defendants, were not called upon.

PHILLIMORE, J.—All I have to determine is whether this loan capital was issued after the 20th of June. It appears as regards that portion of the loan on which duty is now sought to be charged—namely, the million less £209,400—the final instalments were not paid until the 21st of June, and therefore the inscribing of that stock was not complete as regards this until even later than the 21st of June.

It is contended on behalf of the Crown that, inasmuch as the final payment was not made until after the 20th of June, this loan capital was issued after the passing of the Finance Act, 1899, which received the Royal Assent on the 20th of June. Now, I do not say at this moment when it is the duty of a corporation endeavouring to raise money by a permanent loan to deliver the statement, duly stamped, to the commissioners, which section 8 of the Finance Act, 1899, requires them to deliver. It may be, and there are analogies which would certainly point to that, that they must do so before they advertise in the usual way for tenders, which advertisement implies an obligation or promise to accept tenders within the terms of the advertisement. It may be that it is before they do that, that they must deliver this statement—I am not sure and I do not so decide—but what I do feel sure of is that they must do it before they issue the scrip certificate. I understand that all the scrip certificates were in fact issued on the 2nd of May, or, at any rate, considerably before the 20th of June. That being the case, I conceive that that is the latest date which can be said to be within the meaning of the statute "the issue," and if as I think, at least by that date the corporation were bound to do it, they are equally entitled to say, as against the Crown, that unless that date falls after the coming into force of the Finance Act, 1899, they do not fall within section 8 at all. In other words, my opinion is that the whole of the issue of the million—not merely the £209,400—was made before the 20th of June, 1899, and that therefore the corporation could not, and had no duty to, comply with section 8, and that therefore they are not taxable.

As I have said, the analogy of the tax on companies—when they originally create their capital, or where their capital is being increased—to the tax imposed by the Stamp Act of 1891, but enlarged and therefore referred to by the Finance Act, 1899, in the very clause which immediately precedes the clause in question—would lead one to suppose that the statement must be delivered to the commissioners and the duty paid before there is an attempt to get from the public the loan capital which the corporation is seeking to raise. But I understand and appreciate the fact that there may be hardships and difficulties in that construction, and I do not wish at all to say that that is a necessary construction here. All I do say is that by the time the corporation have issued the necessary certificates whereby they have bound themselves, upon the creditor complying with the remainder of the terms, to issue the stock to him and enter him as a stockholder, by that time, in my opinion, they have issued the loan.

Therefore I must give judgment in favour of the defendants, with costs against the Crown.

Judgment for defendants, with costs.

Solicitor for the Crown, *Solicitor to Inland Revenue.*

Solicitors for the defendants, *F. Venn & Co.*, for *E. R. Pickmere*, Town Clerk, Liverpool.

K. B. Div. (Walton, J.) — Oct. 31; Nov. 1; Jan. 11.

ESHER URBAN DISTRICT COUNCIL v. MARKS. (a.)

Highway—New road in place of old—Obligation to repair ratione tenuræ—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25 (2).

In the year 1773 *O. was the owner of lands now comprised in the plaintiffs' district, through which there passed an old highway. O. desired to stop up and inclose this highway, and in due course received licence to do so on his undertaking to make, as he did, upon his own land another road in lieu of the old road, "as fit for horses, carts, carriages, and foot passengers to pass and repass," and on his undertaking that he and his heirs would keep the substituted road in repair.*

The defendant was the owner and occupier of part of the lands formerly held by O., and the plaintiffs desired to make him liable for the repair of the road.

Held, that the defendant was liable ratione tenuræ *as being an assign of O., and that he was none the less liable because he was the assign of part only of such land.*

Action tried before Walton, J., without a jury.

The Urban District Council of Esher and the Dittons claimed a sum of £137, the amount of expenses incurred by them in repairing a certain road, known as Ember-lane, being a highway leading from Bridge-road, Thames Ditton, westward to the bank of the River Ember, which the plaintiffs alleged that the defendant was liable to repair *ratione tenuræ*, and had failed to do, after due notice had been served on him pursuant to the provisions of section 25 (2) of the Local Government Act, 1894. That section provides that where a highway repairable *ratione tenuræ* is reported out of repair, and the person liable fails when requested by the district council to place it in proper repair, the district council may do the work and charge the person liable with the expenses incurred.

The facts and arguments sufficiently appear from the considered judgment of the learned judge, given on the 11th of January last, the case having been tried by him on the 31st of October and the 1st of November, 1901.

Macmorran, K.C., and *Manisty, K.C.*, for the plaintiffs.

Robson, K.C., and *G. F. Hart*, for the defendant.

WALTON, J., read the following judgment: In this action the Urban District Council of Esher and the Dittons claim a sum of £137 10s. 5d., the amount of expenses incurred by the district council in the repair of a road within their district called Ember-lane. The action is brought under section 25, sub-section 2, of the Local Government Act, 1894, which provides: "Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair same fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing." The history of

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Ember-lane appears to be as follows: In the year 1773, Mr. George Onslow was the owner of lands which may be described as the Ember Court estate, Ember Court, or as it was then more commonly called, Imber Court, or, by a still earlier name, Imworth, which was a manor in the parish of Thames Ditton: see the recitals of the Inclosure Act (48 Geo. 3, c. 134). Through these lands of Mr. Onslow there passed an old highway, leading from Thames Ditton and Esher towards East and West Molesey. Mr. Onslow desired to stop up and inclose this highway, and accordingly, on the 6th of October, 1773, he sued out a writ of *ad quod damnum*; and on the 11th of October in the same year an inquisition was taken before the sheriff of the county of Surrey by virtue of such writ and the jurors upon this inquisition found that it would not be to the damage of the king or of any other if the king should grant to George Onslow a licence to inclose and stop up the old highway, which was a highway for horses, carts, carriages, and foot passengers, and to hold such road when stopped up to the said George Onslow and his heirs for ever, so that instead thereof George Onslow did in his own land make another road as fit and convenient for horses, carts, carriage and foot passengers to pass and repass; and the jurors further said that it would not be to the damage or prejudice of the king or of any other if the king granted to George Onslow such licence if George Onslow did in his own lands set out in place of the existing highway another road commencing opposite to the foot-bridge over the River Mole next below Ember Mills and passing through certain land belonging to George Onslow to the road leading from Hampton Court Bridge towards Esher, such road to be for ever thereafter kept in good and sufficient repair by George Onslow, his heirs and assigns. At the following quarter sessions for the county of Surrey, held on the 11th of January, 1774, the inquisition and return were by order of the court entered and recorded amongst the records of the sessions. It is not disputed—indeed upon the pleadings it was admitted—that the old highway referred to in the inquisition was stopped up and enclosed and was from that time held by George Onslow, his heirs and assigns, as part of his lands known as the Ember Court estate. And it cannot be doubted (nor was it disputed at the trial, although a question was raised as to a subsequent alteration in its character) that Ember-lane, as originally set out, was the road which Mr. Onslow was required by the terms of the inquisition to set out, and which he did set out, for the use of the public in place of the old highway which he stopped up and inclosed. Apparently, when Ember-lane was first made it led to a foot-bridge across the river and by a ford for horses and carriages to a cart or carriage-way on the other side of the river, leading to East and West Molesey. It may be noticed that in the finding of the jury the new road was described as commencing opposite the foot-bridge over the River Mole. The River Mole empties itself by two mouths, one of which is called the Mole, and the other is now called the Ember. The road called Ember-lane in fact commences opposite to a foot-bridge across that mouth of the Mole which is now called the Ember. I am satisfied that in 1773 both mouths were spoken of as the "Mole," or perhaps more commonly as the "Moulsey river." This appears from old maps, and even if I am not entitled to take judicial notice of this as a geographical fact, I am satisfied upon the evidence—and, as I have said, it was not really disputed—that Ember-lane is the road which was set out pursuant to the inquisition of 1773. I shall deal with the question as to its subsequent change of character presently. I have first to consider a difficulty which arises in the present case from the fact that, although the terms of the writ and inquisition and return have been proved by the production of the records of the quarter sessions of Surrey, no trace can be found of any licence by the king, which in the ordinary course should have been granted in the terms of the findings of the jury upon the inquisition. If any such licence was granted it appears to have been lost. There is no doubt that the inquisition was acted upon, the old road was stopped and the new road was made and has ever since been used as a highway. There was also evidence which satisfies me that the new road was never repaired by the inhabitants or by any public body. There was evidence that such repair as has from time to time been done was done by owners of lands forming part of the land referred to in the inquisition as the land of Mr. Onslow. This evidence of repair would not be sufficient to prove a liability to repair by prescription; but, taken in connection with the other facts showing that the inquisition was acted upon, it is not entirely to be disregarded. The case of *Leigh Urban Council* v. *King*, [1901] 1 K. B. 747, 49 W. R. Dig. 71, is an illustration of the kind of inference which a court is entitled to draw in a case of this kind, where certain formal order and proceedings necessary to legally justify the substitution of one highway for another cannot be proved. In such cases when, for a long period of time every one has acted openly as if the required orders and proceedings had been made and taken, there is a strong presumption that such orders were made and such proceedings taken, and that the records and evidence of them have been lost. I have no hesitation in finding as a fact that a licence was granted by the king and that the old road was stopped up, and Ember-lane set out and substituted for it under such licence. The question, no doubt, remains whether the licence incorporated the conditions required by the findings in the inquisition. When one remembers that as far back as 8 & 9 Will. 3 any member of the public aggrieved by the inclosure of a road under an inquisition taken upon a writ of *ad quod damnum* had an appeal to quarter sessions, and the determination of such appeal was final and conclusive, it is impossible to suppose that the Crown would override the rights of the public by granting a licence which did not give to the public the protection required by the inquisition. I find, therefore, that a licence was granted by the king in the terms and subject to the conditions of the inquisition. A point was made by Mr. Robson on behalf of the defendant with which it will be convenient to deal at once. He contended that the case was similar to *Reg.* v. *Barker*, 25 Q. B. D. 213, 38 W. R. Dig. 85, and that the old road set out as a highway in 1774 or thereabouts had disappeared; that its character had been so completely changed that it had, long before any question arose between the plaintiffs and the defendant, ceased to be the road which Mr. Onslow, his heirs and assigns, were required to repair, and had become something entirely different. It is true that at some date later than 1773, probably about 1821, the road on the other side of the river towards which Ember-lane led, ceased to be used by carts or carriages, and for many years past there has been no access to or egress from Ember-lane at the end nearest to the river except for foot passengers. Ember-lane itself, however, has always been open from the other end to the use of the public for cart and carriage traffic, although, no doubt, it has in fact been used principally by foot passengers. It was contended by Mr. Robson, on behalf of the defendant, that it had ceased to be a highway for carts and carriages, but, in my judgment, the fact that it has become a *cul-de-*

sac for traffic of that character has not taken away the rights of the public to use it so far as it may be found convenient to do so for carts, carriages, and horses: see *Gwyn* v. *Hardwicke*, 4 W. R. 486; *Reg.* v. *Burney*, 23 W. R. Dig. 95. I am further satisfied that there has been no such change in the character of the road as to make it so different from the road which Mr. Onslow and his heirs and assigns were required to keep in repair, that the old Ember-lane can be said to have disappeared. I find, therefore, that Ember-lane was and is a highway for horses, carts, carriages, and foot-passengers, and that it was laid out and thrown open to the public pursuant to the inquisition of the 11th of October, 1773, and a licence of the Crown which has been lost, but which allowed Mr. Onslow to stop up the old road on condition that he and his heirs should keep the substitute road Ember-lane in repair. About April, 1900, it was reported to the plaintiffs by their surveyor (who was a competent surveyor within the meaning of section 25, sub-section 2, of the Act of 1894) that Ember-lane was not in proper repair so as to be fit for use either by carts or carriages or by foot-passengers. At this time the defendant Mr. Marks was the owner and occupier, and as such was an assign of Mr. George Onslow of part of the lands referred to in the inquisition. The district council claimed that as such assign and by reason of his tenure and occupation he was liable to repair Ember-lane. Certain correspondence passed between the district council and the defendant in April, 1900, and by a letter of the 24th of April the council required the defendant to place the road in a proper state of repair. The defendant, however, repudiated any liability to repair, and the plaintiffs thereupon placed the road in proper repair, incurring expenses in so doing which amounted to £137 10s. 5d., the amount claimed in this action.

It was contended on behalf of the defendant that a liability to repair a highway *ratione tenuræ* can exist by prescription only, and therefore that where the road in question can be shown to have been first made within the period of legal memory there can be no such liability; and that as Ember-lane did not exist as a road before the year 1773 the defendant could not be liable to repair it *ratione tenuræ*. It is true that in cases in which the claim against an occupier of land, that he is bound to repair *ratione tenuræ*, is founded upon usage or, in other words, on evidence of acts of repair, such usage must be immemorial, and if it can be shown in such a case that the usage commenced at some time since the reign of King Richard I., the attempt to establish a liability to repair *ratione tenuræ* fails. In other words, to prove such an obligation by prescription the usage must be immemorial. But as was pointed out in the case of *The Mayor of Lyme Regis* v. *Henley*, 1 Bing. N. C. 222, prescription necessarily implies some legal origin, and the legal origin of an obligation to repair *ratione tenuræ* may be a grant from the Crown. If it can be proved that the king granted a licence to the owner of certain lands to stop and inclose for the benefit of himself and his heirs a public highway passing through such lands, imposing at the same time a condition that the owner of such lands should make a new road in place of the old one, and that he, his heirs and assigns, should keep such new road in repair, and if it can further be proved that the grantee accepted and acted upon such grant by stopping up the old highway, this would, in my judgment, be sufficient to establish an obligation *ratione tenuræ* to repair the new road made in place of the old road so stopped up. And it appears to me to be immaterial whether such grant was made and accepted before or after the reign of King Richard I. For these propositions the case which I have cited of *The Mayor of Lyme Regis* v. *Henley* appears to me to be a sufficient authority. The *Stratford Bridge case*, reported in 2 M. & Sel. 520n, affords an example of the way in which this kind of liability might arise before the reign of Richard I. It may, however, be suggested that the defendant was not an assign of Mr. Onslow within the meaning of the inquisition. He admits that he was the owner and occupier of Ember Court from the 29th of September, 1899, to the 24th of October, 1900, and that Ember Court formed part of the lands formerly belonging to George Onslow, and that the expenses in question were incurred about August, 1900. But it is true that some part of the lands of George Onslow referred to in the inquisition never belonged to the defendant. In *The Queen* v. *Duchess of Buccleugh*, 1 Salk. 358, it was held that where a manor was held subject to an obligation of repairing a highway and the manor became afterwards divided amongst several persons, each alienee was liable to the whole charge, his remedy being by contribution from the others. In the present case there was a licence to the owner of lands to stop and inclose a highway passing through such lands and "to hold it, when stopped up, to him and his heirs for ever," subject, however, to the condition that the owner of the lands should make another road through his lands in place of the old road, and that he, his heirs and assigns, should for ever keep the new road in repair. I think that "heirs and assigns," within the meaning of the inquisition, are the heirs and assigns of the lands through which the old road passed and through which also the new road was to pass—that is to say, the lands constituting the Ember Court estate of Mr. Onslow. In my judgment, therefore, the liability to repair was charged upon the heirs and assigns of that estate. Following the principle of the case which I have cited, when the estate became divided among several persons each alienee and occupier of any part of the estate, and, therefore, the defendant, was liable to the whole charge. It was further suggested that, even if there was an obligation upon the defendant to repair, it was not an obligation *ratione tenuræ*, because such an obligation is enforceable against an occupier only, and not against an owner who is not an occupier, and therefore an action under section 25, sub-section 2, of the Act of 1894 would not lie, and that the only remedy was under section 34 of the Highways Act, 1862. In the first place it is admitted that at all material times the defendant was occupier as well as owner. In my judgment a grant of a licence by the Crown in the terms of the inquisition of 1773 is sufficient to create an obligation *ratione tenuræ*. The cases already cited of *Lyme Regis* v. *Henley* and the *Stratford Bridge case* appear to me to establish this. The rule that was acted upon when highways were stopped and substituted roads made under a licence granted pursuant to an inquisition upon a writ of *ad quod damnum* was to leave the burden of repair as far as possible where it lay before. There is the strongest ground for inferring that the reason why Mr. Onslow and his heirs were required to repair the new road was that the old road which was stopped up was one which the owner of Ember Court was bound to repair *ratione tenuræ*. They accepted a similar liability in respect of the new road.

For these reasons I think that the plaintiffs have established their case, and, as there is no dispute as to the amount, there will be judgment for the plaintiffs for £137 10s. 5d. and costs. I ought to add that what I have said as to the obligation *ratione tenuræ* to repair applies only to a grant from the Crown, and not as between subject and subject. Licences appear to have been granted since George III., and no legislation appears to have been necessary in order to

complete the proceedings under a writ of *ad quod damnum*. I have had inquiries made and have discovered that there are records of inquisitions later than 1773. I do not see why the statute should have made any difference, because appeals existed earlier than the reign of George III.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *C. M. Barker.*

Solicitors for the defendant, *Michael Abrahams, Sons, & Co.*

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Wright, Bruce, and Darling, JJ.) — Dec. 14.

REX *v.* WISEMAN. (*a.*)

Criminal law—Bankruptcy—Failure by debtor fully and truly to discover all his property to the trustee—Disclosure by debtor at private meeting of creditors—Intent to defraud—Admissibility of evidence negativing such intent—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-sections* 1, 2, 4, *and* 6.

Upon an indictment under section 11, *sub-sections* 1, 2, 4, *and* 6, *of the Debtors Act,* 1869, *charging a bankrupt with not fully and truly discovering to the trustee all his property, evidence that the bankrupt at a private meeting of his creditors, held after the presentation of the bankruptcy petition, had disclosed all his property, is admissible for the purpose of negativing any intent on his part to defraud his creditors.*

Case stated.

This was a case stated by the assistant recorder for the city of Birmingham, as follows:

The defendant was tried before the assistant recorder at the quarter sessions for the city of Birmingham, on the 12th of October, 1901, on an indictment containing eight counts, framed under sub-sections 1, 2, 4, and 6 of section 11 of the Debtors Act, 1869, charging the defendant with not fully and truly discovering to the trustee administering the estate for the benefit of his creditors two sums of £70 and £65 1s. 2d. respectively. It was proved in evidence that the defendant carried on the business of a timber merchant at Elkington-street, Birmingham. He also traded at 83A, Constitution-hill, Birmingham, under the name of "The Unique Cabinet Manufacturing Co.'s Works." This latter was quite a small business.

On the 18th and 19th of April, 1901, the defendant instructed an auctioneer to sell by auction the business that he carried on at 83A, Constitution-hill, and also his household furniture and effects where he resided at Westminster-road, Handsworth. The auctioneer, on defendant's instructions, sold both his business and the household furniture the next day, the 20th of April, 1901. The business was sold for £35. The household furniture was sold for £108 15s.

On the 24th of April, 1901, the auctioneer gave the defendant an open cheque for £70 on account of these two sales. The defendant presented the cheque at the bank the same day and received the money for it.

On the 25th of April the auctioneer gave the defendant another open cheque for £65 1s. 2d., being the balance due to the defendant, less expenses, on these sales, and on the same day the defendant also cashed this cheque at the same bank. These were the two sums in respect of which the defendant was charged with the offences set out in the indictment.

On the 27th of April, 1901, the defendant executed a deed of assignment. The petition in bankruptcy was filed by a creditor on the 7th of May, 1901, the act of bankruptcy being the execution of this said deed. The receiving order was made on the 20th of May, 1901, and the defendant was adjudicated bankrupt thereon on the 8th of July, 1901. The defendant filed his statement of affairs, in which he made no mention of the receipt by him of either of the said sums of money so received by him as aforesaid. The defendant had also to answer in writing certain questions contained in a form called "O. R. 7." Question 11 was "What money had you in your possession or under your control at the date of the receiving order?" To this the defendant answered "None."

The assistant official receiver on the 22nd of May, 1901, saw the defendant with reference to his answers to the questions in the said form "O. R. 7," and on being questioned the defendant then stated that he had had some furniture, but that it was sold by auction on the 11th of March, 1901, and that he had received £90 for it, which he had expended in his business.

On the 19th of June, 1901, the defendant swore to his said statement of affairs, and in the said statement he made no mention under the head of cash in hand of either of the said two sums of money so received as aforesaid.

On the 9th of July, 1901, one James Rhodes, was duly appointed trustee in the defendant's bankruptcy, and at an interview between the said trustee and the defendant on the 17th of July, 1901, the trustee asked the defendant for the name of the auctioneer who had sold his furniture on the 11th of March, 1901, and where the account was. The defendant said that he could not remember the name of the auctioneer nor could he give any account of the matter.

It appeared that there had been a private meeting of the defendant's creditors on the 11th of May, 1901, at which the defendant and his solicitor and one Richards, the trustee under the said deed of assignment, were present. The defendant's counsel at the trial before the assistant recorder tendered evidence to show that the defendant at this private meeting of the creditors had disclosed the sale of his said furniture and business, the amount he received from the said sale, and that the various creditors questioned him as to what he had done with the money so received, and that he told the creditors at the said meeting that he was living on the money so received. Counsel for the prosecution objected to the reception of this evidence, contending that it was not relevant to any of the issues raised in the indictment, especially as at this date the said James Rhodes was neither appointed trustee in bankruptcy nor was he present at the said meeting. Counsel for the defendant contended that this evidence was relevant on the question of intent to defraud. The assistant recorder ruled that the evidence was not admissible and that counsel for the defence could not address the jury as to what transpired at the meeting of the 11th of May, 1901; but decided to grant a case if the defendant was convicted. The defendant was found guilty upon all the counts of the indictment. The question for the opinion of the court was whether the assistant recorder was right in law in rejecting the evidence so tendered for the defence, and in not allowing counsel for the defence to address the jury as to what took place at this meeting of the 11th of May, 1901.

By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, it is provided as follows:

"Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say:

"(1) If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors, all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied he had no intent to defraud:

"(2) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

"(4) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

"(6) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud."

Lawless, for the defendant.—The evidence tendered is admissible and should have been admitted.

Stamford Hutton, for the prosecution.—The assistant recorder was right in refusing to allow counsel for the defence to address the jury as to what transpired at the meeting of the 11th of May, and the evidence tendered as to what took place at that meeting is clearly inadmissible, for there is no connection between what took place then and the offence charged. There was no duty on the part of the bankrupt to make a disclosure at the meeting.

Lord ALVERSTONE, L.C J.—We are of opinion that this conviction must be quashed. The offences charged are under sub-sections 1, 2, 4, and 6 of section 11 of the Debtors Act, 1869, each of which sub-sections provides that any person adjudged bankrupt and any person whose affairs are liquidated by arrangement shall in each of the cases mentioned in those sub-sections be liable on conviction to be imprisoned "unless the jury is satisfied he had no intent to defraud." Under such a proviso the defendant should be allowed to give evidence which is relevant to the transaction and which would negative an intent to defraud. The presence or absence of such intent may of course appear upon the evidence tendered by the prosecution. In this case a very substantial part of the defence is that at a private meeting of the defendant's creditors, held on the 11th of May, 1901, the defendant disclosed the sale of his furniture and business, and the amount he had received from such sale, and what he had done with the money so received. Whether or not this evidence would have been sufficient to satisfy the jury that the defendant had no intent to defraud would be a question for them, but it was clearly admissible with the object of negativing an intent to defraud.

LAWRANCE, WRIGHT, BRUCE, and DARLING, JJ., concurred.

Conviction quashed.

Solicitor for the prosecution, *Director of Public Prosecutions.*

Solicitor for the defendant, *A. J. Speechley*, for *W. J. Rabnett*, Birmingham.

IN BANKRUPTCY.

K. B. Div. (Wright and Bigham, JJ.) Feb. 10, 11.

In re KEEN & KEEN.
Ex parte THE BRISTOL SCHOOL BOARD. (a.)

Bankruptcy—Property of bankrupt—Reputed ownership—Order and disposition—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 44.

A clause in a building contract whereby it is provided that "all plant, work, or materials brought to and left upon the ground by the contractor shall be considered the property" of the building owners, does not constitute them the true owners thereof for the purpose of consent to reputation of ownership by the contractor.

Appeal from a decision of his Honour Judge Beresford in the County Court at Bridgwater.

Keen & Keen were a firm of building contractors who in 1899 entered into a contract to build a school at Knowle, near Bristol, for the Bristol School Board. They engaged to furnish the plant and materials and to finish the work in 1901.

By clause 10 of the contract it was provided that "all plant, work, or materials brought to and left upon the ground by the contractor shall be considered the property of the board, and the same shall not on any account whatever be removed or taken away by the contractor, or by any other person, without the express licence in writing of the architect."

The same clause went on to say that the board should not be answerable for any loss or damage which might happen to the goods while upon the property.

Clause 20 provided that if the contractor should become bankrupt, or suspend or delay his part of the work, then the architect should be at liberty to give a notice requiring the work to be proceeded with within seven days, and in default all plant should be forfeited to the board.

Keen & Keen presented their own petition in bankruptcy upon the 16th of February, 1900, and on the 21st of February the architect gave the notice provided for in clause 20. The period of seven days was extended in order to give the trustee time to consider whether he would complete the contract. He eventually decided to disclaim the contract, whereupon the school board entered upon the land, seized the plant, and continued the buildings. The trustee thereupon moved in the county court for a declaration that he was entitled to the plant and materials as having been in the order and disposition of the bankrupts with the consent of the true owner at the commencement of the bankruptcy, under such circumstances that they were the reputed owners. The county court judge decided in favour of the trustee.

The school board appealed.

Reed, K.C., and *F. E. Weatherly*, for the appellants.—The plant and materials cannot be said to have been in the order and disposition of the bankrupts, because they could not remove them; but if they were, the school board were not the true owners and could give no consent to their remaining in the bankrupt's order and disposition.

They cited *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436; *Ex parte Newitt, In re Garrud*, 29 W. R. 344, 16 Ch. D. 522; *In re Waugh, Ex parte Dickin*, 25 W. R. 258, 4 Ch. D. 524.

Muir Mackenzie and *B. R. Vachell*, for the respondents.—The school board were the true owners of the

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

plant and materials by the terms of the contract, and the fact that by clause 20 they could not seize until seven days had elapsed after the giving of the notice requiring the bankrupts to proceed with the work, does not exclude their consent to the goods remaining in the order and disposition of the bankrupt: *Ex parte London and Universal Bank, In re Ginger*, 46 W. R. 144, [1897] 2 Q. B. 401.

WRIGHT, J.—In this case the school board were not, on the construction of this agreement, the owners of the plant or materials at the time of the bankruptcy. The language of the agreement is wholly different from the language in *Reeves* v. *Barlow*. What the interest of the school board was it is not very easy to say or to put into language. They had a contractual right, legal just as much as equitable, as far as I can see, to have these things remain on the land, for use by the builder on the land, for the benefit of the school board, for or in the construction of the building. That right, whether it ought to be described as equitable or legal, so far as it was a contractual right vested in the school board before the bankruptcy, and was a right which would not be overridden by the bankruptcy alone, but it was a right which might be overridden under the provisions of section 44 of the Act of 1883 if the facts established a case of reputed ownership. But in order that that case should be established, three things must be shown. First of all, it must be shown that the things remained in the possession of the builder. They did remain in the possession of the builder in one sense, but it was an ambiguous possession, and a possession which he could not make use of to remove the goods from the premises. It might be said, I think, in some sense, that the school board had something in the nature of an interest in the possession as well as the builder, because without their consent the goods could not be removed or made use of in any way except for the building. Secondly, it must be shown that there was a consent by the school board to the builder being in possession; and thirdly, I think it must be shown in some sense that there was a consent to the reputation by the school board. That used to be the law, and, so far as I know, it is the law still.

Now it seems to me that there is no room for those inferences of consent to be drawn, if, from the very nature of the right, the school board had no power to withdraw the goods from the possession and apparent ownership of the builder. That would be so if they were placed in his hands for a specific purpose, as I think the materials were, for the purpose of being placed by him in the building. Here there is no consent by the school board that the builder shall be the reputed owner of that of which he is not really the owner. He was entitled to be in the position of owner of those goods so long as the building went on, for the purpose of using them in the building, and the consent of the school board did not in any way go beyond that. They merely consented that the things should remain on the land for that very purpose for which they were placed there. Sometimes in some cases it is said that the true owner of the goods is not to suffer under this clause unless there is something which might be described as unconscientious in leaving the things in the way in which they are left in the possession of the debtor. Here there is certainly nothing unconscientious and nothing which would work any wrong in the event of bankruptcy. I do not know what the school board were to have done. I do not see what kind of notice they could give. The builder would not have allowed them to stick up a notice to say that the goods were not removable in case of bankruptcy.

The decision in *Shuttleworth* v. *Hernaman*, 5 W. R. 853, 1 De G. & J. 322, seems to me to be quite different. There the landlord had no need to leave the machinery on the premises at all. The tenant covenanted with the landlord to keep in the mill certain machinery as security for the rent. Then the landlord resisted the removal of the machinery by the official assignee on the ground that, according to the landlord, the covenant by the tenant had given him a lien upon the machinery, but it is obvious that, supposing the landlord had a right to the machinery, the leaving the machinery upon the premises was not a furtherance of the object for which it was placed there, and it is quite a different case from leaving materials on the ground when the whole object of the arrangement is that the materials shall be used in the building. I think there is no reputed ownership in this case.

BIGHAM, J.—I am of the same opinion. At the date of the receiving order these chattels were the property of the bankrupt, although it is true to say that they were on the ground, upon the terms, as between the bankrupt and the building owners, that they should remain there during the progress of the works, in order that they might be used for the purpose of the works.

I think clause 10 of the contract sufficiently shows this. The expression used in clause 10 is that all plant, work, and materials brought to and left upon the ground by the contractor shall be considered to be the property of the board. That is an ambiguous expression which, if it is read with reference to the other part of the clause and with reference to the whole of the contract, becomes clear. If one goes on with the clause it is plain what it means, "and the same shall not on any account whatever be removed or taken away by the contractor, or by any other person without the express licence in writing of the architect." There would be no occasion whatever for those words if the property in the goods had vested entirely, as it is suggested it had, in the school board. And the clause goes on to say that the board shall not be in any way answerable for any loss or damage which may happen to the goods while they are upon the property. It is unnecessary to put such words into the clause if the goods are already the property of the school board. Not only do the words of the clause, in my opinion, show that the property in the goods is not in the school board, but the fact that when the works are completed the goods (as we all know) can be taken away by the builder without any further act by the building owner in itself shows that the property in the goods has never passed out of the builder. At the end of the contract he takes away his plant and he takes away any surplus materials there may be as a matter of right, without any further act to vest or re-vest the property in him. Why does he take it away? He takes it away because it is his. But though the goods were, at the date of the receiving order, the goods of the builder, there was by the contract a contingency on the happening of which the property might pass to the school board. Now that contingency is to be found in clause 20, and the trustee when his title supervened took the goods which were the goods of the builder subject to that contingency. He could have no better title to the goods; but it was a defeasible title. But then that happens afterwards which was contemplated by clause 20—the contingency which transferred the property in the goods from the builder into the building owners, the school board.

In my opinion, reputed ownership has nothing at all to do with the case.

Perhaps I ought to add that possibly the contingency of bankruptcy happening is one which would not vest the property in the school board, but the contingency contemplated by clause 20 is the trustee electing not to go on to complete the works. He elected not to complete the works, and in my opinion the property thereupon vested in the building owners.

Appeal allowed.

Solicitors for the appellants, *Gamlen, Burdett, & Co.*, for *Brittans, Livett, & Miller*, Bristol.

Solicitors for the respondent, *Ford & Ford*, for *Wansborough, Dickinson, & Co.*, Bristol.

K. B. Div.
(Wright and Phillimore, JJ.) Dec. 9.

In re CARR.
Ex parte JACOBS. (*a.*)

Bankruptcy—Act of bankruptcy—Deed of assignment—Assent of petitioning creditor—Delay in presenting petition.

A creditor who, knowing that the debtor has executed a deed of assignment, unduly delays the presentation of a petition will be taken to have assented to the deed.

The mere sending of a representative to a meeting of creditors, who takes no part in the proceedings, does not bind the creditor who sends him to any course that may be agreed upon at such meeting.

Appeal from the dismissal of a bankruptcy petition by the registrar of the county court at Leicester.

Upon the 29th of July, 1901, the debtor by his solicitors sent out a circular to his creditors asking them to attend a meeting on the 1st of August. The petitioning creditors sent a representative to the meeting to report what took place, but he took no part in the proceedings and neither assented to or dissented from anything that was done. The other creditors present at the meeting agreed to accept a composition of 10s. in the £ to be secured by a deed of assignment. The debtor's solicitors thereupon sent a circular to all the creditors containing a statement of the debtor's affairs and a record of the resolutions passed at the meeting.

Upon the 8th of August the debtor's solicitors sent a further circular to the creditors stating that the debtor had executed a deed of assignment for the benefit of creditors.

Upon the 16th of August the trustee under the deed of assignment sent to all the creditors a form of assent to the deed and requested them to execute and return the same.

The petitioning creditors did not execute or return the form of assent, and on the 22nd of October they presented a petition against the debtor, the act of bankruptcy therein alleged being the execution of the deed of assignment.

The registrar dismissed the petition on the grounds that a creditor who knows of a deed of assignment having been executed and does not at once petition must be taken to have assented to it, and that the petitioning creditors' representative having attended the creditors' meeting and not voted against the deed must be taken to have assented to it on their behalf.

The petitioning creditors appealed.

Reed, K.C., and *C. B. Marriott*, for the appellants.—The petitioning creditors never assented to the deed of assignment, and there is no authority which goes to the length of saying that they must actively express their dissent; if they do not assent they are taken to dissent. Their representative was sent to the meeting merely to report what took place there, and his presence there could not bind them in any way.

They cited *Ex parte Stray, In re Stray*, 15 W. R. 600, L. R. 2 Ch. App. 374; *Ex parte Michael, In re Michael*, 8 Morr. 305; *In re Hawley, Ex parte Ridgeway*, 4 Mans. 41, 45 W. R. Dig. 9; *Ex parte Woodroff, In re Woodroff*, 4 Mans. 46, 45 W. R. Dig. 9.

Neilson, for the respondents.—It was held in *Ex parte Ridgeway, In re Hawley*, that the presence of a representative who did not dissent from the proposal of a deed of assignment was an element to be considered. In this case there is the further fact that the creditors stood by for ten weeks before they presented their petition, and that in itself is sufficient to justify the registrar's decision.

Reed, K.C., replied.

WRIGHT, J.—In this case the difficulty is that the registrar has decided the case not so much on the facts as on a view of the law which is not accurate. It seems to me that two things are reasonably clear—firstly, that a creditor is not affected by notice that a deed of assignment has been executed, and is not obliged to express his assent or dissent; secondly, that a creditor's representative who attends a meeting and expresses no opinion cannot be held to bind his principals to any particular course, indeed he may have no power to do so.

On the other hand, if the representative does not expressly reserve the rights of his principals, and they for a long time abstain from doing anything, there is a great difficulty in their way. Here these creditors received notice that the deed had been executed on the 15th of August; they returned no answer to that communication and took no step of any kind until they presented their petition upon the 22nd of October. No explanation has been offered of this delay and under those circumstances I do not think they were entitled to succeed on their petition.

PHILLIMORE, J., concurred.

Appeal dismissed.

Solicitor for the appellants, *R. Raphael.*

Solicitors for the respondents, *Crowders & Visard*, for *Owston, Dickinson, & Simpson*, Leicester.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). Nov. 28.

HIGGINS AND OTHERS v. DAWSON AND OTHERS. (a.)

Will—Construction—Ambiguity—Administration of assets—Extrinsic evidence.

A testator, after bequeathing a number of general legacies, gave and bequeathed "all the residue and remainder" of two specific mortgage funds, after payment of his just debts and funeral and testamentary expenses, to certain persons therein mentioned. There was no general residuary bequest.

The testator possessed at the date of his will no residuary property out of which to provide the general pecuniary legacies, but at his death he had obtained more than sufficient for the purpose.

Held, that the general pecuniary legacies were payable out of the residue in exoneration of the two specifically bequeathed mortgage debts, which were only subject to the debts and funeral and testamentary expenses, and that there was no ambiguity in the will to admit extrinsic evidence.

Decision of the Court of Appeal, sub. nom. In re Grainger, Dawson *v.* Higgins, 48 *W. R.* 673, [1900] 2 *Ch.* 756, *reversed.*

Appeal from an order of the Court of Appeal (Lord Alverstone, M.R., and Collins, L.J., Rigby, L.J., dissenting), 48 W. R. 673, [1900] 2 Ch. 756, reported *sub. nom. In re Grainger, Dawson* v. *Higgins*, which had reversed a decision of Stirling, J.

By his will dated the 31st of May, 1895, the late Monsignor John Grainger, after directing that all his just debts and funeral and testamentary expenses should be paid, and making some specific devises or bequests, and after bequeathing a number of general legacies amounting to over £11,000, gave and bequeathed "all the residue and remainder" of two specific mortgage funds of £9,000 and £4,000 after payment of his just debts and funeral and testamentary expenses to certain Canons Regular of the Lateran. There was no residuary bequest.

At the date of the will the testator possessed only the mortgage debts above mentioned, other than the specific devise or bequests above mentioned, and a small balance at his bankers.

At the time of the testator's death he possessed a further sum of £10,000 which he acquired subsequently to making his will.

The facts are given in more detail in the report below.

Stirling, J., decided that the £10,000 was liable for the payment of the general pecuniary legacies in exoneration of the two mortgage debts.

The majority of the Court of Appeal, however, held that the general pecuniary legacies were payable out of the mortgage funds, after admitting extrinsic evidence to show the state of the testator's property at time of his making his will.

The legatees of the mortgage debts appealed.

Jenkins, K.C., and *Cann*, for the appellants.—The language used was clear. There is no ambiguity, and extrinsic evidence is not admissible.

Theobald, K.C., and *Fischer Williams*, for the respondents, the next-of-kin and the pecuniary legatees.—It was clear that the testator intended the legacies to be paid out of the mortgage debts.

Fonnereau v. *Poyntz*, 1 Bro. Ch. Cas. 472; *Colpoys* v. *Colpoys*, Jac. 451; *Boys* v. *Williams*, 2 Russ. & My. 689; *Smith* v. *Doe d. Jersey*, 2 Br. & B. 473; *Boyes* v. *Cook*, 28 W. R. 754, 42 L. T. Rep. 556, 14 Ch. D. 53; *Bank of New Zealand* v. *Simpson*, 49 W. R. 591, [1900] A. C. 182; *Kingsbury* v. *Walter*, 49 W. R. Dig. 194, [1901] A. C. 187; Wigram on Extrinsic Evidence; were cited or referred to.

Ingpen, K.C., and *Northcote*, for the executor.

Earl of HALSBURY, L.C.—I think that we are very much indebted to counsel for the respondents for the very able and learned exposition of the principles upon which a will is to be construed in this country; but I confess that I have not been able to entertain the smallest doubt as to what is the true solution of the question propounded for our determination. Stated very narrowly—and the more narrowly stated the better—the question for determination on this particular will turns upon two phrases, or, even more compendiously stated, upon one phrase of the will: "All the residue and remainder of the sum of nine thousand one hundred and eighty-seven pounds, lent on mortgate to Sir John Lawson, the deeds being in the keeping of Messrs. Blount, Lynch, & Petre, of Fitzalan House, Arundel-street, Strand, and of the sum of four thousand pounds, lent on mortgage to Mrs. Alicia Kirk, of the Park, Gorey, Ireland, the deeds being in the keeping of the same firm, after payment of my just debts and funeral expenses, and the expense of proving this my will." Those are the words which we have to construe; and I confess that it is to my mind absolutely amazing that anyone can entertain the smallest doubt as to what those words mean. I have read the words by themselves because, in my view of the meaning of this instrument, they are by themselves. One does not doubt that, where you are construing either a will or any other instrument, it is perfectly legitimate to look at the whole instrument—and, indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and cannot rely upon one particular passage in it to the exclusion of what is relevant to the exposition and explanation of the particular clause that you are expounding. That is perfectly true as a general proposition; but I ask myself here what other words—what part of the will, what provision other than the one which I am construing—reflects any light on, or gives the smallest interpretation to, the particular words which I am called upon to expound? If I am right in saying that there is no other part of the will that cuts down, qualifies, or in any degree alters the sense of the words which I have read (and Collins, L.J., himself says: "Read by itself and cut off from its context it is, I agree, capable of one meaning only"), then I ask myself what is it in the other part of the instrument to which the Lord Justice refers by which he says that the natural and ordinary plain meaning of the words can be cut down and expounded into meaning something different from that which he has in very plain words said is the ordinary and natural meaning of the words themselves? In the course of the very learned and exhaustive argument I have not heard one word quoted from any other part of the will which affects that question. What has been done (with the utmost respect I say it) by Lord Alverstone, M.R., and the Lord Justice is to cut a sentence into two, and to read the words "residue and remainder" as if they stood by themselves. Now, it has been said, and said very truly, that "residue and remainder" are relative terms: you cannot tell what they mean until you have found out in relation to what they are used. If, as Collins, L.J., says, these words had been left by themselves and without an exposition of what they were to be read in relation to, there would have been

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

considerable justice in the suggestion that you might read them as applicable to the residue of the whole estate after payment of its natural and just burthens. But that is not true; and all through the argument, in spite of repeated questions by me to the learned counsel, I found that in no case would they read the words as they stand in the will, but they would read the words "residue and remainder" by themselves, and said, and said truly, that those are relative words. But when I come to look at the will itself, I must construe them as they stand in the context, and in their grammatical meaning, and with reference to what is there said; and then it seems to me that the problem is solved without the smallest difficulty. The testator says, "all the residue and remainder" (now there the argument has stopped throughout over and over again, but that is not the way to read any sentence) "all the residue and remainder of the sum of £9,187"—and he repeats the same with reference to the second mortgage debt—"and of the sum of £4,000," and so on. How is it possible to say that that language is susceptible of doubt? The observations of very learned judges have been quoted to show that you must read all the words in every instrument with reference to the circumstances under which they are uttered or written. In one sense that is quite true; but the problem is not—as I think the counsel who last addressed us very truly put it—to find out the "who" or the "what"—who is to take, and what it is that the person so designated is to take. It is quite true that, where you are finding out persons or things—who are the persons designated by the will, what are the things left by the will—you may find either the person or the thing by proper external evidence of what is referred to. In the case cited—*Fonnereau* v. *Poyntz*—nothing could be more intelligible than this: A man leaves an annuity of so much; it has to be ascertained what he meant by it; the word "annuity" by itself means an annual sum, which, of course, might be a very large sum indeed; or you may find out that the testator possessed a thing which was called an "annuity" because it was the designation of it on the Stock Exchange; you may find out by external evidence what it was that he was referring to. Whatever the subject-matter of it is, you may, of course, find out by external evidence to what he refers. And here the odd thing is that the supposed ambiguous words which you are to construe are the words "residue and remainder," and yet from first to last the learned counsel have refused to refer to the words "residue and remainder" as they are used in the will. It is not "residue and remainder" absolutely; and that is the fallacy of the whole argument that has been addressed to this House. It is residue and remainder of a particular thing, and you cannot cut the phrase into two and pretend that it becomes ambiguous because you cut the language in two and take one part of a phrase which is admittedly relative and treat it as if you could read it apart from the context in which it is, and apart from the thing of which it purports to be the residue. And that is really the key to the whole of this matter. I have often said—and I think it is perfectly just—that to treat language with that violence and to say that you have arrived at the conclusion from external circumstances that the testator would have made a different disposition from what he has done if he had had the whole subject-matter in his mind, and therefore to construe his language differently, is not to construe or to interpret the language which the testator himself has used, but to make a will for him which you think that he ought to have made if he had had the whole circumstances present to his mind. Now, if I were to concede—what I certainly do not in this case, for I know nothing about it—that it is more probable that the testator would have treated the residue as being the residue of his whole estate, and not of this particular sum of which it is stated to be the residue, if he had had the facts and circumstances of his property before him—if I were to concede that, it would not help the present respondents, because in the view which I take, if you were to construe it with reference to any such question it would be making a new will for him, and not construing the will which he has made. In the case of *Hunter* v. *Attorney-General*, 47 W. R. 673, [1899] A. C. 309, I find myself saying: "The plain fact remains in this will that the testator has not declared the trust that the Court of Appeal have imagined for him, and no apt words have been found to fit or give effect to his supposed intention; and I think that your lordships are not justified in taking such a liberty of interpretation. That certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money except something of that nature, although it is admitted that there are no words in the will to convey the intention which it is suggested that he had in his mind, you can invent provisions and impose conditions which the testator himself has not introduced." I find that Lord Davey, in the same case, said: "I can only say, with unfeigned respect for the opinion of that learned judge"—referring to the Master of the Rolls—"that he seems to me to be making a will for the testator and not interpreting the words which he has used." "The words are directly and plainly applicable to the second purpose, and, in my opinion, to that only." I say here—to paraphrase those words—the words are plainly applicable to the residue of the sums of money to which they are applied as a residue, and to that only. The language, therefore, is to my mind absolutely unambiguous. I confess that I am confirmed in the view which I entertain by the true construction of section 24 of the Wills Act. With whatever purpose, or in respect of whatever supposed defect in the law, that section was enacted, I can only say that the language there seems to me plain and unambiguous—that I am to construe this will as if the condition of things to which it refers was that immediately before the testator's death. I do not believe that, for any such purpose as is now contended, you have any right to go into the history of the testator's property and see when he came into possession of it. I say that, by way of protest against the construction proposed to be placed upon that section of the Wills Act; but, for the purposes of this case, it is enough to say that I think that, in this particular will, the language is plain and unambiguous, and that for no such purpose as has been suggested could you go into external circumstances. I am very clearly of opinion that the judgment of the Court of Appeal ought to be reversed.

Lord SHAND.—I entirely concur with what has fallen from the Lord Chancellor on the subject of the alleged ambiguity in this will. It appears to me, with great deference to those who have thought differently, that the will is unambiguous in itself. It is only ambiguous in this sense, that it has admitted of much argument on two different views of the construction of its terms, and not only of argument, but of very strong difference of opinion on the part of the learned judges in the Court of Appeal. But although that has been so, I agree with his lordship in thinking that, in reference to the so-called ambiguity, the meaning of the testator on a sound construction of his will is that the deductions to be made from the residue therein described are only the debts, funeral expenses, and the expense of

proving his will. He has, in my opinion, expressly stated that these are to be the only deductions from the residue. I agree with the learned Lord Chancellor that the "residue" to which the testator there refers, according to the plain language of the instrument, is the residue and remainder of the sums then lent upon mortgages, and of those sums only. It appears to me that it is a violent construction of this will to treat the word "residue" as referring to the residue of the testator's general estate, or because of the order in which the clauses occur, to hold that the residue of the mortgages is to be taken after deduction of the legacies, which are not mentioned as deductions to be made in the clause which specifies what the deductions are to be. I agree with Stirling, J., that what is really proposed is to read in the word "legacies" in the clause specifying deductions; and in the sound construction of the language of the will as a whole, I can find no warrant for this, or for the suggestion that legacies were to form a deduction from the residue of the mortgage debts. I must further say that I have very great difficulty indeed as to whether any such proof as has been allowed and has been so much referred to in the argument is admissible in this case. The case is not one in which either the property dealt with by the testator, or the legatees or persons to be benefited by the will, are at all doubtful. In the class of cases in which you cannot tell exactly what is given or to whom it is given because of obscure and doubtful expressions of the testator's will in regard to the particular conditions of his property, you must have recourse to extrinsic evidence in order to ascertain his meaning. But here, in the first place, the will is in its expressions and language, as I think, unambiguous; and that being so, no proof in reference to the amount of the testator's estate at the date of the will can affect its construction. It appears to me that the purpose, or the effect at all events, of the proposal to lead evidence in this case is to supply a basis for inferring the intention of the testator, and to take one away from the true construction of the will, as showing that the testator intended something different to what he has said. I agree with his lordship in thinking that, even if it could be shown that the intention of the testator was something different from the language of the will, that intention would not prevail, but that the language of the will must settle the rights of parties. The object of showing that there was a deficiency in the assets dealt with by the will as a whole is really to affect this question of intention, and I would observe that if, in order to place the court entirely in the position of the testator when he made his will, it is competent to lead evidence as to the amount of his estate at that date, it must, I think, be equally competent to lead counter evidence in order to show that, although his estate was of that amount, he had great expectations that his estate would be considerably larger in the course of a few days or a few years during which he expected to live. The one class of evidence must be admitted as a counterpoise to the other. But the importance of such evidence and its real effect can be of very little consequence, if any, because of the provision in the Wills Act to which his lordship has just referred, to the effect that under the statute the will speaks as from the date the death, and the amount and nature of the estate must be regarded as at that date and not at a date of three or four years before, when the estate might have been different altogether. On these grounds I am entirely of opinion with the Lord Chancellor that the judgment ought to be as his lordship has proposed.

Lord DAVEY.—Notwithstanding the very able argument of counsel for the respondents, I cannot bring myself to feel any doubt as to the construction of this will, nor do I think that any case has been made by the respondents for the admission of extrinsic evidence for the purpose of enabling us to construe it. On both those points I am quite satisfied with the judgment delivered by Rigby, L.J., in the Court of Appeal, and I adopt the reasons which he has given. I need not, therefore, make any lengthened observations upon the case; but I wish in particular to call attention to two passages in the judgment of that learned Lord Justice. He says this: "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact: Wigram (3rd ed.), pl. 10. This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consist of the ascertaining of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction imposed upon it by extrinsic evidence, I by no means undertake to assert that in point of fact this has never been done. Before the publication of Sir James Wigram's treatise there probably were, and subsequently there possibly may have been, instances of the kind. All such instances, however, must be attributable to the result of an unconscious though an illegitimate yielding to almost necessary bias in favour of a particular intention indicated or suggested by extrinsic facts as distinguished from the explanatory effect of such facts on the words of the will under discussion." The learned Lord Justice adds in a later passage: "It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning notwithstanding any difficulty that the courts may have felt in arriving judicially at the construction. It is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it"—I will add what is apparently the meaning of the Lord Justice—without some explanation of expressions used in it which are descriptive of the subjects of the bequests or of the persons to whom the bequests are made. Like Rigby, L.J., I will not undertake to say that no case is to be found (I do not pretend to have made an exhaustive search) but I am not aware of any case in which extrinsic evidence has been admitted to enable the courts to construe a difficult will where the words themselves require no interpretation, but the difficulty is only in the construction of the sentence in which the words occur. The cases cited by counsel for the respondents do not appear to me to bear a contrary character. They were all cases where the question was as to the meaning of an indefinite or uncertain description of persons or things. And to admit such evidence as has been tendered in this case would, in my opinion, be contrary to section 24 of the Wills Act, which bids us construe a will as if it were made immediately before the testator's death. Not only would it be contrary to that section, but in my opinion it would also be contrary to the general principles which guide the courts in the construction of wills and of other instruments as well. I have already said that the gift in this will does not, in my opinion, present any difficulty of construction. No doubt the word "residue" is in itself a relative term; but in this case the testator has himself told us the meaning in which he uses the word "residue," and the subject-matter with reference to which the word "residue" is used

—namely, it is to be the residue of the mortgage debts, after the payment of debts and funeral and testamentary expenses. Am I to change my opinion of the meaning of those words, which I think very plain, because I know that at the time when he made his will the mortgage debts formed the bulk of his property? I think not. Nor do I think that I ought to admit that consideration to influence my opinion merely because other persons as well qualified, or better qualified, than myself have attached a different meaning to those words. It may be that the testator may have been imperfectly acquainted with the use of legal language; he may not have understood the legal effect of making a specific gift or what a specific gift was, and he may have used language the legal interpretation of which does not carry out the intentions that he had in his mind. I do not know whether that is so or not. But, whether that be so or not, of this I am quite clear, that that fact should not induce the court to put a meaning on his words different from that which the court judicially determines to be the meaning which they bear. The difficulty which arises from departing from this plain and simple and well-founded rule of construction is illustrated by this very case. The consequence of holding that the words "residue after payment of" "debts and funeral" and testamentary expenses means something different from what the testator has said, has led to this extraordinary result — that the court has felt itself constrained, having put that unnatural meaning upon the words which the testator has used, to determine that legacies which are *primâ facie* mere pecuniary legacies of £100 or more—there are several pecuniary legacies of £100, £150, £1,000, £750, and so forth — that those legacies, which are expressed in language as to the meaning of which no lawyer could possibly have any doubt, are to be held to be specific—that is, to be not what they say, a gift of £100, but a gift of an aliquot portion of a mortgage debt. That is only an illustration of the danger of departing from what has been sometimes called the golden rule of construing every instrument according to the natural meaning which the words bear in the instrument in which you find them. I am therefore of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Stirling, J., restored.

Lord BRAMPTON.—I so thoroughly concur in every word that was said by the Lord Chancellor in giving judgment just now, that I do not feel that I could usefully add one single word. His reasons for the judgment at which the House has arrived seem to me to be not only sound law, but extremely good, ordinary sense. Therefore I satisfy myself by concurring with that judgment. I think the judgment of Stirling, J., ought to be restored, and the judgment of the Court of Appeal reversed.

Lord ROBERTSON.—I understand and respectfully appreciate the view taken of this will in the Court of Appeal and ably supported by the learned counsel for the respondents. But I am entirely unable to see ambiguity in this will, for I find the subject of the gift to the canons to be expressly defined in the words of the gift. I can see no relation in the word "residue" to the prior legacies and a direct relation to the debts, funeral expenses, and the expense of proving the will.

Order of the Court of Appeal reversed and order of Stirling, J., restored. Cause remitted to the Chancery Division.

Solicitors for the appellants, *Withalls & Belton.*

Solicitors for the respondents, *Collyer & Davis; Blount, Lynch, & Petre.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 20, 21.

OLIVER v. BANK OF ENGLAND. (a.)

Principal and agent—Power of attorney—Forged signature — Transfer of stock — Stockbroker — Implied authority—Liability—Indemnity.

Any person who, by representing himself as having the authority of the principal, induces another person to enter into any transaction, into which he would not have entered but for the representation, is liable personally for the damage that occurs if the representation turns out to be untrue to the injury of the person to whom it was made. Thus a stockbroker who executes a transfer of stock as attorney under a power is liable for any loss occasioned by the fact that a signature on the power has been forged, though it has been forged without his knowledge and he honestly believed it to be genuine.

Collen v. Wright, 5 *W. R.* 265, 7 *E. & B.* 301, 6 *W. R.* 123, 8 *E. & B.* 647, *and* Furbank's Executors v. Humphreys, 35 *W. R.* 92, 18 *Q. B. D.* 54, *followed.*

Decision of Kekewich, J. (49 *W. R.* 391, [1901] 1 *Ch.* 652), *affirmed.*

This was an appeal of W. J. Starkey from a decision of Kekewich, J. (reported 49 W. R. 391, [1901] 1 Ch. 652).

In December, 1897, the firm of Starkey, Levison, & Cooke, stockbrokers, of which the appellant was a member, received instructions from a solicitor named F. W. Oliver, for whom they usually acted, to apply for a power of attorney for the sale of a sum of £2,633 12s. 6d. Consols standing in the books of the Bank of England in the names of F. W. Oliver's brother, E. Oliver, and F. W. Oliver himself as trustees.

The firm accordingly obtained the form of power, and forwarded it for execution to F. W. Oliver, who returned it purporting to be signed and executed by himself and E. Oliver, and appointing the appellant and E J. Levison, another member of the firm, as attorneys for the sale and transfer.

The appellant alone, however, demanded to act on the power, both signatures to which he honestly believed to be genuine; and on the 23rd of December, 1897, the bank transferred the Consols under it, into other names, after having first, in accordance with their custom, compared the signatures with genuine ones of the Olivers in their possession, and written to inform them of the proposed sale. The letter, however, never reached E. Oliver, since a wrong address had been given.

On the 8th of March, 1898, the bank transferred to other persons £147 5s. 4d. bank stock also standing in the names of the two Olivers under a power obtained by F. W. Oliver and returned by him in precisely the same way.

F. W. Oliver died on the 7th of July, 1899, and E. Oliver then for the first time heard of these transactions of which he had previously been in entire ignorance; and his signature to both powers had been forged. He thereupon brought an action against the bank claiming a declaration that the transfers were void by reason of the forgery, and also claiming replacement of the stocks and payment of interim dividends or interest, and on proof of the forgery obtained judgment.

The bank, however, had issued a third-party notice

(a.) Reported by H. W. LAW, Esq., Barrister-at-Law.

to the appellant's firm claiming indemnity from them on the representations of authority made in the powers and transfers, and on the implied warranty that the signatures were genuine; on the hearing of this third-party claim, Kekewich, J., while granting no relief against the other members of the firm, ordered the appellant to pay to the bank all that the bank were bound to pay to the plaintiff in the original action, including costs, and the costs of the third-party notice.

From this decision Starkey appealed.

Sir R. T. Reid, K.C., Upjohn, K.C., and *Stewart Smith*, for the appellant.—We do not dispute the authority of *Collen* v. *Wright*, 5 W. R. 265, 7 E. & B. 301, 6 W. R. 123, 8 E. & B. 647, but the true grounds and limit of that decision must be considered. It is limited in its application to cases falling within it, and must be strictly interpreted. Otherwise it will be possible to bring an action based on implied warranty where an action of deceit could not be brought, and the rule laid down in *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, will be seriously invaded. *Collen* v. *Wright* applies only to cases of inducing to enter into a contract, and is not an instance of a wider law.

They also cited *Lewis* v. *Nicholson*, 18 Q. B. 503; *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Randell* v. *Trimen*, 18 C. B. 786, 5 W. R. C. L. Dig. 179; *Weeks* v. *Propert*, 21 W. R. 676, L. R. 8 C. P. 427; *Merry* v. *Nickalls*, 20 W. R. 929, L. R. 7 Ch. App. 733; *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82, and referred to most of the other cases mentioned in the judgment of Vaughan Williams, L.J.

H. D. Greene, K.C., Latham, K.C., and *Howard Wright*, for the bank, were not called upon.

VAUGHAN WILLIAMS, L.J.—The facts of this case are very simple. [His lordship stated them, and continued:] The powers of attorney were produced to the bank in the ordinary course, and the brokers demanded that on the production of this authority the bank should perform their statutory duty, and the bank did perform it in pursuance of the powers. The sole question is whether, as the law stands, there is raised by implication of law a warranty by the brokers of authority on which they asked the bank to act, since they purported to act as agents of the principals, the Olivers. In my judgment the law does raise such an implication. In spite of the ingenious arguments of Sir R. Reid and Mr. Upjohn, who asked us to determine what was the principle of *Collen* v. *Wright*, and how far it extends, I think we have only to decide (1) does this case come within *Collen* v. *Wright*? (2) If it does, has there been any decision overruling or, perhaps, (3) so narrowing that decision, as to prevent it applying here? I think no decision has had that effect; on the contrary, I think the subsequent cases show demonstrably that this case is governed by *Collen* v. *Wright*. The weight of that decision itself is much enhanced by the fact that Cockburn, C.J., dissented from it and put many of the considerations urged on this court to-day, stating his opinion that no such implied contract ought to be raised, and pointing out that it had not been raised in the past, firstly, because an action lay for the false representation, and secondly, because if it turned out that the alleged agent was not an agent he could be made liable as principal. Both statements were wrong in law, and, indeed, invented grounds to support Cockburn, C.J.'s, belief that the person misled in such circumstances had no remedy; and I agree with the judgment of Willes, J., in that case and with the principle he lays down, that one who professes to enter into a transaction as agent impliedly promises that his professed authority exists. *Collen* v. *Wright*, however, was only a decision applicable to cases where one purports to be acting as agent for another: other cases—*e.g.*, *Derry* v. *Peek*—have arisen where other false representations have been made, and I am only assuming now that *Collen* v. *Wright* applies to cases of representation made by a purporting agent in a matter of business. Mr. Upjohn urges that it is confined to cases where the agent purports to make a contract on behalf of another; but though these were the actual facts of *Collen* v. *Wright*, I cannot think that Willes, J., intended to limit the decision to cases of inducement to enter into a contract, and later decisions support this view. The judgment of Lord Esher in *Firbank's Executors* v. *Humphreys* is entirely contrary to the view that *Collen* v. *Wright* applies only if there is an inducement to contract, for he extends it to all cases where one person, by untruly asserting that he has the authority of the principal, induces another to enter into a transaction which he would not have entered into but for that assertion. I think this covers the present case, and the only way of escape is to limit the meaning of "transaction" so as to exclude cases such as the present one. But I think no possible meaning of "transaction" can be found which would exclude it, and as Lindley, L.J., says in the same case that the exception to the general rule that an action will not lie for honest misrepresentation extends to all cases where an agent assumes authority and induces another to deal with him on the faith of it. I think this case falls within the very words of the judgment in *Firbank's Executors* v. *Humphreys*, while in *Dickson* v. *Reuter's Telegraph Co.*, 26 W. R. 23, 3 C. P. D. 1, the same view of the effect of *Collen* v. *Wright* is taken by the court. It has been suggested that *Derry* v. *Peek* has in some way overruled *Collen* v. *Wright*, and also that *Low* v. *Bouverie* shows that in the Chancery Division cases such as *Collen* v. *Wright* have been treated as overruled. But the fact that in *Derry* v. *Peek* the House of Lords decided that no action of deceit will lie without actual fraud does not prove that no implied warranty can be raised in other cases, or throw any doubt on *Collen* v. *Wright*; and as to *Low* v. *Bouverie*, Lindley and Bowen, L.JJ., both speak in their judgments of actions on warranties in such a way as to lead one to suppose that they thought *Derry* v. *Peek* had left *Collen* v. *Wright* unaffected; and though Kay, L.J., did not deal with the relation of *Derry* v. *Peek* to *Collen* v. *Wright*, he plainly thought the Court of Chancery had in former days power to make a person liable for an innocent misrepresentation, and that this power was still in existence. I think *Collen* v. *Wright* is still good law, and that the judgment of Kekewich, J., should be affirmed.

STIRLING, L.J.—I agree. The first question is whether the principle of *Collen* v. *Wright* should be applied here. It is has been argued for the appellant that that decision is of very limited application, and only to be followed in cases similar to it; but this argument cannot prevail here, for it was urged in *Firbank's Executors* v. *Humphreys*, and Lord Esher and Lindley, L.J., negatived it. I accept the law as laid down by them, and the only question, therefore, is whether it is applicable here. I think the course of dealing between Mr. Starkey and the bank amounted to a transaction, for if the power of attorney had been good the legal position of the holders of the stocks would have been changed, and as it was, that of the bank was altered, and the bank were liable to an action if they refused to transfer in pursuance of their duty. Then it is said that the bank took their usual precautions to verify the signatures to the powers, and that therefore we ought not to raise an implication of warranty. But for this purpose,

would have had to be shown that the bank relied on their precautions and on those only; since if a misrepresentation is relied on, it does not signify that other inducements to the same end existed; in support of which proposition I may refer to *Edgington* v. *Fitzmaurice*, 33 W. R. 911, 29 Ch. D. 459. Here the bank acted on Mr. Starkey's representations also, and not on their precautions alone.

COZENS-HARDY, L.J.—I entirely concur in the judgments that have been delivered, and will not take up time by saying more.

Appeal dismissed.

Solicitors for the appellant, *Morley, Shirreff, & Co.*

Solicitors for the respondents, *Freshfields.*

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Jan. 28, 29.

In re PITT-RIVERS.
SCOTT *v.* PITT-RIVERS. (*a.*)

Will—Construction—Secret trust.

A testator built a museum and laid out pleasure grounds on a part of his estate, to which he admitted the public free, but carefully guarded against the public acquiring any right in respect thereof. By his will he devised his real estate, including the museum and grounds, to his first and other sons successively for life and in tail male. By a codicil to his will he devised the museum and grounds, with £300 per annum for their maintenance, to his eldest son and his heirs male, and also appointed two trustees for the purposes only of the museum and grounds. Evidence showed that the testator wished that his son should maintain the museum and grounds as in his lifetime, but that the public should acquire no rights therein, and that the son accepted the gift on these terms.

Held, that the intention of the testator having been that the public should acquire no rights, it was impossible to say that an effectual trust had been created binding on the son which could be enforced against him in favour of the public.

Decision of Kekewich, J. (49 *W. R.* 425, [1901] 1 *Ch.* 352), *reversed.*

This was an appeal from a decision of Kekewich, J. (reported 49 W. R. 425, [1901] 1 Ch. 352).

The testator, General Augustus H. L. F. Pitt-Rivers, had built a museum at Farnham on a part of his estates and also laid out another part which was called the Larmer grounds as pleasure grounds. During the testator's life the public had been permitted to have free access to the museum and the Larmer grounds; but the testator always insisted on his own paramount right to the museum and the grounds, and on certain days closed them to prevent the public from acquiring any rights.

The testator died on the 4th of May, 1900. By his will, dated the 12th of June, 1892, he devised his freehold property, including the museum and the Larmer grounds, to trustees upon trusts to raise out of the income thereof certain rent-charges in favour of his widow and children; and subject thereto he devised his estates to his first and other sons successively for life, with remainders over in tail male.

The testator made the following codicil to his will dated the 20th of November, 1899: "(1) I bequeath my museum at Farnham, in the county of Dorset, together with its contents and the objects of curiosity in my house at Rushmore which are intended to be placed in the said museum to my eldest son A. R. L. F. Pitt-Rivers and his heirs male. (2) I bequeath my Larmer grounds . . . to my eldest son A. R. L. F. Pitt-Rivers and his heirs male. (3) I also bequeath unto my eldest son A. R. L F. Pitt-Rivers and his heirs male the sum of £300 per annum, the said sum of £300 per annum is to be for the future maintenance of the said museum and Larmer grounds and the articles of interest therein and thereon. (4) I direct that the said museum and Larmer grounds with the articles of interest therein and the con shall be kept in a good state of preservation, and I further direct that the said sum of £300 is to be a further charge upon my estates in the counties of Wilts and Dorset. (5) I appoint my son-in-law John Lubbock, Bart. (since Lord Avebury), . . . and Chas. Hercules Reed . . . to be the trustees only for the purposes so far as necessary in connection with the future maintenance of the said museum and Larmer grounds and the objects of interest therein and thereon."

A summons was taken out by the executor of the will to have it determined whether the testator's eldest son took the gifts made to him by the codicil beneficially or subject to a secret trust to maintain and use the museum and Larmer grounds as in the testator's lifetime for the benefit of the public; and as to what, if any, estate the trustees appointed by the codicil took in the museum and grounds and the £300 per annum.

Evidence was adduced to show the intention of the testator with respect to the maintenance of the museum and Larmer grounds after his death. This evidence consisted of correspondence which passed between the testator and his solicitors, Messrs. Farrer & Co. and Messrs. Creech & Co., and of the evidence of the son and of Messrs. Creech as to a conversation which took place between the testator and his son.

The effect of this evidence is dealt with in the judgment of Vaughan Williams, L.J.

Kekewich, J., held that the museum and Larmer grounds were given to the defendant A. R. L. F. Pitt-Rivers as tenant in tail, and the £300 to him absolutely as personal estate; but, on the evidence, subject to a secret trust which must be enforced for the benefit of the public. His lordship therefore declared that the gifts made by the codicil to the defendant A. R. L. F. Pitt-Rivers were made to and accepted by him for the express purpose that the museum and Larmer grounds should be used and maintained as in the lifetime of the testator and, despite the testator's intention that the public should acquire no rights, for the benefit of the public; and that the defendant and those claiming under him held the property subject to a trust for such user or maintenance. His lordship also declared that the two trustees appointed by the codicil took no estate or interest in any of the properties given by the codicil, and had no duties to perform.

The defendant A. R. L. F. Pitt-Rivers appealed.

Haldane, K.C., P. O. Lawrence, K.C., and *W. M. Cann*, for the appellant, referred to *Hughes* v. *Stubbs*, 1 Hare, 476; *McCormick* v. *Grogan*, 17 W. R. 961, L. R. 4 H. L. 82.

Sir R. Finlay, A.G., and *R. J. Parker*, for the Attorney-General.

Renshaw, K.C., and *F. L. Wright*, for the trustees of the codicil.

Warrington, K.C., and *P. S. Stokes*, for the heir expectant.

Sheldon, for the executor.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, L J.—The question in this case is whether by reason of what happened between the testator and his son Mr. Pitt-Rivers a trust has been created which is binding on the conscience of Mr. Pitt-Rivers, and therefore enforceable in equity against him. There is no suggestion here that a trust has been created by the codicil of the 20th of November. The suggestion here is that there has been such a distinct promise made by Mr. Pitt-Rivers to the testator, his father — in consideration of which his father may be taken either to have executed the codicil or to have refrained subsequently from revoking it—that that promise will be enforced against Mr. Pitt-Rivers. In order to constitute such a promise binding upon the person who has taken a benefit under the will it is absolutely necessary that the trust should be communicated to the donee, and that he should accept it. We have, therefore, to see here whether there is such a promise proved. It has been discussed very often what are the essentials which are necessary in order to induce the courts to give effect to a trust which has not been expressed in the way in which the Wills Act requires that testamentary intentions should be expressed. But in this case there is no need to go into any fine questions about that at all. The court is relieved by the evidence from the necessity of so doing. Secondly, the court never gives the go-by, if I may use the expression, to the provisions of the Wills Act by enforcing upon anyone testamentary intentions which have not been expressed in the shape and form required by that Act, except for the prevention of fraud. That is the only ground upon which it can be done. But I am not going here to enter into any sort of question as to how distinct the promise need be in order to induce the court to enforce that promise and the trust arising under it. I will deal with this promise —because the evidence enables me to dispose of the case if I do so—as if it were a mere question between A. and B. whether the bargain was entered into, and I do not look for any greater distinction than is required when one is asking oneself apart from questions under the Wills Act, "Aye or no, is the promise established here?" In my judgment no such promise has been established here as can be enforced as a trust on the conscience of Mr. Pitt-Rivers, the son. Really, if the evidence of the conversation in the father's room on the 20th of December be looked at—whether you take the evidence of the son himself, or take the evidence of the two Messrs. Creech —it does not seem to me possible to come to the conclusion that there was here an express promise in words. Indeed, as far as I understood the arguments, it was hardly suggested that there was. If you look at the conversation, all that can be inferred properly from the evidence of those three witnesses, to my mind, is that the son said to his father that he would continue to use this property for the amusement and the enjoyment of the public in the same way as his father had done. I will treat the words, therefore, as being ambiguous. What was the meaning of his continuing to deal with the property in the same way as his father had done? It might mean, possibly, that he would continue as the owner of the property of his own free will and voluntarily to entertain the public and allow the public to use this property in the same way as his father had done as a matter of grace. If it meant that, I do not suppose anyone would say that there was any promise of such a kind as to create a trust. Or it might possibly mean that he would, apart from his own will, but as part of the wish of his father, treat this property as trust property dedicated to the use and amusement of the public. I am assuming that the evidence shows a conversation which might mean either one of those things. In my own personal opinion I think that really the balance of evidence is very much in favour of the first interpretation. But it is said that if you bear in mind that the son here not only had the conversation with his father, but that he also heard the letters read which had passed between Messrs. Farrer & Co. and Messrs. Creech, writing on behalf of the testator, you ought then to consider the words, in the light of those letters, as words spoken between persons who were bearing those letters in mind. It is said that then you will come to the conclusion that the intention of the father was not to be content with anything which should depend upon hope or goodwill, or anything of the sort, but meant to place the property in such a position that really his son would by law be compellable to continue to appropriate the property to these purposes. Here, again, I can only say that even if one imputes to the son that he did carry this correspondence in his head, I then should not come to this conclusion that by this conversation he promised his father that he would so deal with the property, because I really do not draw that conclusion myself from the correspondence. It seems to me that the father was extremely anxious that the property should remain the property of the owner of Rushmore, and that anything that was done with the property should be done by the owner of Rushmore voluntarily, that is, by his own will as distinct from the will of the testator from whom he took the property. In order really to understand the correspondence between Messrs. Farrer & Co. and Messrs. Creech, one should bear in mind what the father says in the letter which was written, I think, some five years before the codicil was executed. He had had a letter from the son, in which the son says: "My dear father,—I quite agree with you that it would be a pity if the museum was left away from the property. It would be a great bore for the owner of Rushmore to have a hostile county council show so near. I see clearly that the holder of the property after your time will have very little to spend if he can keep the place together. You say that I am always perfectly indifferent to business. How do you know? The only little business I had to do has been done here. I am always very glad to hear what you propose to do with the property, but I do not know how I am to make it my business. I certainly think that this museum ought to be the property of the owner of Rushmore, as it would be a record of diggings, &c., that have taken place on the estate." The answer of the father to that, dated the 3rd of August, 1894, contains this passage: "I am glad to see by your letter received to-day that you take a reasonable view of my wishes in regard to the museum and other establishment here. I shall be glad to feel that it is not necessary for me to make special provisions for the keeping up of these things which would deprive the owner of Rushmore of the pleasure and credit of keeping them up of his own free will and make the people of the neighbourhood gradually come to look upon them as a right. Whereas my great object is that the estate, viewed as an institution for the benefit of its surroundings, should continue to be regarded as voluntarily contributing to the pleasure and benefit of the people about." It seems to me that that letter makes it perfectly plain that the testator at that moment was determined if he could to leave this property with the museum and other things upon it in the hands of the owner of Rushmore in such a way that anything that was done with it for the amusement or benefit of the people would be something done of his own free will for those people. And it seems to me that that is absolutely inconsistent with

the trust which we are now asked to say the son promised the father he would carry out. On the other hand there is no doubt that the father, having that wish, also had a strong desire to have some certainty that his son would really keep up the museum in the way in which he could wish it to be kept up, and would spend enough money upon it. In that state of mind he draws the codicil himself. Before this correspondence takes place I do not really see the slightest ground for suggesting that he had in any way departed from his views as expressed in the letter of the 3rd of August, 1894, from which I have just read an extract. Being in that state of mind the testator then draws that codicil. Upon that if the son had then been called in to the father's room without there being any correspondence with Messrs. Farrer at all and had been asked whether he approved of his father's will, I cannot conceive that anybody could have said, that by saying that he approved he thereby made any promise creating a trust, the result of which would be to prevent him as the owner of Rushmore from keeping up the museum of his own free will. But it is said that this correspondence with Messrs. Farrer makes the difference. I do not wish to go into that at length: it really is not necessary. But Messrs. Farrer suggest that really the best way for him would be to express a hope which they tell him will not be legally binding, and then trust that his son will be inclined, acting for himself, to follow out the same course. Then when the testator is not satisfied with that, because no doubt it does not seem to bind the son sufficiently firmly, Messrs. Farrer point out to him the other alternative. But it is Scylla and Charybdis. It is plain that that which the father was so set upon, that the people should have no rights at all whatsoever, that the owner of Rushmore for the time being should do these things and get the credit of doing these things of his own free will, would be impossible if the alternative suggestion which Messrs. Farrer pointed out was carried out—that is say, if he had the intervention of trustees who should obtain the necessary leave from the court. Then when that correspondence has been read, the father has read to the son the codicil which had been previously drawn for him by Messrs. Creech —whether at his dictation or not I am not quite sure. We are asked to say that in consequence, then, of the son having promised the father that he would continue things as they were in his father's lifetime, a trust has been created which the court ought to enforce; that is to say, a trust has been created by the giving by the son of a promise which it would be unconscientious for the son not to perform. I cannot agree. I find no such promise at all. The only promise I do find is a promise which to my mind is much more consistent with the absence of a trust like that which is suggested here, than it is with the presence of it. I think, therefore, that the decision of Kekewich, J., was wrong, and that it ought to be reversed.

STIRLING, L.J.—I am of the same opinion. In this case Kekewich, J., in the first place decided that the codicil as it stands created no trust, but simply contained absolute gifts in favour of the testator's son. But he held that it appeared from the evidence that the testator communicated the existence of this codicil to the son and at the same time disclosed to him his wishes with reference to the property, and exacted from the son an assurance that those wishes should be fulfilled. Under these circumstances he came to the conclusion that a trust had been created which could be enforced as against the son at the instance of the Attorney-General as representing the public. Now what were the wishes which were thus communicated to the son? In the first place the learned judge says this: "He"—that is, the testator—"certainly did intend him"—that is, the son—"to maintain the museum and grounds and to allow the public access thereto, and the son certainly accepted the gift of both with the assurance that this should be done." Then he adds this: "When giving the property already mentioned to the son for the purpose of maintaining the museum and grounds as heretofore the testator insisted that the public should have no rights." I think that the conclusions of fact at which the learned judge arrived as stated by him are justified by the evidence. The learned judge then proceeded to consider what was the effect of the communication of the wishes as found, with the result which I have stated. He came to the conclusion that a trust had been created which could be enforced. With the utmost respect I am unable to agree with that conclusion on that state of facts. It seems to me that when once you arrive at the conclusion that the public were to have no rights it is impossible to say that an effectual trust has been created, and looking at the whole evidence, which I shall not go into, I think that what the testator really meant to do was that which in the Irish case of *M'Cormick* v. *Grogan*, Ir. Rep. 1 Eq. 313, the Lord Justice of Appeal stated to have been the object of the testator whose bequests were the subject of consideration in that case. He considered there that the purpose was to set up after the decease of the testator not a trustee but as it were a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect. The truth is that the testator, though he had with the utmost liberality afforded admission to the public to the museum and grounds, had anxiously guarded throughout his whole life against the public acquiring any rights against him. It appears from the evidence that he was equally anxious that no such rights should be acquired by the public against his successor, and I think the result is that he was satisfied by his son and successor undertaking an honourable obligation to carry on the museum and the grounds which had been thrown open to the public during the testator's lifetime in the same manner and to the same extent, and no further, as the testator himself had done. I agree, therefore, that the appeal ought to be allowed.

COZENS-HARDY, L.J.—I agree and I have very little to add. It seems to me that the testator's wish, as expressed by him to his son, was inconsistent with the true idea of a charity. The public were to have no rights. It may be that he desired to create that which not being in the view of the law charity would be void as a perpetuity. But I cannot see that the son is in any way bound to do more than to agree to hold the property upon the terms verbally expressed to him by the testator, and these terms do not create a charitable trust.

Appeal allowed.

Solicitors, *C. R. Woolley; The Solicitor to the Treasury; Kennedy, Hughes, & Ponsonby; Tatham & Pym.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) Jan. 15.

ST. JAMES AND ST. JOHN, CLERKENWELL, VESTRY v. EDMONDSON & SON. (a.)

Metropolis—Management Acts—Street—"New street"—Sewering—Expenses—New buildings on one side of old street—Sewer put in on new side—Liability of frontagers—Highway forming boundary of metropolis—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53

An old highway which formed the boundary between the parish of Hornsey, in the county of Middlesex, and the parish of Clerkenwell, in the County of London, had buildings erected on the Hornsey side of it for almost its whole length before 1856, *when the Metropolis Management Act,* 1855, *came into operation. On the Clerkenwell side there were then only a few houses. Recently the Clerkenwell side also had been covered with buildings, and in* 1898 *the Clerkenwell Vestry laid down a sewer under their part of the highway to receive the drainage of the houses on their side. It was found as a fact that the road, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act,* 1855, *came into operation.*

Held, that, for the purpose of determining whether the frontagers on the Clerkenwell side of the road were liable under sections 52 *and* 53 *of the Metropolis Management Act,* 1862, *to contribute to the expense of making the sewer as for the drainage of a "new street," the road must be treated as a whole, and the Clerkenwell side could not be treated as being by itself a new street.*

Judgment of Lord Alverstone, L.C.J., *and* Kennedy, J. (49 *W. R.* 171, [1901] 1 *K. B.* 264), *affirmed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy, J.), on a special case stated by justices of the County of London sitting at Highgate: 49 W. R. 171, [1901] 1 K. B. 264.

The appellants were the Vestry of St. James and St. John, Clerkenwell. The respondents were Messrs. Edmondson & Son.

A complaint was preferred by the appellants under sections 52 and 53 of the Metropolis Management Act, 1862, against the respondents, stating that the appellants during the years 1897 and 1898, in accordance with the provisions of the Metropolis Management Acts, executed certain works—viz., the construction of a sewer, and the works appertaining thereto, in a new street known as Colney Hatch-lane, for or in respect of certain premises in the said street of which the respondents were the owners, and that the appellants had thereby incurred expenses of which the amounts apportioned in respect of the respondents' premises were £130 6s. 8d. and £7 2s. 10d. respectively, and that the respondents had not paid the said sums nor any part thereof.

Colney Hatch-lane was an old highway forming the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the County of London, and the parish and urban district of Hornsey, in the county of Middlesex. The actual boundary was nearly in the centre of the lane, but the greater part of the surface was within the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell or London side of the lane there were at that time only about seven or eight buildings at various points. the entire length of the lane was 2,993ft., and the character and extent of the buildings was shown on the ordnance map published in 1862. Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell or London side had been laid out for building, and the greater part of the frontage to the lane was now covered with buildings.

In or about the year 1887 the Hornsey Local Board laid a sewer on their side of the lane for the drainage of the houses in their district. By agreement between that board and the appellants, two of the houses on the Clerkenwell side were drained into that sewer until the new sewer, the cost of which was in dispute, was constructed; and by agreement between the same board and the owners of two other houses on the Clerkenwell side, those owners connected their drains with the Hornsey sewer.

On the Clerkenwell side of the lane there was no sewer of any kind save a surface-water sewer, which had been laid for the drainage of the road itself, partly by the owners of adjoining land and partly by the appellants, and for a short distance an old brick sewer running obliquely across the lane and taking the drainage of three or four of the houses on that side.

The part of the parish of Clerkenwell which comprised the eastern side of Colney Hatch-lane was wholly detached from the rest of the parish, and was entirely surrounded by the county of Middlesex. For this reason it was found to be impracticable to provide an outlet into the metropolitan main drainage system from this part of the parish. By the Metropolitan Board of Works (Various Powers) Act, 1887, s. 44, the Metropolitan Board of Works (now the London County Council) were enabled by agreement with the local authorities of certain adjoining districts, or any of them, to cause any sewer or sewers constructed or to be constructed by such board in the said detached portion of Clerkenwell to communicate with the sewers of one or more of such authorities, and an agreement for this purpose was made in the year 1896 by the London County Council with the Friern Barnet Urban District Council, and an outlet for the sewage of the said detached part of Clerkenwell into a sewer of the London County Council, and thence into the Friern Barnet sewers, was provided in pursuance of the said agreement in the year 1897. As soon as such outlet was provided, the appellants laid down under their part of Colney Hatch-lane the sewer which was the subject of this case for the drainage of the houses and buildings which then were or might thereafter be erected on the Clerkenwell or London side of the lane, and such sewer was completed in the year 1898.

It was contended on behalf of the appellants that so much of Colney Hatch-lane as was within the parish of Clerkenwell was a "new street" within the meaning of the Metropolis Management Acts, and that it had become a new street by reason of the erection of buildings fronting it as above mentioned; that in order to determine whether it had become a new street no regard could be had to the portion of the lane in the parish of Hornsey or to the buildings on the Hornsey side, these being in a different parish, district, and county, and subject to entirely different statutes.

It was contended on behalf of the respondents that Colney Hatch-lane, taken as a whole, had become a street in the ordinary sense of the term by reason of the buildings erected along it before the year 1856, and was an old street when the Metropolis Management Act, 1855, came into operation, that no part of such street could become a new street subsequently by

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

reason of the erection of additional buildings along it, and that the portion of the lane which was in Clerkenwell could not be dealt with by itself without regard to the portion which was in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a new street within the meaning of the Metropolis Management Acts.

The justices found that Colney Hatch-lane, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and they were of opinion that that portion of the lane which was in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street, and for those reasons they dismissed the summonses.

On the hearing of the special case, the Divisional Court upheld the decision of the justices.

The appellants appealed to the Court of Appeal.

Section 52 of the Metropolis Management Act, 1852, enacts as follows: "Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of January, 1856, the expense of constructing such sewer and the works appertaining thereto . . . shall be borne and defrayed by the owners of such street or houses and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportion as they may deem just."

Macmorran, K.C. (*C. F. Pritchard* with him), for the appellants.—For the purpose of considering whether that part of the road which is in Clerkenwell is a new street within the meaning of the Metropolis Management Act, that part should be treated by itself without regard to the other part of the road which is in Hornsey. The justices were wrong in thinking that the road must be treated as a whole. By section 112 of the Act of 1862 "new street" includes part of a street: see *Richards* v. *Kessick*, 57 L. J. M. C. 48. It would be absurd to construe this Act in such a way as to allow the fact that there have been houses on the Hornsey side of the road for many years to affect the question whether the part of the road which is in Clerkenwell is a new street. On this question depend certain rights and liabilities of the frontagers on the one hand, and of the whole body of ratepayers of Clerkenwell on the other. Those rights and liabilities ought not to be affected by something which has been done in past years entirely outside the parish of Clerkenwell by persons who were not even metropolitan ratepayers. The Clerkenwell part of the road, taken by itself, is a new street by reason of erection of houses along it since 1856: *Pound* v. *Plumstead Board of Works*, 20 W. R. 177, L. R. 7 Q. B. 183.

He referred to *Property Exchange* (*Limited*) v. *Wandsworth Board of Works*, 84 L. T. Rep. 689, 49 W. R. Dig. 120, and *White* v. *Fulham Vestry*, 74 L. T. Rep. 425, 44 W. R. Dig. 108.

Alexander Glen, for the respondents, was not called upon to argue.

COLLINS, M.R.—In my opinion this appeal ought to be dismissed. The question arises with regard to a certain old highway which forms the boundary between the parishes of Hornsey, in Middlesex, and Clerkenwell, in London. The actual boundary line runs somewhere near the middle of the highway, and is, as I understand, rather nearer to the Hornsey side of the road than to the Clerkenwell side. The Vestry of Clerkenwell, as the authority under the Metropolis Management Acts, are desirous of treating this highway as a new street in order that they may exercise their power of making the owners of houses fronting or abutting on it, pay the expenses of constructing a new sewer and sewerage works. If it is not a new street, then they have not got that power. Their contention is that that part of the highway which is within the parish of Clerkenwell may be deemed to be a new street within the meaning of the Metropolis Management Acts.

The justices found that before the first Metropolis Management Act came into operation this highway had become a street by reason of the houses which had been built on the Hornsey side of it, and that it was therefore not a new street, but an old street. It seems to me that that is a question of fact. The question whether a particular highway has become a street, and when it became a street, cannot be a question of law, but must be a question of fact. Neither is this a case in which we have to trouble ourselves as to the area of an old highway, for no additions have been made to this highway. All that appears is that long before the sewer in question was constructed houses were built on the Hornsey side of the road in such numbers that the highway became a street. That being a question of fact, I think that the matter is concluded.

It seems to me that the argument of the appellants rests on a confusion between the physical fact of a particular highway being a street and the rights and liabilities of persons arising from the fact of its being a street. It introduces into the question of whether a highway is a street the question of what were the rights of the various owners of houses abutting on the highway with respect to the highway. The justices found that this highway was a street, within whosoever jurisdiction it was, and the Divisional Court affirmed their decision. In my opinion the judgment of the Divisional Court was right, and the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. I think there is great force in the observation of Kennedy, J., that, in the absence of authority, to create one more artificiality in the understanding of the expressions "street" and "new street" is certainly not to be desired. In my opinion Colney Hatch-lane was and is one street, and that an old street, and it ought not to be treated as two streets, an old and a new street.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Boulton, Sons, & Sandeman.*

Solicitors for the respondents, *Tatham & Hardy.*

High Court of Justice.

Chan. Div. Swinfen Eady, J. — Feb. 1.

In re FERNELEY'S ESTATE. (*a.*)

Will—Remoteness—Restraint on anticipation—Separability of class.

A restraint on anticipation imposed by will on a class of females is valid as regards members of the class born in the testator's lifetime, though void for remoteness as regards those born afterwards.

Herbert v. Webster, 15 *Ch. D.* 610, 28 *W. R. Dig.* 197, *followed*

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Petition.

By his will, dated the 8th of February, 1834, a testator gave his real and personal estate to his trustees upon trust for sale and conversion, and as to one-fourth share of the proceeds thereof upon trust (subject to the payment of £1,000 to his daughter Betsy) to invest and stand possessed of the same upon certain trusts as to the income thereof during the life of his said daughter Betsy, and after her death upon trust for all her children who should attain twenty-one years or be married in equal shares, and as to one other share of the proceeds thereof upon trust (subject to the payment of £1,000 to his daughter Esther) to lay out the same in like manner and stand possessed thereof upon the like trusts and with the like powers, restrictions, and declarations in all respects, and particularly against anticipation, for the benefit of his daughter Esther and her children as were thereinbefore given, expressed, and declared concerning the fourth share for the benefit of his daughter Betsy and her children.

The will contained a declaration that the dispositions therein made for his daughters and their children and also for any persons being females should be for their respective own sole and separate use and benefit, notwithstanding any coverture, to the end that the same might be for their respective separate use, maintenance, and support, and not be paid to them by anticipation.

The testator died on the 3rd of March, 1850. On the 19th of March, 1844, his daughter Esther married; there was issue of the marriage seven children, of whom the petitioner (a daughter) was one; some of the children (including the petitioner) were born before the testator's death, and some afterwards.

On the 10th of April, 1874, the petitioner married, and on the 21st of February, 1885 (during her coverture), she mortgaged her reversionary one-seventh part of one-fourth share in the estate of the testator

On the 17th of September, 1900, this one-fourth share became divisible.

On the 31st of July, 1901, the then sole trustee under the testator's will in pursuance of the Trustee Act, 1893, having notice of the conflicting claims of the petitioner and of the legal personal representative of the mortgagee, paid certain moneys representing the share of the petitioner into court.

The petitioner accordingly presented a petition praying that these moneys might be paid out to her.

A. Grant, for the petitioner.—The mortgage was void because the restraint on anticipation imposed on such of the females as were born in the testator's lifetime is not obnoxious to the rule against perpetuities: *Herbert* v. *Webster*, 15 Ch. D. 610, 28 W. R. Dig. 197, which overrides all earlier cases to the contrary. In that case Hall, V.C., refused to follow his previous decision in *In re Michael's Trusts*, 46 L. J Ch. 651, 25 W. R. Dig. 318. In all cases where the restraint can attach it ought to attach; whether it can attach or not depends in this case on whether the female was born before or after the testator's death: *Wilson* v. *Wilson*, 7 W. R. 26, 28 L. J. Ch. 95; *In re Russell*, 44 W. R. 100, [1895] 2 Ch. 698. In *In re Ridley*, 27 W. R. 527, 11 Ch. D. 645, Jessel, M.R., to whom *Wilson* v. *Wilson* was not cited, felt himself bound by earlier decisions to decide the contrary.

R. J. Parker, for the legal personal representative of the mortgagee, cited in addition *Armitage* v. *Coates*, 35 Beav. 1, and *Cooper* v. *Laroche*, 29 W. R. 438, 17 Ch. D. 368.

W. H. Cozens-Hardy, for the trustee, took no part in the argument.

SWINFEN EADY, J.—I am bound by the decision of Hall, V.C, in *Herbert* v. *Webster*, which, I think, embodies the sounder view, and I, therefore, hold that the petitioner was restrained from anticipation during coverture

Solicitors, *Orford & Sons; Busk, Mellor, & Norris, for Slater, Heelis, Williamson, Colley, & Tulloch.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Nov. 7, 8.

SEALEY v. TANDY. (*a.*)

Licensing law—Public-house—Right to refuse entry—Licensing Act, 1872, *s.* 18.

The occupier of licensed premises (other than an inn) may request any customer to leave the premises, even though he be not drunk, quarrelsome, violent, or disorderly.

Case stated by a magistrate dismissing a charge of assault against the respondent.

The appellant was the occupier and licensee of a public-house which was licensed for the sale of intoxicating liquors, but was not an inn.

On the 25th of February, 1901, the respondent entered the appellant's premises, from which he had several times previously been ejected and had been forbidden the house. The appellant ejected the respondent and received a severe kick in so doing.

The magistrate was of opinion that the respondent had not been guilty of any violent or disorderly conduct and that the kick given by him to the appellant was given in the course of resisting ejection, and that the appellant sought to eject the respondent on account of his disorderly conduct on former occasions. On these findings the magistrate dismissed the summons on the ground that the appellant's right to eject the respondent was limited by section 18 of the Licensing Act of 1872, and that on the authority of *Dallimore* v. *Sutton*, 62 J. P. 423, 46 W. R Dig. 93, the appellant could not eject the respondent unless he had been violent, drunken, quarrelsome, or disorderly. The question for the decision of the court was whether the magistrate was right in so holding, or whether the appellant could at any time require the respondent to leave his premises even though he had not been drunken, violent, quarrelsome, or disorderly, and eject him if he refused.

Danckwerts, K.C. (*Bruce Williamson*, with him), for the appellant.—The magistrate was wrong in holding that *Dallimore* v. *Sutton* decided on this point. That case only decides that a man must come within the category of persons named in section 18 in order to be convicted of refusing to leave licensed premises. There is no obligation on the part of a licence-holder to supply anyone, and the respondent had no right to be there. The right of entry is limited to a traveller at an inn, and this was not an inn nor was the respondent a traveller.

He cited *Reg.* v. *Armagh Justices*, [1897] 2 Ir. R. 57; *Lamond* v. *Richard*, 45 W. R. 289, [1897] 1 Q B. 541; *Reg.* v. *Rymer*, 25 W. R. 415, 2 Q. B. D. 136.

The respondent did not appear.

Cur. adv. vult.

Nov. 8.—Lord ALVERSTONE, L.C.J.—This is a case stated by the magistrate who had dismissed the

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

summons for assault because he considered that the proceedings out of which the assault arose were occasioned by the appellant (who is the occupier and licensee of a public-house) requesting the respondent to leave the premises and on his refusal attempting to forcibly eject him; and that therefore whatever followed he could not entertain the proceedings for assault.

The learned magistrate seems to have thought that the rights of a publican to request a person to leave his premises depended on section 18 of the Licensing Act, 1872, and that unless the person was drunk, violent, quarrelsome, or disorderly at that time he could not make such a request. We think he has overlooked two elements in this case. Firstly, that the house of the appellant was not an inn; and, secondly, that the person who was turned out or attempted to be turned out was not a traveller. These distinctions have been cited in many cases, in *Reg.* v. *Armagh Justices* and also in *Reg.* v. *Rymer* and other cases which have been cited to us. In our opinion the distinctions are well founded, and the occupier of a public-house has a right to request a person to leave whom he does not wish to remain on the premises. In our opinion the licensee of or occupier of licensed premises has a right to request a person to leave, except in the case of a traveller at an inn. The case must go back to the magistrate in order, if necessary, that the question of assault may be tried. The objection which the magistrate took was not well founded, and the appeal must be allowed.

DARLING, J.—I am of the same opinion. It seems to me that there is, and always has been, a very great difference between the old kind of inn and the modern public-house. In a passage in the judgment of Holmes, J., in *Reg.* v. *Armagh Justices*, it is said that the English inn was coeval with English literature. I have no doubt that the learned judge was thinking of the inn as described in Chaucer, and perhaps as described by Dr. Johnson. I could not help recalling, as I heard that, the passage in which Dr. Johnson said one of the characteristics of an inn was that you were made welcome, and that the more noise you made, the more trouble you gave, the more welcome you were. Having made this statement he proceeded, as Boswell said, to repeat with great emotion a well-known verse.

This particular person did not make himself welcome. He was a person who belonged to a disorderly gang, who would not be a good customer as the publican well knew, and the latter therefore acted on his undoubted right in saying, "I am quite ready to serve some customers, even noisy customers, and I serve them, but you are the kind of customer who not only makes a noise but will do me no good, and I will not serve you; I have the choice like other shopkeepers and I shall not serve you" It seems to me in acting so the appellant was acting for the public advantage because the other customers might very well have complained if he were to allow a person who to his knowledge was a member of a disorderly gang to frequent his premises. If he allowed one he must all of the gang, and by allowing such a gang to frequent the house he would undoubtedly endanger his licence. I think, therefore, that he was not only acting well within his rights when he told the respondent to leave his premises, and the respondent ought at once to have done so.

CHANNELL, J., concurred.

Case remitted.

Solicitors for appellant, *Maitland, Peckham, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wright and Ridley, JJ.) } Feb. 3, 4, 5, 10.

REX v. ARCHBISHOP OF CANTERBURY.
In re GORE.
Ex parte COBHAM AND GARBETT. (a.)

Ecclesiastical law—Mandamus—*Confirmation of bishop-elect by Archbishop or Vicar-General—Objections as to doctrine*—25 *Hen.* 8, *c.* 20.

There is no jurisdiction in the Archbishop of Canterbury or his Vicar-General to entertain, upon the confirmation of the election of a bishop-elect, objections raised to such confirmation alleging ecclesiastical offences—the contravention of the articles of religion by the publication of false doctrine, want of prudence and discretion, and unfitness to fill the office of a bishop.

Semble, that a mandamus *will not lie to the Archbishop to compel him to inform his mind as to the fitness of the bishop-elect before he proceeds to confirmation.*

In this case cause was shown against two rules *nisi* for a *mandamus* directed to the Archbishop of Canterbury and Mr. C. A. Cripps, K.C., the Vicar-General, commanding them or one of them, at a court to be therefor duly holden in the matter of the confirmation of the election of the Rev. Canon Gore, D.D., to the bishopric of Worcester, to permit and admit to appear in due form of law Alexander William Cobham and Edward Henry Garbett, to oppose the confirmation of the said election; and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof.

The facts of the case and the arguments of counsel sufficiently appear in the judgments of the court.

Sir R. Finlay, A.G., Sir E. Carson, S.G., Dibdin, K.C., and *Sutton*, for the Crown.

Sir E. Clarke, K.C., and *E. W. Hansell*, for the Archbishop of Canterbury and the Vicar-General.

J. G. Talbot and *Rayner Goddard*, for the bishop-elect.

Haldane, K.C., Bramwell Davis, K.C., and *Whitehead*, for Cobham.

Danckwerts, K.C., and *Morton Smith*, for Garbett.

Cur. adv. vult.

Feb. 10.—Lord ALVERSTONE, L.C.J., read the following written judgment: These were two rules in the same terms moved on behalf of two gentlemen of the names of Cobham and Garbett calling on his Grace the Archbishop of Canterbury and Charles Alfred Cripps, Esq., Vicar-General, "to show cause why a writ of *mandamus* should not issue directed to them commanding them, or one of them, at a court to be therefor duly holden in the cause or business or matter of the confirmation of the election of the Rev. Charles Gore, D.D., to the bishopric of Worcester, to permit and admit to appear in due form of law the said Alex. William Cobham, chairman of the Church Association, to oppose the said confirmation of the said election of the said Rev. Charles Gore, D.D., and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof." Cause was shewn against these rules on behalf of the Crown and on behalf of the Archbishop and Vicar-General. It appeared from the affidavits that the Rev. Canon Gore having been duly nominated in letters missive from his Majesty the King was elected Bishop of Worcester by his Dean and Chapter of Worcester acting under royal

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

licence, and was then presented for confirmation to the Archbishop. On the 16th of January the Archbishop of Canterbury had issued a citation substantially in the form which has for many years been used on such occasions, but to which was added the following note or addition: "Persons claiming to be heard as objectors must deliver notice of their objections in writing at the office of the Provincial Registry, No. 3, Creed-lane, Ludgate-hill, before 4 p.m. on Tuesday, the 21st of January inst. No objection will be considered unless such written statement has been delivered. The Vicar-General will sit in chambers at committee room No. 2 at the said Church House, at 10 a.m. on Wednesday, the 22nd inst., to consider any objections which may have been delivered, and no objector who does not appear in chambers and establish his right to appear and be heard can appear or be heard during the business of confirmation." In accordance with the direction contained in such note certain persons acting in the same interest as Mr. Cobham appeared in chambers and handed in to the Vicar-General printed objections, which were verified by affidavit, and Mr. Garbett and certain other gentlemen handed in certain other objections in writing, to which it is not necessary to refer in detail. It is sufficient to say that the objection handed in on behalf of Mr. Garbett alleged that the Rev. Canon Gore, the bishop-elect, had committed ecclesiastical offences, and had published false doctrine, and had thereby contravened the articles of religion, and that he was by reason of such publications unfit to be entrusted with the care and superintendence of a diocese. The other set of objections alleged, among other things, that Canon Gore was not a prudent and discreet man, and not at all a fit and proper person to fill the office of bishop, by reason of certain passages in his published works, and, further, that he had been a member of certain societies mentioned in the objections. The learned Vicar-General, after considering the nature of the objections, declined to hear any of the objectors in support of them, and after taking the names of the objectors, gave his decision that they were not objections which he could entertain. He gave reasons for arriving at that decision, set out in the shorthand notes verified by affidavit and read before us.

The question raised is, no doubt, one of extreme importance. We have been greatly assisted by the arguments of the learned counsel who have appeared before us on both sides, and also by the full report of the arguments which took place in the case of *The Queen* v. *The Archbishop of Canterbury*, reported in 11 Q. B. 483, and also by Mr. Jebb. Without that assistance it would have been impossible for me to prepare my judgment within so short a time after the argument; but I have endeavoured to prepare the reasons for the judgment which I am about to give as quickly as possible, because we are aware that it is very important in the interests of the diocese that there should be no delay in dealing with the matter. One main ground of the contention of the learned counsel in support of the rule was that the Vicar-General was sitting as a court to which opposers had been summoned by virtue of the citation of the 16th of January, and that they were entitled in accordance with the terms of the citation to state any ground of opposition to the election or confirmation of Canon Gore, and therefore to raise by way of opposition the charges of ecclesiastical offences and the other objections referred to in the notices. The case was in the first instance launched when the rule was moved, as a claim for a *mandamus* to compel a court of limited jurisdiction to exercise the jurisdiction which it was bound to exercise at the instance of the parties who demanded its exercise. I am of opinion that the rules could only be made absolute if that position can be maintained, and that unless it is made out, no *mandamus* ought to issue. It was on this basis that the case was considered by the judges of the Queen's Bench in *The Queen* v. *The Archbishop of Canterbury*: see the judgment of Coleridge, J., at p. 577, and the judgment of Patteson, J., at p. 633 of the report in 11 Q. B., and the authorities upon the point which are collected in Tapping on Mandamus, pp. 230 *et seq.* This point will be found of considerable importance in view of an alternative contention urged on behalf of Mr. Cobham by Mr. Haldane, to which I will refer later, to the effect that the court ought also to grant a *mandamus* to compel the Archbishop of Canterbury to consider these particular objections in order to inform his mind as to whether or not Canon Gore was a fit person to be confirmed and consecrated as a bishop. Dealing with the ground first mentioned—the claim thus set up is a claim that any member of the public, or at least any inhabitant of the diocese interested, who desires to oppose the confirmation and consecration of any person who has been elected a bishop may appear in answer to the citation of the Archbishop and call upon the Vicar-General or the Archbishop to hear and decide alleged charges of heresy, false doctrine, or other alleged ecclesiastical offences, or, secondly, to inquire into and give judgment upon general objections to the fitness for the episcopal office of the person nominated by the Crown, duly elected by the dean and chapter, and presented to the Archbishop for confirmation. It was not disputed by the learned counsel who supported the rules that, in order to make good this first contention, we must hold that the act of confirmation done by the Archbishop or the Vicar-General was the act of a court having jurisdiction to hear and determine such questions at the instance of the persons raising them.

The question primarily depends upon the true construction to be put upon the Act 25 Hen. 8, c. 20. Briefly summarized that Act by section 4 enables the king on every voidance of an archbishopric or bishopric to grant to the dean and chapter a licence to proceed to the election of a person named in a letter missive sent by the king, and provides that the dean and chapter shall elect and choose the person so named. By section 5 it provides that, if the dean and chapter elect and choose such person, then their election shall stand good and effectual to all intents; and further, that the king may by letters patent under the great seal signify the election to the Archbishop and require and command him to confirm the election and to invest and consecrate the person so elected. Section 4 contains a further provision that, if the dean and chapter defer or delay the election for more than twelve days, the king may by letters patent nominate and present to the said office such person as he thinks able and convenient. The 7th section provides that the failure of the dean and chapter to elect in accordance with the king's licence and letters missive or the refusal of the Archbishop to confirm, invest, and consecrate such person within twenty days after the king's letters patent have come to his hands shall involve the one or the other in the dangers and penalties of the Statute of *Præmunire*. Upon the construction of this statute, speaking for myself, I can add little if anything to the judgment of Erle, J., in which I entirely concur. There is in the statute no mention of any examination or inquiry by the Archbishop; but he is directed to confirm the election within a period of twenty days, nor does the statute on the face of it in terms contemplate or directly or indirectly suggest that the Archbishop can in any way question the fitness of the person nominated by the Crown unless such power is involved in the use of the

word "confirm." If the Archbishop had such a general right the position of the Crown would be extraordinary and, as was pointed out by the Attorney-General in reply, far worse than the patron of an ordinary living in relation to his patronage. Without now enlarging upon a matter from some aspects of considerable importance, I may point out that bishoprics have always had largely the character of donatives; and, if the Archbishop possessed the right to veto the nominees of the Crown, I know of no legal proceeding by which the king can enforce his rights as patron. We have nothing to do on this application with any question of refusal or unwillingness on the part of an Archbishop executing his high office to confirm or consecrate; the Archbishop would do so upon his own responsibility, and would incur the risk of *præmunire* contemplated by the statute. No question was, or could be, raised before us upon the argument of these rules as to the consequences of such an act. I mention this because both in the argument of *Bishop Hampden's case* (Jebb) and on the argument before us what appear to me to be extravagant suggestions were made that the Archbishop might be compelled to confirm as bishop a man who was not a priest in holy orders, a person under the age of thirty, a Jew or Turk, a pronounced infidel, or one having some other obvious disqualification, and there is a strong passage in the judgment of Coleridge, J. (11 Q. B., at p. 604, Jebb, p. 465) to the same effect. We are not dealing with any such case, and, in my opinion, these considerations do not assist us. We have only to read the history of the last 150 years of our own times to know that the choice of persons to fill the high office of a bishop is a matter of most anxious consideration by the Crown, and that advice is given by those who are most competent to guide in the selection of fit persons.

We have in this case to deal with the claim of those on behalf of whom these rules were moved, to appear upon this citation before the Archbishop or his Vicar-General and to demand a judicial decision upon the objections which they have raised. I have not omitted to notice the limit of twenty days fixed by section 7. I am rather inclined to agree with the argument presented by Mr. Danckwerts and other learned counsel that this limit should not be considered absolutely binding if an objection was lawfully raised which would lead the Archbishop to refuse or postpone confirmation. But, upon the other hand, a set limit of days does seem wholly inconsistent with the idea that the statute referred to a recognized practice whereby opponents might raise questions which might not possibly be determined except by protracted litigation. To meet the plain objection which arises upon the words of the statute, it was urged that the words "confirm such election" in section 5 and "confirm" in section 7 refer to a practice of confirmation alleged to be well known which was said to have existed in normal circumstances in the Church of England at some period prior to the passing of the Act, a practice under which it was contended that there was a duty on the part of the Archbishop before confirming any person, although such person had been named by the king and duly elected by the dean and chapter, to inquire at the stage of confirmation as to his fitness, having regard to the qualifications of a bishop as laid down in the canons of the Church, and that as a consequence persons who were of opinion that the person named was not fit to be a bishop would be entitled to appear before the Archbishop and be heard. It was not suggested that this practice was actually existing in the Church of England at the date of the passing of the Act of 1533; on the contrary, Mr. Haldane admitted, and made it a part of his argument, that what he called the normal practice had been interrupted from 1316 up to 1533, a period of upwards of 200 years. But he contended strenuously that prior to 1316 the practice at any rate of examination by the bishop had taken place under what he called the normal state of things, and that the words "and confirm" used in sections 5 and 7 were meant to refer to that pre-existing practice, involving, as he said, the right of opposers to appear before the Archbishop and raise objections. It was also contended that the forms which were used shortly after the passing of the Act, and which have continued in use substantially in the same form from that time down to the present—a period of upwards of 375 years—must have been intended to recognize the right of the opposer to be heard and demand judicial investigation. If the evidence supported the contention that there was at the time of the passing of the Act such a practice it would have been necessary to consider more closely the true effects of the words in section 4 of the Act, "their election shall stand good and effectual to all intents," and, further, whether the continuance of any such practice was consistent with the express provisions of the statute. I must not be thought to express any opinion that, even if such practice had been established, persons could have claimed the benefit of it, having regard to the clear language of the statute. But, after the most careful consideration of the many matters, historical and legal, which have been brought before us, I am clearly of opinion that there is no evidence of the existence of any such established practice prior to the passing of the statute, and that the forms, which, as I have said, have been used without alteration from that time to the present, were not intended to refer to or to revive any practice of the kind. The uniform practice in usage since the year 1533 is practically conclusive against the contention that it is possible to construe the statute as referring to any such practice or right. It is absolutely essential to keep clearly in view the distinction between the state of things in the Church when bishops were really elected by some electoral body and when the metropolitan had, as such, the responsibility of inquiring into and confirming the choice of the electors after that choice had been made. From the earliest days of the Church it has no doubt been recognized that a bishop should possess certain qualifications. They are to be found in many ancient ecclesiastical works and were in great part based originally upon the Epistles of St. Paul. Speaking of the foreign canon law, I think it is established that from very early times, when the choice of bishops was by actual election, there was inquiry and occasionally examination by a superior authority—not infrequently the metropolitan—as to the qualifications of the person elected; see, among other authorities, the *decretum* of Pope Nicholas, Corpus Juris Canonici, pt. 1, p. 79, Richter's edition, 1879, which, I think, refers to Pope Nicholas II., who lived about 1058, and which was read to us by Mr. Haldane. So far as the foreign canon law is concerned, and the practice of the early Church, I think that substantially the same directions could be found at a very much earlier date; but I need scarcely say that, whatever may be the view adopted when any question arises in the Ecclesiastical Court, the foreign canon law, unless accepted in this country and thereby having become English canon law, does not form part of that law of England which we are administering to-day. The work of Lancelottus, to which reference was made both in the argument before us and in *Hampden's case*, appears to me to be treating of the qualification of bishops and the examination of bishops-designate according to the foreign canon law, and not to

be treating of the practice or order of confirmation in England either before or after the statute; and I understand the reference in the judgment in *Evans* v. *Ascuithe*, Jones 158, Palmer 457, to be a reference to him as a writer in that capacity. See Palmer, p. 472. Turning now to the evidence before us of the practice in England prior to the statute and during the period suggested by Mr. Haldane as being the normal period—namely, prior to 1316—we were referred to the cases taken from Wharton's *Anglia Sacra* mentioned in the argument of Mr. Badeley, Jebb, pp. 345-349. None others were cited to us on the argument of this case, and having regard to the great learning of the counsel who argued *Hampden's case*, I should doubt whether any can be found. I am not in a position to add to them from my own knowledge or research. I have carefully examined in the *Anglia Sacra* the cases therein cited. All except one, that of Wakeryng, occurred between 1189 and 1316. They do seem to me to establish that during that period in some instances a day was given for opposers to appear—see the case of Rochester in 1316 (*Anglia Sacra*, vol. 1, 357); that in some cases the Archbishop did decline to confirm the election on grounds based upon the canon law—see the case of Winchester in 1274 (*Anglia Sacra*, vol. 1, 315); and in some cases was an appeal to Rome—see the cases of Ely in there 1256 (*Anglia Sacra*, vol. 1, 637), Worcester in 1302 (*Anglia Sacra*, vol. 1), 531, and Ely in 1310 (*Anglia Sacra*, vol. 1, 640); and that in some cases there was an examination as to competence and doctrine before confirmation—see the case of Durham in 1213 (*Anglia Sacra*, vol. 1, 735), and Rochester, 1227 (*Anglia Sacra*, vol. 1, 348). The only case later than 1316 which has been mentioned to us was that of Wakeryng, Bishop of Norwich, in 1416 (*Anglia Sacra*, vol. 1, 417), which does not assist the argument. Beyond the above points, however, nothing can be gathered from the particulars given of the character of the objections, if any, raised by the opposers. It is, however, most important to note that, as far as I can gather from the statement in *Anglia Sacra*, in every one of these cases prior to 1316 there had been a real election either by the dean and chapter or by the prior and convent, so that they relate to a period when there was a real election to be confirmed. It is to this period—namely, the beginning of the thirteenth century, 1227, that the Legatine Constitutions of Otho and Othobon refer. They no doubt express the English canon law, but they have no reference to the actual state of things at the time of the passing of the statute, or for many years before. But from about the year 1316 down to the passing of the statute in 1533, a period of over 200 years, an entirely different state of things seems to have prevailed. At one time the popes were insisting upon the right not only to confirm, but to select; at another the Crown was resisting the Papal claims. Sometimes the struggle would appear to have been between the pope on the one side and the metropolitan or the electing corporation on the other, be it dean and chapter or abbot and convent. Confirmations at times took place at Rome, at times in England under Bulls from the Pope, and during the last fifty years immediately preceding the statute some authorities state that the King had successfully defended his claim to nominate independently of any interference by the pope: Green's History of the English People, and Stubbs's Constitutional History. In my opinion, during a period of more than 200 years prior to 1533 there was no recognized practice at all; but it is sufficient to say that there is no evidence of any such normal practice as that which was contended for by the counsel who supported the rules, and that, therefore, it is, in my opinion, impossible to say that in using the word "confirm" the statute was referring to a procedure well known and understood at the time in any such sense as the argument of the applicants assumes. I must notice one other argument. It was said that "confirm" must be used with reference to the canon law and that, inasmuch as by the ancient foreign canon law a bishop had to possess qualifications, and it was the duty of the archbishop before ordaining a bishop to be satisfied that he possessed the qualifications, to that extent the canon law was recognized by and incorporated with the statute. I am wholly unable to assent to this line of argument. I need not cite authorities to show that it is well established that the foreign canon law only forms part of the law of England in so far as it has been adopted into the English common law, ecclesiastical or civil, or recognized by statute; and, unless it can be contended that by the law of England apart from the foreign canon law the word "confirm" used in the statute 25 Hen. 8, c. 20, imported this duty on the part of the archbishop and the correlative right of opposers, the foreign canon law cannot, in my opinion, be appealed to for the purpose of establishing that any such duty or right existed. If it could be successfully maintained that an examination of the fitness of a bishop-elect, to take place at the stage of confirmation, was at the date of the passing of the statute considered a necessary condition of the consecration and appointment of all bishops, the matter would stand on a very different footing.

But it was contended by the counsel for the Crown and the Archbishop, and not disputed by the counsel who supported the rules, that in a considerable number of instances no confirmation took place; and, as illustrative of this, it was stated by Mr. Dibdin in the course of his argument that at the present time out of upwards of 100 bishops of the Church of England not more than twenty-five would be elected subject to confirmation. That this was to a certain extent a state of things contemplated by the statute and ending at, and shortly after, its passing cannot be disputed. It is, in my opinion, very important to observe that in the case contemplated by the statute itself—namely, of an archbishop or bishop being nominated by the king by letters patent in default of election—no confirmation is to take place, but the statute enacted that the person so nominated is to be invested and consecrated by the archbishop. Again, in the case of the bishops of the Irish Church under 2 Eliz. c. 4 (Ireland), no confirmation was necessary. It is not quite clear to me whether the bishops appointed under the statute 31 Hen. 8, c. 9, are cases in point—at any rate except during the period between that date and the repeal of that statute by 1 Philip and Mary, c. 8, when they came under the general law. I think it will be found *Evans* v. *Ascuithe* did, at any rate, show that Bristol, one of the six sees established by the Act 31 Hen. 8, c. 9, was under the general law in the time of Charles II. I have not had time to look and see whether there was any general law at the time of the passing of the statute of 31 Hen. 8, which would put those sees under it. I am not quite sure about it. I do not stop to consider the case of Colonial and Indian bishops, or the appointment of bishops of St. Albans under the statute of 1875, and Liverpool, Newcastle, Wakefield, and Southwell under the Act of 1878, because they are of a much later date; but the practical contemporary statutes to which I have referred show that at that time the confirmation of a bishop by an Archbishop was not in all cases an essential step in the appointment of a bishop. In the case of bishops other than those elected by deans and chapters in

in use when elections really had to be inquired into, and that the reference in Ayliffe, to which I have already referred as to the summoning of persons *nominatim* (p. 245) who had opposed the election, and in general where there had been no opposition, gives an indication of the genesis of the forms. We were referred by the Attorney-General to the practice on the confirmation of the election of deans (Coke upon Littleton, 96*a*). The forms in use upon these occasions are set out in Oughton's Ordo Judiciorum, vol. 2, p. 97, *et seq.*, *form.* 227. The commission to the Vicar-General there directs him to approve, ratify, confirm, "*ac si opus fuerit, ac res ita exegerit* . . ."annul and make void the election. The whole passage is important, and will repay examination in connection with the matter under discussion. The citation set out at p. 99, which corresponds in many respects with the citation in use in the case of a bishop since 1535, was published in a similar manner. A comparison between these documents and those added on the occasion of the confirmation of a bishop after 1533 leads me to surmise that in all probability the view suggested by Mr. Bramwell Davis is correct—namely, that the forms are based on forms in use before the statute, having been originally framed to meet the practice existing as far back as the twelfth, or even the eleventh century, in the case of the confirmation of elections generally, and that the important and fundamental differences which exist between the two forms, subsequent to the statute may be due to the fact that old forms were properly adapted to the new state of things, the words "*infirmandum, annullandum, irritandum, et cassandum*" being omitted and the words *confirmatio* and *confirmari* alone retained, the public notices and citation of opposers being advisedly retained in case there should be any defect in the election, and also to preserve the public character of the proceedings. I have not been able to find in Oughton a corresponding form in the case of the confirmation of a bishop; the earlier chapter on the subject in this work I have already referred to. It must be remembered that ever since the statute, although, in my opinion, the proceedings by way of confirmation are formal in the sense that no general opposition can be raised at that stage to the fitness of the person elected, they were still a proceeding of a solemn character, in which, after the original licence, return of the election, Letters Patent, and other necessary steps were formally proved, confirmation by the Archbishop, or his representative the Vicar-General, followed. It seems to me not unnatural that the desire to maintain the dignity and public character of the act of confirmation and election should have led to the retention of the ancient practice of summoning opposers to appear if they thought fit.

It was further contended that, because the proceedings include a summary petition which alleges the various steps, and contains among other allegations a statement (see Jebb, p 64) that the bishop-elect is a learned person and fulfils some of the qualifications which were from the earliest days considered necessary for a bishop, and that as this allegation in *Parker's case* was supported or formally proved by the evidence of two witnesses, who deposed to the various paragraphs of the summary petition, this showed that the proceedings were in the nature of proceedings before a court, and that opponents could traverse those allegations, be heard upon them, and the Vicar-General might either pass judgment, or, if he thought fit, delay the confirmation, and refer the matter to the Archbishop. It is to be noted, however, that these witnesses are called by the proctor for the dean and chapter; and, in my judgment, they are the formal proof of matters which have to be given, if I may borrow an expression from the Probate Court, in solemn form as laying the foundation for the confirmation. We were informed by the Attorney-General and Mr. Dibdin in the course of the argument that a summary petition is a petition which has evidence, to use their expression, "attached to it," but is not proved like a formal suit by libel or articles. It was urged by Mr. Bramwell Davis that because the writs, as set out in various volumes of Rymer's Fœdera both before and after the statute, were in the same form, it must be assumed that the forms and practice in use immediately after the statute had been in use before. Even assuming this to be the case, I do not think it assists us materially in dealing with the question, because the writs, as I understand them, only direct the Archbishop to confirm, but do not contain any words indicating that which was included or covered by the word confirmation. I should, however, observe that an examination of the forms as set out in *Parker's case* shows that they could not have been in all respects the same as those before the statute, because reference is made in them to the statute. For the same reasons the statute 3 Hen. 5 (1418), set out at p. 350 of Jebb, does not carry the matter any further, as it only refers in general terms to confirmation. We were pressed to say that the opinion of Bishop Fell, p. 389 of Dr. Nicholls's Commentary on the Book of Common Prayer, cited at p. 390 of Jebb, is only consistent with the view that there was a judicial inquiry into the qualifications of the bishop at the stage of confirmation. Having regard to the object with which these words were written, as indicated by Mr. Baddeley in his argument in the *Hampden case*, and looking to the language of the passages quoted themselves, they fall far short of any such proposition, and cannot, in my opinion, be regarded as authorities upon the legal questions argued before us.

There is, in my opinion, another fundamental difficulty in the view that the proceedings of confirmation before the Vicar-General are to be regarded as the proceedings of a court, in which it is the duty of the Vicar-General or the Archbishop to adjudicate judicially upon the grounds of the objections raised by the opponents. It is to this that I alluded when I referred earlier in my judgment to the necessity, if the arguments in support of the rule are correct, for independent legal proceedings to be taken at the stage of confirmation. This difficulty arises from the fact that, as far as I can see, the bishop-elect, though present at the confirmation and taking certain oaths there, is not a party to the proceedings in the proper sense of the word. The proceedings are initiated by the dean and chapter, and the citation is not addressed to the bishop-elect. If charges of ecclesiastical offences can at that stage, and as a part of those proceedings, be preferred against the bishop-elect, there is no trace of any machinery or practice for getting him before the court for this purpose, or for dealing with the numerous questions of procedure or costs which are likely to arise. I put this difficulty to Mr. Danckwerts, who contended, as part of his argument, that among the objections raised by the opposer for whom he appeared were charges of ecclesiastical offences. He replied that it would be the duty of the Vicar-General to permit the opposer to appear and bring in articles, or, in effect, to commence formal criminal proceedings against the bishop-elect. I can see no trace of any such procedure, and it seems to me to be utterly foreign to the nature of the proceedings on confirmation, as it has existed in the United Kingdom for upwards of 600 years.

When pressed with the difficulty which lay in the way of contending that the proceeding of the Vicar-General was in the nature of a judicial proceeding by a court of limited jurisdiction, and that a *mandamus* would go, at the instance of the party aggrieved, to compel the court to exercise its jurisdiction, Mr. Haldane based his contention upon another ground—namely, that the Archbishop had a duty to inform his mind before he confirmed the bishop-elect, and, that being so, he was bound to inquire into any objection raised by objectors and postpone the confirmation until he had so inquired; or, in other words, that he was bound to inform his mind upon any matters which the objectors chose to raise. I hope I have not done the argument injustice. I endeavoured to appreciate it, and have refreshed my memory by reference to the shorthand note. If the application for *mandamus* can only be based on the duty of the Archbishop to inform his mind as to the fitness of the bishop-elect before he proceeds to confirm the election, or consecrate the person elected, it must fail. We cannot direct him to inform his mind in any particular way. The distinction between such a case and the case of refusal to exercise jurisdiction is well pointed out in the judgments of the Court of King's Bench in *The King* v. *The Archbishop of Canterbury*, 15 East. 117 (referred to in the judgment of my brother Wright), and the judgment in *Reg.* v. *Bishop of Chichester*, 7 W. R. 629, 29 L. J. Q. B. 23 at p. 30. As I have pointed out at the beginning of my judgment, no question of that kind can possibly arise before us, and there is, so far as I know, no precedent for a *mandamus* being granted in such a case as that suggested by Mr. Haldane.

If the claim of the opposers to appear, based upon their charges against the bishop of ecclesiastical offences, cannot be supported, I am clearly of opinion that the other vague allegations contained in the objections are not charges which any ecclesiastical court could entertain; nor can they be regarded as grounds which, in the view of the law already indicated, either the Vicar-General or Archbishop should entertain at the stage of confirmation. So far as the objections were based upon charges of heresy or ecclesiastical offences, there is a further objection which should, I think, receive attention. It has been invariably laid down by writers on ecclesiastical law that such charges must be alleged with precision and particularity (see, among others, Ayliffe, p. 345), so that the person charged may know exactly what offence is alleged against him. This view of the law has been repeatedly enforced by the Ecclesiastical Courts and Privy Council. As I understand them, these decisions rest not on any modern rule or practice, but upon the nature of the alleged offences, as, for instance, breaches of the statute 13 Eliz, c. 12. If this be so, it seems to afford an additional argument against the possibility of such charges being entertained in such proceedings as those which are now under consideration.

A point was raised in argument by the Attorney-General on which I do not express any opinion, but which I ought not to leave entirely unnoticed. These proceedings for confirmation have for a great many years taken place before the Vicar-General. As far as I can gather from the authorities cited on the argument and from some others which I have been able to consult, the court of the Vicar-General does not entertain contentious cases. This is clearly laid down in Oughton's Prolegomena, p. 16, and is supported by Ayliffe's Parergon, p. 160; Lyndwood, liber 2, tit. 4, p. 104; and there is the high authority of Lord Stowell in the case of *Thorp* v. *Mansell*, 1 Haggard's Consistory Cases, 4*n*, in which the limit of the jurisdiction of the Vicar-General in such matters is clearly pointed out. But inasmuch as the letters patent to Mr. Cripps appointing him Vicar-General also appointed him official principal, I am not sure that the objection raised by the Attorney-General is of substance; the point may require further consideration should the extent of the jurisdiction of the Vicar-General ever become a matter for decision. It is not, in my opinion, necessary to decide that in no case can any objection be raised at the stage of confirmation which might have to be investigated by the Vicar-General or the Archbishop, as, *e.g.*, an objection to the validity of the election or the genuineness of the documents produced, the identity of the person elected with the person named in the letters missive, or possibly some action or conduct of the bishop-elect since the time of his election; but I hold, for the reasons I have given, that the Vicar-General ought not to entertain, still less adjudicate upon, charges of the character alleged in the objections tendered by either of the opponents to the confirmation in this case.

As regards the note or addendum to the citation, I need only repeat that which I said upon the motion for the rules *nisi*, that, in my opinion, it would be no ground for *mandamus* that the Archbishop or Vicar-General had required objections to be presented in writing before the actual ceremony; but I may add that, in view of the questions that have been raised, I think it a proper course, so that the character of the proposed objections, if any, may be fully considered.

For the above reasons, which I have expressed, I fear, at too great length, and yet not with the clearness with which I might have expressed them had more time for research and consideration been at my disposal, I am clearly of opinion that these rules should be discharged. I cannot part with the case without observing that it seems to me worthy of consideration whether the form of public citation, which ought to be retained for some purposes, should not be modified so as to meet the real case and remove the possibility of the observation that it is a temptation to people to raise questions at an unsuitable time and place. If the facilities for trying questions of heresy or other ecclesiastical offences are not sufficient the law should be amended. But, if the view which I have expressed is correct, I venture to deprecate the attempt to raise in a proceeding wholly unfitted for the purpose matters which must have received the anxious consideration of the responsible advisers of the Crown before the name of any person is inserted in the letters missive to the dean and chapter.

WRIGHT, J., read the following judgment: I can add nothing of importance to the judgment which has just been read; and it is only because of the division of opinion in *Bishop Hampden's case* that it is necessary to state the manner in which I arrive at the same conclusion as my lord. Even if the case depended solely upon the language of the statute 25 Henry 8, c. 20, I should have strongly inclined to the opinion of Erle, J. that the language of the statute precludes the Archbishop from entertaining judicially any objection whatever to the election made in accordance with the sovereign's command. If, indeed, anything were brought to his notice by opponents or otherwise which might suggest to him that the sovereign had been deceived or misinformed, he might, in my opinion, properly delay confirmation or consecration until the sovereign's direction could be taken. But it seem to me nearly impossible to construe the statute as authorizing the Archbishop to declare judicially that the election which the statute says is to stand good and effectual to all

intents, and which he is expressly directed to confirm, is void. If it had been intended to give him such a power or discretion some provision must have been made for the manner and consequences of rejection. And, I think, there is much force in the Attorney-General's argument that it is incredible that the Crown should have been intended to be in a worse position than a private patron, who can enforce his nomination by *quare impedit*. No doubt the Crown has, in the *præmunire* a more effectual remedy in a case in which it is appropriate than the subject has and it is appropriate enough if the Archbishop has no jurisdiction or discretion; but it would not be appropriate for determining whether the Archbishop has rightly exercised a jurisdiction or discretion vested in him by law. But the case does not depend solely on the language of the statute. About 350 years have elapsed since the statute was passed, and it is admitted that there has not during all that time been any case in which the Archbishop has entertained an objection to the election of a bishop on the Crown's nomination. Nor does the case stand as if the matter had never been considered. It was definitely raised so early as 1629 in *Mountague's case*, and it has been the subject of observation and discussion by text writers during the whole period since the passing of the statute. It has twice, at least, been the subject of decision by eminent civilians—in the case of *Bishop Hampden* and again in the case of *Bishop Temple*—and, in my judgment, there is a great preponderance of opinion in favour of this construction. We do not know with any accuracy what was the reality of opposition to confirmation of elections of bishops before the statute of Henry VIII., but we have abundant and uncontradicted evidence that since the statute the opposition has been treated as a mere form. We have a complete register of the proceedings at the confirmation of Archbishop Parker in 1559, shortly after the date of the statute, and substantially the same forms have been continued to the present day, and they show in the most convincing manner that although an ancient form of objection has been preserved, it has never since the statute retained, if it ever possessed, any reality. The only judicial inquiry has been whether the proper forms of election have been followed, and whether the bishop-elect was qualified as the law requires; and even this inquiry has always, so far as we know, taken the form of summary and *ex parte* proof by the electoral chapter without any admission of traverse by objectors.

Then, even if it is still necessary to cite opposers, and even if they ought to be heard to state their objections, I think that the only conclusion would be that the opposers have no *locus standi* to do more than to suggest to the Archbishop the matters of objection, not as matters for decision by him, but at most as matters which in his discretion he may take into consideration for the purpose of deciding whether he will make any representation to the Sovereign; and if so, *mandamus* will not lie. The case is not like *Rex* v. *Archbishop of Canterbury*, 1812, in 15 East. at p. 140, where the Archbishop was bound to exercise a judicial discretion as to the licensing of a lecturer, and where it was said that he ought not to reject proper means of information to guide his judicial discretion. Here there is no judicial discretion to exercise as to the particular objections raised. The principal opposer's objection in this case is one of heresy, and where the Archbishop is called upon to defer the confirmation on a ground of this kind it is not immaterial to ask what means he has for trying such a question. Consistently with the forms in use for 350 years there is no room for such an inquiry. No procedure is provided, or ever has been provided for it. The bishop-elect is not made a party. No sentence could be pronounced. If in such a case a *mandamus* were to go we should in effect be directing the Archbishop to try and determine issues of heresy without any established form of procedure and without power to pass any sentence or to do anything but inform his own conscience. I know of nothing to show that he can have any such right or power which could properly be described as jurisdiction; and if he has not what amounts to jurisdiction, the *mandamus* cannot go.

RIDLEY, J., read a written judgment, which was in the following terms: But for the importance of this case I should not have thought it necessary to add anything to the judgments of my lord and my brother Wright, with which I agree. The question is, whether a *mandamus* ought to go to the Archbishop of Canterbury to order him to hear and decide on objections made by the applicants on doctrinal grounds to the confirmation of the election of the Rev. Canon Gore to the bishopric of Worcester. The answer depends upon the proper construction of the statute 25 Hen. 8, c. 20. Does that statute place on the Archbishop the duty of hearing objections put forward and of judicially determining, after hearing them, on the validity or invalidity of the election, and on the fitness or unfitness of the person elected? Or, on the other hand, on proper evidence being offered, informing the Archbishop that the election had been in fact held according to the *congé d'élire*, and as to the personal qualifications of the elected, is he bound to confirm? I am not proposing to examine all the authorities which have been quoted in the very learned arguments addressed to us on the hearing; but I shall endeavour to summarize and to bring the results to bear on the main question—namely, the construction of the statute.

First of all, the usages prevailing at the time of the passing of a statute are of importance, and must be considered when the meaning of the phrases or expressions which it contains is to be determined, though they cannot be used to contradict the plain terms of the enactment. What, then, was at the time the usage or custom in England as to the election, confirmation, and consecration of bishops? I think the fair deduction from the authorities is that bishops were at this time appointed by the pope on the nomination of the Crown, and that the election by dean and chapter had long become a formal matter: Green's History of the English People, vol. 2, p. 160; Stubbs's Constitutional History, vol. 3, pp. 339-341. But it is necessary to inquire more precisely what was the nature of the confirmation required, and I think that in the earlier centuries, and as a part of the foreign canon law, it is probable that the ecclesiastical authority did, before confirming a bishop, summon objectors and determine their causes of objection. Authority was quoted to that effect, and it would seem, from Justinian Novel 123, that, in those times, if objections were found on inquiry to be without substance, those who made them were subject to expulsion from the province. There is no trace of any such custom or law in England, although it appears that down to the year 1316, according to the instances quoted from Wharton's *Anglia Sacra*, objectors were summoned and were heard, and that in some cases confirmation was refused. These instances occur chiefly in the thirteenth century, after the Charter of King John. Between the year 1316, however, and the reign of Henry VIII. no instance was quoted in which objectors had appeared; and I think this much is certain—that during this period of nearly 200 years, although it was the duty of the archbishop to inform himself of the identity of the bishop-elect and of

his qualifications, he did not at the ceremony of the confirmation hold anything like a judicial inquiry. During this same period, with a long interval (to which I need not further allude), the confirmations were in the hands of the pope. In some instances he issued bulls, ordering the confirmation to be held in England, but when that was not done it took place at Rome, and objectors to a bishop elected to an English see could hardly have appeared there to make their objections. At the outset of this period (though with vicissitudes) it seems that the Papal influence was predominant upon the whole; but later on, in return for the *annates*, the Popes were willing to accept the nominees of the Crown. "They had other objects in view than the influencing of the National Churches, and the end of their spiritual dominion was at hand": Stubbs's Constitutional History, vol. 3, p. 341. There is no instance, I believe, to the contrary of this in the reigns of Henry VII. or Henry VIII.—a period of about fifty years, reckoning to the date of this statute. If that is correct, it shows that at the time now in question the ceremony of confirmation was one of form rather than of substance; nor do the historians seem to have considered that it required any special mention while discussing, as between the Crown, the pope, and the deans and chapters, the right to the election and appointment of bishops—a fact, in my opinion, of much cogency. Certainly it was not a judicial process. It should be added, however, that in the documents it still appears to have been stated, as a matter of form, that opposers had been cited and had not appeared.

In this state of things the statute 25 Hen. 8, c. 20, was passed, which begins by reciting what is known as the Annates Act (23 Hen. 8, c. 20), and then enacts that it shall stand, and that no *annates* shall be sent to Rome, and no bulls received from Rome. Thus was done away with the jurisdiction of the pope in this country. No doubt this was one of the main objects of the statute; but I pause to say that I cannot accept the argument of Mr. Haldane, who contended that it was the only one. To do so is to give no effect to the further sections of the statute, and particularly to section 3, which, in a preamble of its own, states that "it is not plainly and certainly expressed in the recited statute in what manner and fashion archbishops and bishops shall be elected, presented, invested, and consecrated within this realm." Another object of the statute, therefore, was to setttle that matter for the future. Section 4 directs that the dean and chapter shall within twelve days elect the person named in the letters missive of the king; and in case of default that the king may nominate and present to the archbishop such person as he may think able and convenient for the vacant bishopric, and then comes section 5, which enacts, first, that in case of such nomination and appointment the archbishop shall, with all speed, invest and consecrate without any recourse to Rome, and, secondly, that in case the dean and chapter shall elect the person named in the letters missive their election shall stand good and effectual to all intents, and the person so elected shall be reputed and taken by the name of the lord-elect of the bishopric; then, the oath and fealty appointed for the same being made to the king by the person so elected, the king shall signify the election to the archbishop, commanding and requiring him to confirm the said election, and invest and consecrate the person so elected. Section 7 further provides that, if the archbishop shall refuse and do not confirm and consecrate the person so elected or nominated within twenty days he shall incur the penalties of *Præmunire*. Now, upon the natural meaning of the words contained in these enactments, I accept the reasoning of Erle, J., in the *Hampden case* (11 Q. B., at p. 566). It appears to me clear that the intention was to give the nomination of bishops to the king. As to the choice of person, no one was to have power to interfere. Certainly if the dean and chapter do not elect the person named, then the nominee of the king, thought by him able and convenient, is to be consecrated by the archbishop without any power in the latter to refuse or delay; and it is is extremely difficult to follow an argument contending that in the alternative case, where the dean and chapter do elect the person named, there is to be any difference in the power left to the archbishop. It can hardly be contended that the king's nomination is to be without question in the one case where his letters are not obeyed, and is to be questioned in the other where they are obeyed. I further agree with Erle, J., that, if these words be taken in their strict natural meaning a command to confirm gives no authority to annul. A cogent argument in the same sense is, in my opinion, to be founded on the enactment that the election shall "stand good and effectual to all intents." Yet, according to the argument for the rule in this case, it is precisely in that event—namely, in the event of the person named being elected—that there is to be a discretion in the archbishop in the exercise of which he might annul the election.

This being the natural meaning of the statute, it is argued that we must read it otherwise, because the word "confirm" had a recognized sense at that time, in which we must read it — namely, that it included an examination into the validity of the election, and the qualifications of the elected, and a judicial determination upon all objections put forward before the confirming authority. By this reading would be given to the archbishop power and authority to disaffirm and annul the election, a power and authority which is at least foreign to the general scope of the statute if not contradictory of its terms that he should have. If the word had at the time such a definite meaning, it may be that it should be so read, although it is strange that, having so important an effect on the operation of the statute, it should have found no place in the recited statute, or in the preamble. But the true answer to this argument is that it has not been made out that the archbishop did in fact at that time (even if he ever had done so) hold any such court, or exercise any such authority or jurisdiction. This, as is shown in the elaborate judgment of the Lord Chief Justice, and so far as can now be ascertained, is the result of the authorities.

Next it was argued that the practice ever since the time of Henry VIII. has been such as to support the contention of those who apply for the rule. But this, again, is not the fact, for it appears to have proceeded on the former lines. *Archbishop Parker's case* has not been treated as an authority, and the circumstances were unusual: but in this particular it does not seem to have differed from other instances, for the evidence was not given by an opposer; and, on examining the register of that case, it appears that in the citation of opposers it was there expressly stated that, whether opposers should come or not, the court would proceed. These words are to be found at more places than one in the record: see p. 62 of Mr. Jebb's report of *Dr. Hampden's case*. I think it is clear that the words attributed to Dr. Rives in *Mountague's case* (1628) cannot be treated as an authority for this purpose; and there is no later instance to be found in which opposers have either appeared or been heard, except in the cases of *Dr. Hampden* and *Dr. Temple*. With regard to the passage quoted from Bishop Fell's

Epistle of St. Clement (see Jebb's report of the *Hampden case*, p. 389), in which he says, "*et nemine comparente, (quod tamen non semper evenit)*" it appears that this publication dates from about 1669, and therefore these words, which indicate that on some occasions opposers might appear, may be taken as referring to *Mountague's case*, which had happened about forty years before.

It was further argued that as the words of the statute are "confirm, invest, and consecrate," if from our decision it follows that confirmation is a form, it must also follow that consecration is so. I would strongly repudiate this contention. Consecration of a bishop to his sacred office can never be a mere form; it is the solemn and sacred service performed by the Church, by which the bishop-elect is admitted to execute his office. Confirmation, on the other hand, is merely the confirmation of an election already held. Consecration will be performed according to the solemn ritual of the Church in that behalf, and after examination held as prescribed by that ritual. Confirmation may be in any form—possibly not dictated by any law, though probably shaped by precedent. And, so far as confirmation is concerned, if the election by the dean and chapter was to be nothing but a form, solemn indeed, yet but a form, I can see no reason why the confirming of it should not be a form also. But it is hardly necessary to point out that this has no application to consecration.

There are other reasons in favour of the construction of the statute, which I think the right one, and I have not omitted them in arriving at this decision. Thus, where is the form of procedure? How is the court to determine such questions as those raised in this case? Are they to be heard in the absence of the person concerned? Between whom are the issues to be joined, and how are they to be considered? If that was intended, the Legislature surely must have made provision on these subjects. There is also a forcible argument derived from the recital in 1 Edw. 6, c. 2, and there is the high authority of Coke, Gibson's Codex, and others, in later times, including Dr. Lushington. And, on the other side, I find no authority which has similar weight. I am, therefore, of opinion that the rules should be discharged.

Rules discharged, with costs.

Solicitor for the Crown, *Solicitor to the Treasury.*

Solicitor for the Archbishop of Canterbury and the Vicar-General, *Solicitor to the Treasury.*

Solicitors for the bishop-elect, *Peacock & Goddard.*

Solicitors for the applicant Cobham, *Wainwright & Co.*

Solicitor for the applicant Garbett, *R. Todd.*

(1905) 1 Ch. 623.

House of Lords.

From C. A. (England). Dec. 13.

EDWARDES v. BARRINGTON. (a.)

Landlord and tenant—Lease—Lease of theatre—Covenant not to assign—Grant of right to supply refreshments—Breach of covenant.

The lessee of a theatre covenanted "not to assign, demise, or otherwise part with the indenture" of lease "or any estate or interest therein" without the licence of the lessor. Subsequently the lessee granted to a third person the free and exclusive licence and right to use the refreshment-rooms and bars in the theatre.

Held, that his so doing was not any breach of the covenant.

Decision of the Court of Appeal (sub. nom. Daly v. Edwardes, 49 *W. R.* 244) *affirmed.*

Appeal from a judgment of the Court of Appeal (Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.), 49 W. R. 244, affirming a judgment of Kekewich, J., reported 48 W. R. 360.

By an underlease dated the 8th of February, 1894, the appellant Edwardes being lessee of certain premises situate in Cranbourne-street, and known as Daly's Theatre, demised them for a term of twenty years from the 25th of December, 1893, at the yearly rent of £5,500 to Augustin Daly. Mr. Daly covenanted not at any time during the term thereby granted to assign, demise, or otherwise part with the indenture or any estate or interest therein for all or any part of the said term to any person or persons whomsoever without the licence of the lessor or his assigns first had and obtained in writing under his or their hand or hands for that purpose; but such consent was not to be unreasonably withheld in the case of a respectable and responsible tenant, it being the intention that the lessee (Daly) should be at liberty at all times to produce and perform by himself and company or his licensees any first-class comedy, drama, or opera without the necessity of applying to the lessor or his assigns for his consent in that behalf, but that such licensees should not be at liberty to assign, underlet, demise, or otherwise part with their term without the licence of the lessor first had and obtained as aforesaid.

There was also a proviso for re-entry if the rent was in arrear for twenty-one days, or on breach of any covenant by the lessee.

At the date of the underlease the exclusive licence to supply refreshment in the theatre and of advertising, had become vested in Frank Warr & Co.

By an indenture dated the 15th of April, 1898, Daly, in consideration of the sum of £1,400 then paid to him and of the weekly rent or sum of £15, granted to F. Warr & Co. the free and exclusive licence and right to the use of all the refreshment-rooms, bars, smoke-rooms, wine cellars, and offices then or at any time thereafter during the term of the agreement, in or connected with Daly's Theatre aforesaid, together with the free right of and access by the said tenants, their servants and agents, to and from the same by and through the various entrances and exits of the said theatre, and of access to and from all parts of the said theatre and premises necessary or convenient for the purpose of exercising the rights thereby granted, and also the exclusive privilege of advertising therein, for the term of 15¾ years less ten days.

One of the conditions was that the landlord Daly might, by notice in writing, determine that agreement, and the term thereby created, in the event of the rent being in arrear for twenty-one days, or other the events therein mentioned; and that upon the happening of any or either of the events, all the rights and privileges thereby granted to the tenants F. Warr & Co. should at once cease and determine. Another, that the bars should in all respects be conducted in a proper and orderly manner, and in accordance with the rules of the theatre. It was further provided that Augustin Daly should have full power to discharge any servant or servants of F. Warr & Co. who should have misconducted himself, herself, or themselves to the prejudice of the good conduct of the theatre.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

No licence for this agreement was obtained from Mr. Edwardes, who, on the 4th of September, 1898, entered into and took possession of the theatre on the ground that the agreement of the 15th of April, 1898, was a breach of the covenant contained in the underlease. Mr. Daly thereupon issued the writ in this action, and claimed a declaration that the entry was not authorized by the underlease of February, 1894, and asked for an injunction. Mr. Daly died in 1899, and the action was revived by his administrator, the present respondent.

Kekewich, J., and the Court of Appeal held that there had been no breach of covenant; and that the plaintiff was entitled to the relief he claimed.

The defendant Edwardes appealed.

Warmington, K.C., and *G. Cave* (*P. O. Lawrence, K.C.*, and *Herman Cohen* with them), for the appellant.

T. R. Warrington, K.C., Eldon Bankes, K.C., Bristowe, and *Newton Crane*, for the respondent.

Earl of HALSBURY, L.C.—As has been very clearly pointed out, the whole question turns here upon the construction of two documents, and I have come very clearly to the conclusion that the judgment of Kekewich, J., and the judgment of the Court of Appeal confirming it were right. I do not deny that the documents themselves present a beautiful confusion of thought and language by the gentlemen who have contrived them, which was calculated to create the difficulties which all the judges who have had to deal with this matter have expressed. Those who drew up the documents have used words inappropriate to the particular thing with which they were dealing. But they are not words of art, and it is frankly and most properly conceded that we must, if we can, find out from the language of the instrument, having regard to the relations between the parties and the object which was on the face of the instrument apparent, what were the real intentions of the parties. And really but for the extremely confused and inaccurate use of technical words from time to time in the course of these instruments the object is clear enough. The lessee of a theatre is making a bargain with a refreshment contractor, and he wants proper accommodation for those whom he invites to his theatre to be provided by some person who shall preside over and have the command and the profits of the refreshment department of the theatre. The mode in which the parties have contracted is that which really makes the difficulty. But when one looks at the whole thing there is not one word which necessarily, as a matter of art, decides the question. Then let us see what the words are that they did use. They did not say that they demise, for instance, but they say that the person with whom the contract is made is to have the use of certain parts of the premises, and—I confess that I follow the language and the reasoning of the Lord Chief Justice very much—if you look through the whole thing you see what is the object of it. No doubt both parties intended that the one should be the exclusive refreshment contractor, and that the other person who was the lessee of the theatre should have certain control and certain powers of dealing with that part of the theatre which was reserved for refreshment—the refreshment bars, cupboards, &c. If that is the real meaning of the parties, is there anything in the language which they have used which prevents that intention from being carried out? I think not. I think the instrument most unfortunately framed—framed apparently by attempting to adapt a common form of lease of land to the contract into which the parties were entering; and from time to time language is used—I think the strongest case is where you find the covenant for quiet enjoyment, and the payment of rent and so on—which is more appropriate to the ordinary transactions by way of conveyance and lease and covenants in a lease. But still, when I look at the whole and see the relations between the parties, and that which both parties were contemplating to be done respectively by one and the other, I come to the conclusion that the decision which was arrived at by the courts below is correct, and I also come to the conclusion that there is nothing in the language of the instrument in question which prevents us from carrying out the real intention of the parties. That being so, I am of opinion that this appeal fails, and I move your lordships accordingly.

Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Slark, Edwards, & Co.*

Solicitors for the respondent, *John C. Button & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Jan. 31.

BYNOE v. BANK OF ENGLAND. (a.)

Negligence—Breach of duty—False evidence—Wrongful conviction—Conviction unreversed—Cause of action.

An action to recover damages for a breach of duty whereby the plaintiff was wrongfully convicted of an offence, or for negligently giving untrue evidence whereby the plaintiff was so convicted, cannot be maintained while the conviction stands.

Application for leave to appeal from an order of Jelf, J., dismissing the action on the ground that the plaintiff's statement of claim disclosed no cause of action.

The first nine paragraphs of the statement of claim were as follows:

(1) The plaintiff was at the time of the matters hereinafter complained of a fully-qualified physician and surgeon, holding the double qualification and registered on the General Medical Register, residing and carrying on the profession or business of a general practice in medicine, surgery, and dental surgery, at 1, Endsleigh-gardens, London, N.W.

(2) By virtue of divers Acts of Parliament, charters, and provisions of Government passed, granted, and made as well for the profit of the defendant corporation as for the public benefit, the Governor and Company of the Bank of England (hereinafter called the Bank of England) were constituted and are the issuers and custodians for value of a portion of the national currency, that is to say, of the note issue of the Bank of England.

(3) It is one of the duties of the Bank of England as such issuers and custodians as aforesaid to check the return from circulation of Bank of England notes, and for that purpose to keep proper books of account, and to make and preserve entries showing the dates on which and the times at which the notes of the Bank of England are severally returned from circulation, and to be and remain prepared, in the interests of public justice, and for the prevention of fraud,

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

with evidence of the dates and times and generally of the circumstances of such returns from circulation respectively.

(4) On the 14th, 15th, and 16th of January, 1892, the plaintiff was put upon his trial at the Central Criminal Court on a charge of forgery.

(5) In the course of the said trial it became and was held by the presiding judge who tried the case to be material to the issue, and of the utmost importance and necessity in determining the value of the *alibi* set up by the defence, and which *alibi* the judge declared was "perfect" up to one o'clock, that the prosecutor should prove on what day and at what time or times of such day certain Bank of England notes of the aggregate value of £415 were returned to the Bank of England from circulation, and by whom.

(6) The Bank of England, in pursuance of such duty as aforesaid, attended, by their proper officer—viz., by the defendant Charles John Williams, at the said court, and by such officer informed the court, purporting to give such information from the records of the Bank of England that the said notes were returned to the Bank of England from circulation at one and the same time and by the same person "after lunch" on the 5th of May, 1891.

(7) The said information which was supplied to the court as aforesaid from the records of the Bank of England was, and has been admitted both by the Bank of England and by the defendant Charles John Williams to have been, erroneous and given from erroneous and negligently prepared records, and was given by the defendant bank falsely and negligently, and in breach of their duty as aforesaid.

(8) Owing to the negligence, misfeasance, and breach of duty of the Bank of England as aforesaid the plaintiff was wrongfully convicted on the said charge and has thereby suffered damage.

(9) As against the defendant Charles John Williams, and through his negligently giving such false evidence as aforesaid, the plaintiff was wrongfully convicted and has thereby suffered damage.

On the application of the defendants, Jelf, J., dismissed the action on the ground that the statement of claim showed no reasonable cause of action, and refused leave to appeal.

The plaintiff applied for leave to appeal.

The plaintiff in person.

C. W. Mathews, for the defendants.

Cur. adv. vult.

Jan. 31.—COLLINS, M.R., read the following judgment: The plaintiff was unrepresented by counsel in this case, and no authorities were cited by the defendants. We, therefore, thought it well to look a little closer into the law before giving judgment. The plaintiff asks leave to appeal from an order of Jelf, J., dismissing his action on the ground that the statement of claim discloses no cause of action. The claim is against the Bank of England and their officer, Charles John Williams, on the grounds stated substantially in paragraphs 3 to 9 of the statement of claim. This claim is obviously open to many objections based on the immunity of witnesses and other points, some of which might possibly have been cured by amendment. There is, however, one broad principle lying at the root of the whole matter, to which we drew attention during the argument—viz., that, as long as a conviction stands, "no one against whom it is producible shall be permitted to aver against it." See note to *Duchess of Kingston's case*, 2 Smith's Leading Cases (10th ed.), p. 713, where the authorities are collected. In a modern case, *Basébé* v. *Matthews*, 15 W. R. 839, L. R. 2 C. P. 684, the point was raised that this doctrine could not be held to defeat an action for malicious prosecution which resulted in a conviction from which, as here, there could be no appeal, and which, therefore, remained unreversed. That case arose on a demurrer which admitted malice and want of reasonable and probable cause. The court, however, overruled the argument. Byles, J., said: "I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again on its merits. In my judgment, it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderbergh* v. *Blake*, Hardres, 195, where Hale, C.B., says that 'if such an action be allowed'—that is, an action against a custom-house officer for seizing goods which were afterwards condemned as forfeited by judgment of the proper court—'the judgment would be blowed off by a side-wind.'" Montague Smith, J., was of the same opinion, and cited the judgment in the case of *Castrique* v. *Behrens*, 3 E. & E. 709, at p. 721, 9 W. R. C. L. Dig. 37, in which Crompton, J., said: "There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause." Montague Smith, J. continued: "The only ground upon which Mr. Wood (the plaintiff's counsel) has attempted to distinguish this case from the current of authorities is that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a Court of Appeal in a matter in which the Legislature has thought fit to declare that there shall be no appeal. It was intended that the judgment of the magistrate in a case of this sort should be final. It cannot be impeached in an action."

A witness charged with negligence only is clearly not in a worse position than a prosecutor who admits malice and want of reasonable and probable cause. It is clear, therefore, that the plaintiff has no possible cause of action, and his application must be dismissed.

ROMER and MATHEW, L.JJ. concurred.

Application dismissed.

Solicitors for the defendants, *Freshfields & Williams.*

High Court of Justice.

Chan. Div. } Farwell, J. } F. b. 24.

In re CHETWYND'S SETTLEMENT.
SCARISBRICK *v.* NEVINSON. (*a.*)

Trustee—Settlement—Discharge of one trustee without appointing a substitute—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 11, 25.

The court has power, under its inherent jurisdiction in administering the trusts of a settlement, to discharge a trustee, when there are other trustees remaining, without appointing a trustee in the place of the retiring one, but it has not such power under the Trustee Act, 1893.

This was originally a summons asking under section 25 of the Trustee Act, 1893, for the discharge by the court of a trustee under the marriage settlement of a Mr. and Mrs. Chetwynd, leaving three trustees remaining without appointing anyone in his place.

The court refused this application, but gave leave to amend the summons by asking for administration of the trusts of the settlement by the court and making the retiring trustee plaintiff and all other parties interested defendants.

The summons was adjourned into court for the purpose of obtaining a decision on this point.

Finch, for the plaintiff.

Prior, for the three defendant trustees.

Leeke, for the infant children of the marriage.

Mrs. Chetwynd was not represented.

FARWELL, J.—This is an application by a trustee, who is desirous of being discharged, against the other three trustees, the two life tenants and the children of the marriage. Since the summons was taken out the husband and wife have been divorced and an order was made varying the settlement to which I need not refer. When the case came before me originally in chambers it was an action under the Trustee Act alone. I was then of opinion, and now am, that the court had, under that Act, no power to allow a trustee to retire unless the court could appoint the other remaining trustees as trustees in the place of themselves and the retiring trustee, as to which there was considerable conflict of opinion. Jessel, M.R., thought it was possible, but Cotton, L.J., thought it was not, and in *In re Aston*, 31 W. R. 801, 23 Ch. D. 217, Jessel, M.R., in deference to the opinion of the other judges and in order that the practice in Lunacy and Chancery might be the same, withdrew his opinion, and the Court of Appeal declined to make the order. The result is that the court does not allow trustees to retire under the Trustee Act simply. I suggested that the court always had power to allow a trustee to go, under its inherent jurisdiction. The summons was therefore amended by asking for administration and joining all persons interested as defendants with the trustee who wished to retire as plaintiff. In my opinion the trustee is perfectly reasonable in his desire to retire. He has served for ten years as trustee and is sixty years of age. I adopt what was said by Lord St. Leonards in *Courtenay* v. *Courtenay*, 3 Jones & Lat. 519, at p. 533: "It is quite a mistake to suppose that a trustee who is entitled to be discharged from his trust is bound to show to the court that there is some other person ready to accept the trust. The court refers it to the Master to appoint a new trustee, but if no person will accept the trust it may find itself obliged to keep the trustee before the court and not discharge him. The court will, however, take care that the trustee shall not suffer thereby." He referred there obviously to a sole trustee, or a case of two or more other trustees who were unwilling to be reappointed. The right of a trustee who is not capriciously retiring is not dependent on finding someone to take his place, but the court may think it necessary to keep the trustee before it for the purpose of any future question.

Here I have no such difficulty, as I still have three trustees remaining. Section 11 of the Trustee Act, 1893, enables parties to do that out of court which I now propose to do in court. I therefore feel no difficulty in discharging the plaintiff from being trustee without appointing anyone in his place. No vesting order is required, I simply discharge the plaintiff from being trustee.

Solicitors, *Gregory Rowcliffe, Rawle, & Co.*, for *Finch, Johnson, & Finch*, Preston; *Lethbridge & Prior*.

(*a.*) Reported by J. F. CARR, Esq., Barrister-at-Law.

Chan. Div. } Buckley, J. } Jan. 30, 31; Feb. 1, 3.

THE ACETYLENE ILLUMINATING CO. (LIMITED) *v.* THE UNITED ALKALI CO. (LIMITED). (*a.*)

Patent—Invention previously patented abroad—International convention—Patent not ante-dated—Publication between date of foreign patent and English patent—Certificate as to particulars of objections—Particulars of document not an anticipation—Certificate as to validity—Invalid patent—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 29, 31, 103.

A patentee of an invention already patented in a foreign country (which is a party to the international convention), desiring to ante-date his English patent under section 103 *of the Patents, &c., Act,* 1883, *must apply for that purpose within the seven months limited by the section, and subsequent application to ante-date is too late, even although the English patent is applied for within the seven months. If the patentee does not get his grant ante-dated, the court will treat its actual date as conclusive upon the question, and consequently publications prior to its date, though subsequent to the date of the foreign patent, may be proved as anticipations.*

In a patent action a certificate that particulars of objections have been proven, or are reasonable and proper, will not be given as to particulars of documents which are used to prove common knowledge and not as anticipations.

Semble, *particulars of documents which relate to the common knowledge before the patent, and which are not relied upon as anticipations, need not be given by the defendant.*

In an action for infringement, which has failed, and in which the patent has been declared invalid, a certificate that the validity of the patent has come in question will not be given.

Haslam & Co. *v.* Hall, 5 *Rep. Pat. Cas.* 1, *not followed.*

Action.

This was an action for the infringement of four patents of which the plaintiffs, the Willson Laboratory Co., were the registered owners, the first-named plaintiffs being their licensees.

At the trial the plaintiffs abandoned the action as regards the first three patents, and relied only on the latest one, which was granted to T. L. Willson, of

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

New York, No. 16,705 of 1894, and which related to the manufacture of calcium carbides used in the manufacture of acetylene.

The defendants denied that they had infringed, and alleged that the patents were invalid. Among their particulars of objections the defendants alleged that the inventions claimed by the letters patent were published prior to its date by a paper relating to electric furnaces, read by Sir W. Siemens in 1880 before the Society of Telegraph Engineers, and published in their transactions; also by specifications of (among others) Willson (U.S.A.) of the year 1892, and Acheson (U.S.A.) of the same year, which were published in the Patent Office Library, and by a paper by a M. Moissan, printed in the *Comptes Rendus* of the Academie des Sciences, also published in the Patent Office Library on the 16th of March, 1894. The invention had previously to the patent relied upon, been patented in the United States of America, and in view of the preliminary objection which was taken to the paper of M. Moissan being given in evidence as a prior publication the following facts are material:

On the 28th of February, 1894, the patentee, of whom the plaintiffs were the successors in title, made an application in the United States of America in respect of the invention the subject of this English patent.

On the 16th of March, 1894, there was the publication in the Patent Office Library of Moissan's paper.

On the 1st of September, 1894, the patentee lodged his application for a patent in this country. That application was in common form. He did not apply under section 103 of the Patents, &c., Act, 1883, for the patent to be dated in his favour as of the 28th of February, 1894, the date of the application in the United States. The seven months limited by section 103 expired on the 28th of September, 1894. Subsequently, on the 20th of June, 1895, just before lodging his complete specification, his solicitors wrote to the comptroller to the effect that the patentee wished to avail himself of his rights under section 103 of the Patents, &c., Act, 1883. The comptroller replied on the 21st of June, 1895, that he would not be justified in antedating the patent under that section, as no application for such a prior dating had been made within seven months of the date of the foreign application. On the 27th of June, 1895, the patentee lodged his complete specification, which was accepted on the 30th of November, 1895, and the letters patent were sealed as of the 1st of September, 1894.

At the trial of the action a preliminary question arose as to whether under the circumstances the paper of Moissan could be treated as a publication prior to the patent.

Moulton, K.C., and *Colefax* (*Roger Wallace, K.C.*, with them), for the plaintiffs.—The case comes within sub-section 2 of section 103 of the Act, and consequently the publication of a description of the invention subsequent to the foreign application does not invalidate the patent. The case of *British Tanning Co.* (*Limited*) v. *Groth*, 8 Rep. Pat. Cas. 113, 13 W. R. Dig. 148, is not the same as this, as in that case there was no application to the comptroller for the antedating of the patent, as there was here before the delivery of the complete specification.

C. A. Cripps, K.C., Lord Robert Cecil, K.C., A. J. Walter, and *J. A. Bucknill*, for the defendants.

BUCKLEY, J.—On the 27th of June, 1895, the patentee lodged his complete specification, which was accepted on the 30th of November, 1895, and his letters patent were sealed as of the 1st of September, 1894. That being so, the publication by M. Moissan on the 16th of March, 1894, was a prior publication, unless the patentee's application dates back to the 28th of February, 1894. Mr. Moulton argues that it does so. I am of the contrary opinion. It seems to me that the effect of section 103 is this. Where a man has made an application in a foreign state, he is entitled under section 103, sub-section 1, to a patent for his invention in priority to other applicants, and such patent shall have the same date as the date of the foreign application. The effect of section 103 is that a man who has applied to a foreign state has two alternatives, and he may take which he likes. He may take a patent to run from the date of his prior application in the foreign state, which will, of course, be for the lesser term of years, having regard to the time that has expired since that date. Or he may, if he is so minded, take a patent to run for fourteen years from the date of his English application. He is entitled to that under section 103, if he asks for it. He is not bound to ask for it, but he is entitled to it if he does. Then the section goes on: "Provided that the application is made in the case of a patent within seven months from his applying for protection in the foreign state with which the arrangement is in force." Now, what is the application there spoken of? In my opinion it is the application under this section—the application upon which the applicant says: "Of the two alternatives offered me, I will take the patent dating back to the date of my English application." Now it seems to me that his election of exercising the option to which he is entitled must be made within the seven months. Let us see what reason there is for that. Suppose A. is a person who has applied subsequently to the date of B.'s application in the foreign country, but before B.'s application in this country. If B. avails himself of section 103 he ranks in priority to A. If not, he comes after A. Now, what is the period within which A. is entitled to have his rights in that respect determined? He is entitled to know what they are, I conceive, within the seven months. He is entitled to be able to say, "Within the seven months I will or I will not go on with my application," according as the man who applied abroad before him, and in England after him, avails himself of the earlier or later date. It is said that sub-section 2 of section 103 is some indication to the contrary. I agree that the wording of sub-section 2 of section 103 is a little difficult, but I read it as being a sub-section dealing only with the state of things which is to take place if the man avails himself of this section, or, to put it shortly, that the sub-section is to be read as if it were "shall not invalidate the patent which may be granted under the provisions of this section." It was not intended if the man had made a foreign application, and an English application, that if he took his grant under his English application he should in all cases be protected from prior applications. This would be inconsistent with all the rest of the section. Romer, L.J., in *British Tanning Co.* (*Limited*) v. *Groth*, 8 Rep. Pat. Cas., at p. 122, said that sub-section 2 was only intended to apply as part of the general provisions of section 103 to cases where the patentee was availing himself of the privileges given to him by that section. If I may properly say so, I entirely concur with that expression of opinion. Now here the seven months elapsed on the 28th of September, 1894, and before that time this patentee had not sought to avail himself in any way of the section. Subsequently, on the 20th of June, 1895, he was desirous of doing so, but the Patent Office declined to seal his patent as of the prior date, and in my opinion rightly. Whether rightly or wrongly, the patent which is being sued upon is in point of fact of the date of the 1st of September, 1894, and it appears to me that that is conclusive on this point. It seems to

me, therefore, that the alleged anticipation by Moissan is one of which the defendants will be in a position to avail themselves.

The trial then proceeded and his lordship found that the patent had been anticipated and was invalid, and that there had been no infringement and he dismissed the action with costs.

The defendants asked for a certificate that their particulars of objections were proven, or were reasonable and proper, not only as regards those given in respect of the patent relied on by the plaintiff, but also as regards the patents abandoned at the commencement of the trial.

BUCKLEY, J., refused to grant a certificate as regards the abandoned patents upon the authority of *Mandleberg* v. *Morley*, 11 R. P. C. 1.

The defendants then asked for a certificate as to all the particulars of objections given in respect of the patent relied on, not only as to Moissan's papers and an American specification which had been held to be anticipations, and for which his lordship certified, but also as regards the papers of Sir W. Siemens and others which were used, not as anticipations, but to show the nature of certain furnaces used in connection with the patent.

Lord Robert Cecil, K.C., A. J. Walter, and *J. A. Bucknill* (*C. A. Cripps* with them), for the defendants—It has been the practice to require all specifications intended to be referred to at the trial to be mentioned among the particulars of objections, and if they are not so mentioned they are not allowed to be put in evidence. They are therefore reasonable and proper.

Colefax (*Moulton, K.C.*, and *Roger Wallace, K.C.*, with him), for the plaintiffs.

BUCKLEY, J.—Under section 29, sub-section 6, I have to certify that a particular of objection is reasonable and proper. The defendants have asked me for the costs of the particulars of objections, of which I will take as an instance the specification of Siemens' arc furnace. It appears to me that this specification was no objection at all to the validity of the plaintiffs' patent. The patent mentioned a thing called a Siemen's arc furnace. To ascertain what that was it might be necessary to prove the specification of Siemens which claimed it. That would be a matter of evidence. I suppose a witness could have been called and asked what a Siemens' arc furnace was. The defendants suggest that that could not be done in a patent action unless the specification was mentioned among the particulars of objection. That does not commend itself to my intelligence, and I do not see how it can be so. You may prove anything that is material in an action, subject to this limitation, that if it is an objection you must give particulars of it under the statute, if it is not an objection you may prove it without having done so. I therefore do not certify with respect to the Siemens' or the Cowle's specifications, which were referred to merely for the purpose of ascertaining what electric arc furnaces are.

Colefax asked for a certificate that the validity of the patent relied on had come into question, and referred to *Haslam & Co.* v. *Hall*, 5 Rep. Pat. Cas. 1, and suggested that the patent might be upheld in the Court of Appeal, and that it was doubtful whether they could grant the certificate.

BUCKLEY, J.—I cannot think that the learned judge said what he is reported to have said in *Haslam & Co.* v. *Hall*, because his observations seem to lead to a conclusion the contrary of that at which he arrived. I refuse the certificate.

Solicitors for the plaintiffs, *Guedalla & Cross.*

Solicitors for the defendants, *J. H. & J. Y. Johnson.*

K. B. Div. (Lord Alverstone, L.C.J.) } Jan. 13; Feb. 14.

BARNES v. RICHARDS AND OTHERS. (*a*.)

Contract—Setting aside—Contract of service—Dismissal—Undue pressure.

In an action for salary due and damages for wrongful dismissal the defendants pleaded, inter alia, *that by an agreement entered into by the plaintiff and the defendants, which agreement was embodied in a deed, the plaintiff had tendered his resignation, which had been accepted by the defendants, and that the plaintiff had accepted a certain sum of money in complete satisfaction and discharge of all his claims against the defendants. In his reply the plaintiff pleaded that he was induced to execute the deed by the defendants threatening unlawfully to imprison him unless he executed the same, and that he executed the deed in fear that the threat would be carried out, and that he had given no real or free consent to such execution. At the trial of the action two questions were left to the jury:*

(1) *Was the plaintiff induced to make the agreement by threats of the defendants of criminal proceedings or imprisonment? To which the jury returned the answer, "No."*

(2) *Was the plaintiff induced to make the agreement by undue pressure exercised by the defendants to force the plaintiff to enter into the agreement? To which the jury returned the answer, "Yes."*

Held, on further consideration, that the answer of the jury to the second question was not sufficient to entitle the plaintiff to get rid of the deed and to fall back upon his original claims, and that judgment must be entered for the defendants.

Further consideration.

In this action the plaintiff claimed for balance of salary due and damages for wrongful dismissal.

The plaintiff in his statement of claim stated that in July, 1897, the defendants, the proprietors of Collins' Music Hall, Islington, appointed the plaintiff their manager at the said music hall at a salary of £200 per annum.

The plaintiff served the defendants in this capacity until the 27th of September, 1900, when the defendants, as the plaintiff alleged, wrongfully dismissed him from their service.

The defendants in their statement of defence denied that they wrongfully dismissed the plaintiff from their service and alleged that he tendered his resignation as manager and that they accepted such resignation. They further alleged that on the 27th of September, 1900, there were cross-claims between the plaintiff and the defendants and that it was on that day agreed between the parties that all such claims should be satisfied and discharged by the defendants paying the plaintiff the sum of £300 in satisfaction of all claims existing between them, and in pursuance of such agreement the defendants paid to the plaintiff the sum of £300, which the plaintiff accepted in complete satisfaction and discharge of all his claims against the defendants, and the defendants and the plaintiff then executed a deed which embodied the above agreement, and in which the plaintiff acknowledged receipt of the £300, and the defendants and the plaintiff covenanted with each other and acknowledged that the resignation had been tendered and accepted as from the above date, and each released the other from all claims.

Under the circumstances the defendants denied that they were indebted to the plaintiff at all.

The plaintiff in his reply pleaded that he was

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

induced to execute the deed "by the defendants threatening unlawfully to imprison the plaintiff unless he would execute the same, and the plaintiff executed the said deed in fear that the said threat would be immediately carried into execution." The plaintiff further pleaded that he executed the deed "when he was so taken by surprise and overwhelmed by the said threat . . . that he gave no real or free consent to the said execution of the said deed, which was produced for his signature by the defendants immediately after they had made the said threat in order that the plaintiff might be induced to execute the same when surprised and deceived, as the plaintiff was by the said threat."

The case was tried before Lord Alverstone, L.C.J., and a special jury in December, 1901. Two questions were left to the jury by the learned judge:

(1) Was the plaintiff induced to make the agreement of the 27th of September, 1900, by threats of the defendants or Mr. Rutland, the defendants' solicitor, of criminal proceedings or imprisonment?—Answer, "No."

(2) Was the plaintiff induced to make the agreement of the 27th of September, 1900, by undue pressure exercised by the defendants or Mr. Rutland to force the plaintiff to enter into the agreement?—Answer, "Yes."

The question whether the answer to the second question was sufficient to entitle the plaintiff to get rid of the deed and to fall back upon his original claims was then reserved for further consideration.

Bray, K.C., Arthur Powell, and *W. Higgins*, for the plaintiff.

Sir Edward Clarke, K.C., Gill, K.C., and *Boxall*, for the defendants.

The facts of the case and the arguments of counsel on the further consideration sufficiently appear in the following reserved judgment.

Cur. adv. vult.

Feb. 14.—Lord ALVERSTONE, L.C.J., read the following judgment:

This was an action for balance of salary due and damages for wrongful dismissal brought by the plaintiff against the defendants, and tried before me with a special jury on the 11th, 12th, and 13th of December last. The defence set up, on which the question arises, was that all the claims made by the plaintiff were settled in consideration of the payment of £300 pursuant to the terms of an arrangement made on the 27th of September, 1900, and embodied in a deed of the same date made between the plaintiff and the defendants.

The plaintiff replied that he was induced to execute the deed by the defendants' unlawfully threatening to imprison him, and that he was taken by surprise and overwhelmed by the threat, and in consequence of the threat gave no real or free consent to the execution of the deed. I left the following questions to the jury: (1) Was the plaintiff induced to make the agreement of the 27th of September, 1900, by threats of the defendants or Mr. Rutland of criminal proceedings or imprisonment? To which the jury returned the answer, "No." (2) Was the plaintiff induced to make the agreement of the 27th of September, 1900, by undue pressure exercised by the defendants or Mr. Rutland to force the plaintiff to enter into the agreement? To which the jury answered "Yes," and they assessed the damages provisionally at £100. I reserved for further consideration the question whether the answer to the second question was sufficient to entitle the plaintiff to get rid of the deed and to fall back upon his original claims. The case was argued before me on Monday, the 13th of January last, and I took time to consider my judgment. The case is one of considerable difficulty, and, in the view I take, there is no decision exactly upon the point which I have to consider. A brief outline of the facts will be desirable before dealing with the arguments which were raised before me.

The plaintiff had been engaged by the defendants for the year 1897 as the manager of Collins' Music Hall. At a subsequent date he was also appointed managing director of the London Music Hall, which was owned by a limited company, of which the defendants were the principal shareholders.

The plaintiff was responsible for working accounts of both establishments, and these accounts were audited weekly by a firm of accountants, and, up to the 27th of September, 1900, no question had been raised as to any irregularities by the plaintiff in his accounts or in the discharge of his duties.

On that day, being the occasion of the usual weekly meeting at the Collins' Music Hall, the defendants and their solicitor, Mr. Rutland, attended.

The plaintiff was called in and asked to explain a number of items relating to the accounts of both music halls, as to which it was suggested that irregularities had occurred. The total amount in many of the items was not large, and as to many of them he was able to give a satisfactory explanation, but as to certain others he was unable, at the time, to give an explanation which was satisfactory to the defendants. The discussion, which lasted from about 11 o'clock in the morning until five or six in the afternoon, was interrupted in the course of the day by Mr. Rutland, the defendants' solicitor, being obliged to go away on some other business. On his return an arrangement was come to which was embodied in the deed. The plaintiff was to send in his resignation and to accept the sum of £700, being £300 in respect of his claim for salary from the Collins' Music Hall, and £400 in respect of the loan which he had made to the London Music Hall, and to sign the deed of release set out by the defendants in their statement of defence.

The original case set up by the plaintiff on the pleadings was that the defendants and Mr. Rutland had threatened him with prosecution and arrest, and that he had executed the deed under pressure of those threats. As has already been pointed out, this case was negatived by the finding of the jury, but it was contended by Mr. Bray for the plaintiff, both in his opening and in his reply, that I should leave to the jury the question of whether or not the plaintiff was a free agent at the time that he executed the deed in question.

After consideration I left to the jury the second question, which they have answered in the affirmative. It was contended by Sir Edward Clarke and Mr. Gill on behalf of the defendants that I ought not to have left this question to the jury, because the only substantial answer raised by the plaintiff's reply was founded upon the alleged threat of prosecution or imprisonment, which had been negatived by the jury.

If the finding is sufficient to enable the plaintiff to get rid of the deed, I think that I ought not to give effect to this contention on behalf of the defendants. The point was raised by Mr. Bray in his opening statement and maintained throughout the trial. No objection was taken in point of form, and I should have allowed an amendment in order to raise the question had it been necessary. I have therefore to consider on the merits whether such a finding is sufficient to enable the plaintiff to set aside the arrangement embodied in the deed. It was contended before me that there was no evidence

which I could properly have left to the jury in support of that finding, and as this point may require further consideration, and also because it is necessary in dealing with the question which I have to decide, I think I ought to state the evidence which gave rise to the question, and also what I understand the finding of the jury to mean.

The evidence which gave rise to the contention, assuming that the plaintiff was entitled to raise it, was that the defendants admitted that in the course of the long discussion, they had held that the plaintiff's explanation was unsatisfactory, and that upon the advice of Mr. Rutland, the solicitor, they had determined to, or would, suspend him in order that there might be a thorough inquiry into his accounts. There was no clause in the agreement enabling the defendants to suspend the plaintiff or to give them any special rights in that respect, but it was contended by Mr. Bray, in the course of his argument before me, that the defendants had, as employers, the right to suspend the plaintiff from his duties pending investigation. It was stated by the plaintiff that in the case of such an employment as that of manager of a music hall, suspension was a very serious step, and would be regarded as such by persons acquainted with music hall business, in fact it was in consequence of this suggestion, or expression of intention, that the plaintiff said he asked the defendants to allow him to resign. There were certain other minor pieces of evidence which it is not necessary for me to refer to, as, for instance, the statement that his explanations were not satisfactory, but what I have stated was the main ground upon which the allegation of pressure was raised, and I therefore held, and still think, that it was impossible for me to say that there was no evidence to support the finding of the jury upon the second question.

In considering the question of law it is necessary to deal separately with the two causes of action on which the plaintiff founds his claim—(1) wrongful dismissal, (2) a claim for salary which he alleged was due to him up to the date of ceasing to be manager. As regards the wrongful dismissal, since the argument, I have again gone carefully through the evidence, and I can see no evidence of any dismissal at all. The admitted facts appear to be these: Upon the defendants' suggestion that they proposed or had determined to suspend the plaintiff in order that there might be a full investigation into the accounts, he asked them whether they would accept his resignation. This they consented to do, and he thereupon resigned, and although in a letter of the 4th of October he claims damages for wrongful dismissal, he never attempted to resume the position of manager after the 27th of September. Under these circumstances I am of opinion that the plaintiff resigned and was not dismissed, and that no damages can be claimed in respect of any wrongful dismissal.

As regards the amount claimed for salary I have more difficulty. That seems to me to depend upon whether the finding of the jury in answer to the second question is sufficient to set aside the arrangement made. The strongest cases in favour of the plaintiff are among those cited by Mr. Bray and Mr. Powell in the course of the argument: *Evans* v. *Llewellin*, 1 Cox Ch. Cas. 333; *Wood* v. *Abrey*, 3 Madd. 417; and probably *Ormes* v. *Beadel*, 2 Giff. 166, 8 W. R. Ch. Dig. 17, and on appeal 9 W. R. 25; and *Barrett* v. *Hartley*, 14 W. R 684, L. R. 2 Eq. 789, at p. 797. But I think that the finding of the jury, understood in the sense that I understand it, and which I have already indicated, fails to bring the case within any of the decisions in which courts of equity have set aside arrangements of compromise. The passage in the judgment of Lord Chelmsford in *Williams* v. *Bayley*, L. R. 1 H. L. 200, at p. 216, 14 W. R. H. L. Dig. 4, on which I framed the second question, must, I think, be taken in conjunction with the preceding sentence and the subject-matter under discussion, and not as laying down any general proposition or rule which can be applied in all cases: see also the observations on this case in *Flower* v. *Sadler*, 10 Q. B. D. 572, which was not cited in the argument before me.

In the present case the plaintiff undoubtedly had a claim against the defendants for a sum considerably in excess of the amount received, £300. On the other hand the defendants claimed to have an investigation of the accounts. The plaintiff was the person who had the best means of knowing what the result of such investigation would be. As I have already said, it was conceded in the argument before me that the defendants were entitled to suspend the plaintiff and have an investigation. Accepting, as I am bound to do, the finding of the jury that the plaintiff was induced to make the agreement of the 27th of September, 1900, by undue pressure exercised by the defendants or Mr Rutland to force him to enter into the agreement, I still think that such pressure does not in law entitle the plaintiff to say that he is not bound by the arrangement come to. I have not overlooked the point raised by Mr. Bray with reference to the fact that the wafers which appeared on the deed when produced were not upon the deed when it was executed, but were affixed subsequently by some clerk of Mr. Rutland. Mr. Bray claimed in his argument that upon these facts the case of *Davidson* v. *Cooper*, 11 M. & W. 778 and 13 M & W. 343, was a conclusive authority in his favour. The circumstances of that case were very different, and no question of mutual arrangement or agreement outside the deed arose as in this case; but if the question were material I am by no means sure that the necessary evidence was gone into at the trial to enable Mr. Bray to raise the point. I am not satisfied that there was no impression upon the paper or want of execution before the wafers were affixed, and I doubt whether, having regard to the cases which will be found collected at p. 138 of the 17th edition of Roscoe's *Nisi Prius* Evidence, the objection can be maintained. But in this case the matter does not seem to me to be material, inasmuch as the real question is whether or not the plaintiff was bound by the arrangement which he entered into on the 27th of September. I have only to add that in his letter of the 4th of October the plaintiff alleges that the only ground upon which he claims to set aside the arrangement was the alleged threat of prosecution. With regard to the objections taken by the defendants, first, that the plaintiff ought to have taken independent proceedings, and, secondly, that he had acted upon the arrangement and ratified it by retaining the two sums of £300 and £400, I think that as regards the first it is now clearly established that, if the plaintiff could in equity have set aside the deed, that can now be set up in other proceedings as an answer to any claim or defence in which the deed is relied upon (*Seear* v. *Cohen*, 45 L. T. Rep. 589, 30 W. R. Dig. 49); and, as regards the second point, inasmuch as a larger sum of money was admitted to be due to the plaintiff, apart from the arrangement of the 27th of September, I do not think that his retention of the cheques was sufficient to have prevented him from contending that he was not bound by the arrangement. For the reasons which I have already given I think that judgment must be entered for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiff, *Lesser & Danger.*

Solicitor for the defendants, *Philip J. Rutland.*

K. B. Div. (Phillimore, J.) Jan. 15.

ATTORNEY-GENERAL v. JOHNSON. (a.)

*Inland revenue—Estate duty—Succession duty—Gift of sum of money in lieu of legacy in consideration of an annuity—*Bonâ fide *purchase—Exception for money consideration—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 2 (1) (c), 3 (2)—*Succession Duty Act,* 1853 (16 & 17 *Vict. c.* 51), *s.* 7.

An unincorporated society, which was associated for charitable purposes of a religious character, and which was possessed of considerable funds held by its trustees and disposed of by its directors, in acceptance of an offer by C. B., one of its directors, entered into an arrangement in 1889 *that, in consideration of the payment to the society of* £500 *in lieu of a legacy by the said C. B., the society would pay the sum of* £25 *per annum to C. B. during his life, and a like payment to his wife during her life should she survive him. C. B. died in* 1895, *and his widow died in* 1900. *The Crown claimed that, upon the death of C. B., estate duty became payable by the society under the Finance Act,* 1894, *s.* 2 (1) (c), *on the whole sum of* £500, *and that upon the death of the widow succession duty became payable by the society on the* £500 *under section* 7 *of the Succession Duty Act,* 1853. *The commercial value of the annuity, it appeared, was* £210.

Held, that, as regards estate duty, the whole sum of £500 *was, in the first instance, taxable under section* 2 (1) (c), *but that as the commercial value of the annuity was* £210, *that sum, representing the purchase-money, must be deducted under section* 3 (2), *and duty paid on* £290 *only. Further, that, as regards succession duty, the transaction was a* bonâ fide *sale within the meaning of section* 7 *of the Succession Duty Act,* 1853, *and that, therefore, no succession duty was payable on the death of the widow.*

Information by the Attorney-General, which stated as follows:

"1. The London Missionary Society is a body of persons not incorporated but associated for certain charitable purposes of a religious character and possessed of considerable invested funds which are held by trustees appointed by the society and are dealt with and disposed of by directors in whom the management of the affairs of the society is from time to time invested.

2. In the year 1899 the said London Missionary Society accepted from Mr. Charles Thomas Munday Burton, of Andover Lodge, Ealing, a director of the society, an offer of a sum of £500 in lieu of a legacy subject to a contract or reservation for the payment of £25 per annum to the said Charles Thomas Munday Burton during his life and after his death to his wife, Mrs. Martha Burton, during her life in case she should survive him.

3. The said arrangement (as appears from the following extract from the minutes) was confirmed and carried out by a resolution passed at a meeting of the directors of the society on the 11th of February, 1889—viz., "That in consideration of the payment to the London Missionary Society of £500 in lieu of a legacy by a director (Charles Munday Burton, Esquire) who does not wish his name to appear in any published or announced list of subscriptions the present trustees and their successors in the trusteeship of the society be and hereby are authorized to pay the sum of £25 per annum in quarterly payments (the first payment to be made in months after the receipt of such capital sum) during the life of the said Charles Munday Burton, Esquire, and a like payment to his present wife, Mrs. Martha Burton, during her life should she survive him.

4. The said sum of £500 was given and paid by the said Charles Munday Burton to the society, and the funds of the society held by their trustees became and were pursuant to the said arrangement charged with the payment of the annual sum of £25 during the lives of the said Charles Munday Burton and his wife and the life of the survivor of them, and the said annual sum was duly paid thereout by the said trustees accordingly.

5. The said Charles Thomas Munday Burton died on the 12th of May, 1895. His widow, the said Martha Burton, died on the 5th of May, 1900.

6. Upon the death of the said Charles Thomas Munday Burton estate duty became payable by the society and its trustees under the Finance Act, 1894, s. 2 (1) (c), incorporating section 38 (1) and (2) of the Customs and Inland Revenue Act, 1881, and section 11 (1) of the Customs and Inland Revenue Act, 1889, on the said sum of £500, being a gift to the society of which *bonâ fide* possession and enjoyment was not assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

7. Upon the death of the said Martha Burton succession duty at the rate of 11½ per cent. became payable by the society and its trustees on the said sum of £500 in respect of the determination of the said payment of £25 to Mrs. Burton under the Succession Duty Act. 1853 (16 & 17 Vict. c. 51), s. 7, and the Customs and Inland Revenue Act, 1888, s. 21.

8. The Commissioners of Inland Revenue have caused application to be made to the society and their trustees and to the defendant to deliver proper accounts in respect of the said sum of £500, and to pay the duties which ought to be paid in respect thereof as aforesaid, but they have refused and still refuse to deliver such accounts and to pay such duties, and contend that no such duties are payable.

9. The defendant is the secretary of the said society."

The information prayed that it might be declared that the said sum of £500 ought to have been included in an account to be delivered pursuant to section 2 (1) (c) of the Finance Act, 1894, incorporating section 38, sub-section 2 (a), of the Customs and Inland Revenue Act, 1881, and section 11, sub-section 1, of the Customs and Inland Revenue Act, 1889, on the death of the said Charles Thomas Munday Burton, and that estate duty was and is to be charged and paid on such account as by the said Acts provided; and that succession duty at the rate of 11½ per cent. became payable on the death of the said Martha Burton in respect of the determination of the said annuity of £25 per annum on the said sum of £500 under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888.

The society in their answer to the information pleaded that the said sum of £500 was not given, but was paid by Burton to the society. None of the funds of the society became, pursuant to any arrangement, charged with the annual sum of £25. The said annual sum was never in fact paid by the trustees out of the funds of the society. It was paid by the directors as one of the ordinary outgoings of the society. Upon the death of Burton, estate duty did not become payable by the society. If, contrary to the contention of the society, the sum of £500 passed on the death of Burton, it so passed by reason only of a *bonâ fide* purchase from him within the meaning of section 3 of the Finance Act, 1894, and was, there-

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

fore, exempted from taxation. The only property (if any) which passed on the death of Burton in reference to the arrangement between him and the society was the annual sum of £25, which was exempted from taxation by section 15 of the Finance Act, 1894. Alternatively, the society pleaded, only such part of the said sum of £500 was to be deemed to have passed on the death of Burton as remained after deducting such sum as when invested would satisfy the instalments of the annual sum of £25. Upon the death of Mrs. Burton no succession duty became payable by the society. The annuity was *bonâ fide* purchased by Burton from the society by payment of £500. If, contrary to this contention, there is any succession, it is taxable under the Succession Duty Act, 1853, s. 16, and therefore the rate of duty was 10 per cent. and not 11½ per cent.

Sir R. B. Finlay, A.G., Sir E. Carson, S.G., and *Vaughan Hawkins*, for the Crown.—This case has been brought about owing to the decision in *Earl Grey* v. *The Attorney-General*, 48 W. R. 383, [1900] A. C. 124, the Inland Revenue desiring that the system under which such transactions as the present arise should be settled. The real point in this case is whether this transaction was a purchase of an annuity, as the defendant contends, or, as the Crown contends, a gift with a collateral benefit retained by the donor so as to make it fall within section 11 (1) of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), which amended section 38, sub-section 2, of the Customs and Inland Revenue Act, 1881. It is necessary to determine whether in this case there was a gift or whether there was a purchase, and only if it can be determined there was a purchase can section 3 (2) of the Finance Act, 1894, be applied to this transaction. This was not the case of a purchase, there being no purchaser or vendor of this annuity, it was not a commercial transaction at all, but it was a gift; further, it cannot be both a gift and a commercial transaction. This sum of £500 is therefore liable to estate duty (see *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99), and it does not come within section 3 (2) of the Act of 1894. The whole point of that sub-section lies in the words "paid to the vendor or grantor for his own use or benefit." That section does not apply unless there is a purchaser for a consideration. The transaction must come under the word "purchase," and that is not the word to describe the present transaction: *vide* Austen-Cartmell's Finance Acts (3rd ed.), p. 33. As to the claim for succession duty this transaction cannot be considered a *bonâ fide* sale so as to take it out of liability to succession duty under section 7 of the Succession Duty Act of 1853. If it is not a *bonâ fide* sale then it is not a sale at all.

Micklem, K.C. (*Harman* with him), for the defendant.—No estate duty is payable in respect of this sum of £500. However, if any duty is payable it is payable on the sum of £290 only. [PHILLIMORE, J.—If anything is payable under section 2 it is cut down by section 3.] This transaction was a purchase favourable to the society. If it was partly a purchase and partly a gift, no doubt so far as it was a gift it came into operation at once. There is no complication so far as the gift is concerned, and estate duty would be payable on the death of the husband, but no succession duty became payable on the death of the widow. The annuity was *bonâ fide* purchased from the society: *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675.

Vaughan Hawkins replied.

PHILLIMORE, J.—In this case, on the 11th of February, 1889, the directors of the London Missionary Society resolved as follows: "That in consideration of the payment to the London Missionary Society of £500 in lieu of a legacy by a director (Charles Munday Burton, Esquire) who does not wish his name to appear in any published or announced list of subscriptions, the present trustees and their successors in the trusteeship of the society be and hereby are authorized to pay the sum of £25 per annum in quarterly payments (the first payment to be made in months after the receipt of such capital sum) during the life of the said Charles Munday Burton, Esquire, and a like payment to his present wife, Mrs. Martha Burton, during her life should she survive him."

Before the resolution was arrived at two letters had passed from Mr. Burton to the society which I think it well to read: "1st March.—I have not been able to get to the city since last I had the pleasure of seeing you at the Mansion House, and as I cannot tell when I may be well enough to venture so far again, will you kindly send on to me for approval the amended document which we arranged should be written out anew." And on the 7th of March: "Permit me to thank you for your very kind letter which came to hand last night. I can assure you that payment to the society of the anticipated legacy has been made with a glad heart, in which my wife has cordially joined, and the completion of which brings us rest and peace." Then follow expressions showing his interest in the work and his devotion to the cause of religion.

I am told that this class of arrangement is not infrequent with missionary societies. It appears in this particular case that the commercial value of the annuity stipulated for would be £210, and therefore the society benefit to the extent of £290 if this is to be treated as an ordinary commercial arrangement.

Mr. Burton died in May, 1895, after the passing of the Finance Act, 1894, and his widow died in May, 1900. The Crown now claims, first of all, estate duty upon this sum of £500; and, secondly, succession duty. Now, I have to determine both these points. Section 2, sub-section 1 (c), of the Finance Act, 1894, renders liable to duty "property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the word 'voluntary' and 'voluntarily' and a reference to a volunteer were omitted therefrom."

That section must be read as if the joint sections of the Customs and Inland Revenue Acts, 1881 and 1889, were written out in full therein, and the effect of those two sections is well and, I think, accurately given at pp. 106 and 107 in Hanson's Death Duties (4th ed.) as follows: "Any property taken as a *donatio mortis causâ* made by any person dying after the first day of August, one thousand eight hundred and ninety-four, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Now I think it has been suggested by the Crown that this sum of £500 is taxable as "property taken under any gift, whenever made, of which *bonâ fide*

possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor." My opinion is adverse to such contention. I do not think that *Earl Grey* v. *Attorney-General* has any bearing upon this case at all. The whole question decided by that case is that property out of which the donor reserves benefits for his life is not property which has been assumed and retained to the entire exclusion of the donor. In the present case the property was a sum of £500, and as it was entirely taken by the society without any reservation at all, and as the annuity which the society contracted to pay was not in any way charged upon this property, nor was there property in any way appropriated to the payment of it, I am quite clearly of opinion that that part of the section does not apply.

There remain the words in section 11 of the Act of 1889—namely, "property taken under any gift, wherever made . . . retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

These words are not very apt, but I think I must take it, particularly after the decision of *Attorney-General* v. *Worrall*, that they mean that where property is given and, in consideration of that gift, there is a contemporaneous arrangement by contract to pay to the giver something for his life, that gift is not such an out-and-out gift as to be exempt, and I so assume in deciding this case. Therefore this sum of £500, being property given, but given upon terms that there should be an annual payment to the donor for his life and onwards, would be taxable under section 2 (1) (*c*) if the matter ended there. But then comes section 3 (2), which is a reservation or a taking out of the taxing disposition of certain property passing under certain forms of arrangement. I am clearly of opinion that that is a distinct remission of duty which, but for that section, would have been incurred, and I so construe that section. Now, there is a great difficulty about it, because sub-section 2 of section 3 is in a different plane of thought, or in a different denomination from the sections of the two Customs and Inland Revenue Acts which are to be read into this Act. If those sections had been written out in full in this Act I cannot conceive that any draughtsman would have passed sub-section 2 of section 3, with those words before him exactly in the language in which it stands, but I have got to construe it as the Legislature has left it, and the only way in which I can do that is to say this: Where only the Customs and Inland Revenue Act applies it may be that there is no such thing as a purchase for partial consideration. It is evident that there are certain cases in which there will be a purchase with some consideration, which nevertheless will be a taxable purchase. That is the effect of the decision in the case of *Attorney-General* v. *Worrall*. There may be cases where there are cross-gifts, and where, though one gift is in consideration of the other, for the purposes of taxation each gift is to be treated as gratuitous, and whichever comes to be the taxable one is to be taxable accordingly. But under section 3, sub-section 2, the case is otherwise, and under that section there may be an arrangement under which property is consciously purchased for considerably less than its value, there being a gift to the purchaser of the balance over the true commercial value of the property. In other words, there may be, as it were, in one case cross-claims, and in the other case a set off, and the only amount which is taxable is that which is left after the set off has been discharged. That is my construction of this case. I think this money, as I have already said, is clearly taxable under section 2 (1) (*c*). But then I am directed to allow a deduction from the value of the property for the purpose of estate duty, by section 3, sub-section 2. The whole £500 is in the first instance taxable; then as much of it as is purchase is to be deducted under section 3 (2), and as in this case the commercial value of an annuity of £25 for the two lives is £210, that sum must be deducted, and therefore only £290 remains to be taxed.

I cannot pass from this matter without dealing with the way in which it was put most powerfully before me by counsel for the Crown: You must first determine whether it is a gift or whether it is a purchase, and only if you determine that it is a purchase can you apply section 3, sub-section 2. My answer to that is: That is a mistake arising from confining your attention entirely to the Customs and Inland Revenue Acts, and not reading the Finance Act, 1894, including those two sections read into it, as one Act. When you come to read them as one Act and not as two Acts, historically one after the other, it is to my mind clear that you can have something which is both purchase and gift—*pro tanto* purchase, and *pro tanto* gift—and that that must be the meaning of section 3 (2). Therefore in my opinion there must be judgment for the Crown on the question of estate duty, but on £290 only.

The succession duty question is, I think, more difficult than that of the estate duty. The claim is made under section 7 of the Succession Duty Act, 1853, which section is an addition to the ordinary taxing section—section 2—and would apply in a case like the present if there be no *bonâ fide* sale. It is true there is no property to succeed to upon the death of Mr. Burton and his wife; but the section says that the disposition shall be deemed to confer, at the time appointed for the determination of the benefit, a beneficial increase in the property as a succession. Therefore if this be not a *bonâ fide* sale and comes within this section the Crown is entitled to duty on the full £500. There is no question here of partition between the £290 and the £210; it is on the full £500 or on nothing. But there arises the very formidable objection which Mr. Micklem has pointed out—namely, the nearer to a full consideration you get the annuity, the greater the duty to be paid. Now that, to my mind, is absurd, and that leads me to consider whether the true meaning of this section is not this, that where the annuity or life estate or interest purchased is so much greater than the purchase-money that the sale is not to be deemed a *bonâ fide* sale, then the section applies; in other words, that this section does not apply to a case where a smaller life interest is given than the purchase-money in fact would bring, but only in cases where a large life estate is created really by way of settlement, and that settlement is endeavoured to be concealed by the fact that a sum of money has been given for the purchase. I am inclined to think that that is the meaning of section 7 and that the sale is only to be assumed to be not *bonâ fide* when it is not *bonâ fide* by reason of the life interest created in the settlement being too large. However, I do not decide that point, because, assuming for the moment in favour of the Crown that this is a case such as the section applies to, I have then got to consider what is a *bonâ fide* sale within the meaning of the Succession Duty Act, and I do not think that a sale is not a *bonâ fide* sale within the meaning of the Act because it is at under-value or even at a considerable under-value. I think where a substantial consideration passes—substantial not only absolutely but relatively—that there is an element of bargaining in the matter; it is a *bonâ fide* sale though in reality very much more is given for the life interest than in fact is required. Having regard to the

expressions in the letter of the 1st of March and to the fact that this class of arrangement is not uncommon and that the duty would be imposed upon the directors of this society to see that at any rate the society was not injured by this arrangement, I consider that this was a *bonâ fide* sale within the meaning of the section. I feel certain that the directors would see that they were not granting too large an annuity, and to that extent at any rate the element of consideration and bargaining would enter into the transaction. Upon the whole, therefore, I am of opinion that the Crown is not entitled to succession duty, and is only entitled to estate duty on the £290.

Judgment accordingly. No order as to costs.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitor for the defendant, *Leonard & Pilditch.*

House of Lords.

From C. A. (Scotland). Dec. 17.

BLAIR *v.* DUNCAN AND ANOTHER. (*a.*)

Will—Charity—"Such charitable or public purposes as my trustee thinks proper"—Uncertainty.

A testatrix bequeathed half her residue to be "applied for such charitable or public purposes as my trustee thinks proper."

Held, that such bequest was void for uncertainty.

Decision of the Court of Session in Scotland (3 *Ct. Sess. Cas. 5th Ser.* 274, 38 *Scot. L. R.* 209) *affirmed.*

This was an appeal from the Second Division of the Court of Session in Scotland by John Blair, the sole trustee and executor of the late Miss Agnes Wilson Young, who by her will dated the 5th of December, 1898, bequeathed the residue of her estate to her brothers Archibald Young and the Rev. James Gerard Young, Doctor of Divinity, equally between them, and if either predeceased her then the whole to the survivor.

By a codicil the testatrix made the following directions: "Referring to the will which I have signed today, I direct that in the event of either of my brothers predeceasing me the half of the residue, and in the event of both predeceasing me the whole of the residue, shall be applied for such charitable or public purposes as my trustee thinks proper."

The Rev. Dr. Young predeceased the testatrix. Archibald Young became her heir-at-law and sole next-of-kin, and brought this action for a declaration that the charitable gift was void. Since his death his interests were represented by the respondents.

The Court of Session decided that the gift of half the residue to charitable or public purposes was invalid.

The Lord Advocate (*Graham Murray, K.C.*) and *John Wilson, K.C.*, both of the Scotch bar (with them *R. Scott Brown*, of the Scotch, and *Allan J. Lawrie*, of the English bar), for the appellant.

The Solicitor-General for Scotland (*Scott Dickson, K.C.*) and *Younger, K.C.* (*Duncan Millar*, of the Scotch bar, with them), for the respondents.

THE HOUSE took time for consideration.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Earl of HALSBURY, L.C.—In this case I do not propose to repeat what I said at some length in *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, nor do I think it is necessary to appeal to the decision in that case for the purpose of the decision of this. I will only say that in my view the decision of that case is an authoritative determination, and, in speaking of a taxing Act which applies to both countries, the decision of that case must of course be supreme. But, speaking of a Scottish instrument and the interpretation to be given to the word "charitable" in Scotland, I should regard the decision of *Baird's Trustees* v. *Lord Advocate*, 15 Ct. Sess. Cas. 4th Ser. 682, as still an authoritative exposition of the law of Scotland. I am not quite certain that it is important to consider that question at any length here, because, in the view that I take of this particular testamentary disposition, it appears to me that it is impossible to deny that the words on which the main question turns—namely, "charitable or public"—are used disjunctively. Under those circumstances, it appears to me that it would be equally the law of England as it would be the law of Scotland that the disposition here given to A. B., to determine what particular public purposes should be the objects of the trust, is too vague and uncertain for any court either in England or Scotland to administer. The result of that is, as it appears to me, that the decision of the court below was perfectly right; and I move your lordships, therefore, that this appeal be dismissed with costs.

Lord SHAND.—I am of the same opinion. The whole argument of the appellant was founded on the alleged analogy between a bequest for public purposes and a bequest for charitable and benevolent purposes, which are objects of peculiar favour in the law both of Scotland and of England. In my opinion the analogy clearly fails, and I concur in thinking that a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest.

I will only add that I concur in the judgment of Lord Robertson, which his lordship has given me the opportunity of reading and considering.

Lord DAVEY.—The short question on this appeal is whether a trust for such "charitable or public purposes" as the executor may select is a valid disposition of the testator's property according to the law of Scotland, or is void for uncertainty.

Your lordships were exhorted by the Lord Advocate to dismiss from your minds all preconceived notions derived from the English law of charities, and I have done my best to humbly obey that exhortation. There is no doubt that the English law has attached a wide and somewhat artificial meaning to the words "charity" and "charitable," derived, it is said, from the enumeration of objects in the well-known Act of Elizabeth, but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words. In the course of the argument there was some discussion as to the meaning attached by Scottish judges to the words "charitable purposes." I think that those words include a wider range of objects than such as are of a merely eleemosynary character, and I find authority for saying so in the opinion of Lord Watson in the *Pemsel case.*

But I do not find it necessary to pursue or elaborate the discussion of this topic in the present case, because it is, in my opinion, clearly established that, whatever may be the legal definition of the expression, the courts of Scotland will give effect to a disposition in favour of charitable purposes to be selected by a

named individual. In other words, such a trust is treated as being sufficiently definite to be the subject of a valid disposition.

There are three cases in this House to which your lordships' attention was called. In *Hill* v. *Burns*, 2 Wils. & S. 80, a bequest to trustees was held valid, whereby a testatrix appointed the residue of her estate to be applied by her trustees in aid of "the institutions for charitable and benevolent purposes established or to be established in the city of Glasgow, or neighbourhood thereof," to be appropriated in such manner as to the trustees might seem proper. In *Crichton* v. *Grierson*, 3 Wils. & S. 329, a gift to trustees of a residue to be applied in such charitable purposes and bequests to such of the testator's friends and relations as might be pointed out by his wife, with the approbation of the majority of the trustees, was also held valid. Lastly, in *Miller* v. *Black's Trustees*, 2 Sh. & McL. 866, a bequest for such charitable and benevolent purposes as the trustees might think proper was held valid.

If, therefore, the words in the present case were merely "charitable purposes," or were "charitable and public purposes," I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character.

But the words we have here are "charitable or public purposes," and I think these words must be read disjunctively. It would, therefore, be in the power of the trustee to apply the whole of the fund for purposes which are not charitable, though they might be of a public character. Now I am not aware of any case in which effect has been given in the Scottish courts to a trust for "public purposes," and I find in the cases which have been referred to indications that such a trust would not be considered valid. In *Crichton* v. *Grierson* Lord Lyndhurst, L.C., states the question thus: Whether effect may be given to a power of selection amongst the individuals comprised in "particular classes of individuals and objects"; and he answers the question by saying that according to the authorities in the law of Scotland, a person may make such a disposition. Can it be said that "public purposes" is within the description of a particular class of individuals or objects? I think not. Illustrations were given at the bar, and might be multiplied to any extent, of purposes which would come within the description of "public," and the statement of which would reduce the gift almost *ad absurdum*. The Lord Advocate argued that the expression "public" was no more vague than "charitable." I do not agree, although an exhaustive definition of "charitable" might be difficult, and to attempt it would be unwise. At any rate, it is *positivi juris* that the courts will give effect to a gift for charitable purposes to be selected by an individual. It may be that the law of Scotland is more liberal to the interpretation of bequests for charitable purposes than other bequests, as was said by Lord Gifford in advising this House in *Hill* v. *Burns*. In *M'Lean* v. *Henderson's Trustees*, 7 Ct. Sess. Cas. 4th Ser. 601-611, Lord Moncreiff expressed himself in words which show that in his opinion a bequest might be void for uncertainty if not within the category of charitable bequests.

It appears to me that the point to which I have directed my observations is put clearly and concisely by Lord Young when he says he could not on authority or principle sustain public purposes as a valid direction to a testamentary trustee.

For these reasons I am of opinion that the appeal should be dismissed with costs.

Lord BRAMPTON.—In an event which has happened the testatrix by a codicil to her will directed that one-half of the residue of her estate shall be applied for such "charitable or public purposes" as the testamentary trustee nominated in her will should think proper. It is not disputed that if the word "charitable" had stood alone the devise would have been sufficiently definite and valid; but it is urged by the respondents that the addition of the words "or public purposes" renders the devise indefinite and void because of its vagueness. It seems to me that the addition of those words would confer upon the trustee the power at his option to set aside charitable purposes altogether, and apply the whole of the bequest solely to any one or more of innumerable public purposes comprised within an unlimited area. In short, the intentions of the testatrix are on the face of the will and codicil left, so far as relates to the "public purposes" to be benefited, in absolute uncertainty.

I think, therefore, that this appeal should be dismissed with costs.

Lord ROBERTSON.—The argument at your lordships' bar, able and ingenious as it was, makes it necessary to remember that the question now before the House is whether a bequest of money for such public purposes as the trustee under the will thinks proper is or is not valid (for I am clearly of opinion with your lordships that the gift to public purposes is disjoined from that to charitable purposes).

Now, it is a significant fact that this question, on its merits, has been little if at all discussed by the learned counsel for the appellant. If a bequest by A. to any public purpose to be selected by B. is defensible on its merits, it must be on of two grounds; either that by law A. may validly leave money to be given to any purpose whatever named by B., or that the purposes named—namely, "public" purposes—are not vague and uncertain.

The former of these propositions was asserted by the appellant, but no more than asserted, on the authority of the opinions delivered in the Court of Session in *Hill* v. *Burns*. When those opinions and the authorities cited in them are examined, it will be found that they give no support to the proposition that a bequest is valid which consists merely of a direction that a certain sum of money shall go to any purpose that a nominated trustee may think proper. The case then before the learned judges was not such an unlimited power at all, but a direction to trustees to select as the object of the legacy such of the benevolent and charitable institutions in Glasgow as they thought fit. And in speaking of *alienum arbitrium* they were defending the bequest against the objection that the intervention of *alienum arbitrium* to any extent made the legacy void. This is perfectly plain by the reference by the Lord President to the cases of *Trustees of Brown* v. *His Relations*, Mor. Dict. 2318, and of *Snodgrass* v. *Buchanan*, Mor. Dict. Service of Heirs, App. 1, in both of which the *alienum arbitrium* was invoked merely to select from among the testator's own relations. There is, so far as I know, no authority for the broader proposition that according to Scottish law a good bequest is made by A. when he directs B. to make a will for him as regards either the whole or part of his estate, and it is contrary to the fundamental idea of testamentary disposition.

What has been established as regards the intervention of a trustee is thus stated by Lord Lyndhurst, L.C., in *Crichton* v. *Grierson*, and the passage touches the very core of the present case. He says that "according to the authorities in the law of Scotland it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular

individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select." This is the rule which has got to be applied in the present case, and the question is, Has this testatrix done what Lord Lyndhurst describes?—has she selected a particular class or particular classes of objects among which her trustee is to select?

Now, as I have already remarked, we have not had much argument from the appellant on this question by itself and apart from the medium of the decision about charities. I cannot say that I am surprised, for it seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice.

Now, I have not heard anyone say that this bequest is not vague and uncertain; what is said is merely that a gift to any charitable purpose, to be selected by a trustee, is equally vague, and that the law allows the validity of a gift to any charitable purpose, to be selected by a trustee. The soundness of this argument must therefore be considered.

First of all, I do not agree that "charitable purposes" is as wide or nearly as wide as "public purposes." Even giving to the word "charitable" the widest extension ever allowed to it, there are, as I should believe, many public purposes completely outside it. Giving to the word "charitable" its proper meaning as it occurs in a Scottish testament, its comprehensiveness still further falls short of the word "public." As was suggested at the bar, the trustee would be within his powers if he gave this £1,000 to the election fund of any of the political parties that he pleased. It would be equally within his powers to subscribe the money towards raising a Yeomanry regiment. Each of these purposes is "public," neither is "charitable." Innumerable other illustrations might be given.

A great deal of the appellant's argument was directed to enforcing the relevancy of the decisions about the word "charitable," by showing that they could not be distinguished from the present case. With this view your lordships had presented to you an elaborate and interesting discussion of the difference between the law of charities in England and the law of charities in Scotland.

Much that was advanced is unquestionably sound (although I consider it inconclusive of the present question). "Ever since its institution," said Lord Watson in *Pemsel's case*, "the Court of Session has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purpose to which the estate or income of the trust may be appropriated; and there has consequently been no room for those numerous questions as to a trust being charitable or not, which have arisen in England under the Statute of Elizabeth." The relations of the Court of Session to charities had been based on the same general ground by Lord Cuninghame and Lord Cockburn in *Ross* v. *Heriot's Hospital*, 5 Ct. Sess. Cas., 2nd Ser. 569, and it cannot be doubted that this is an accurate statement of the law. Nor do I think that exception can be taken to the interesting comparison of the laws of the two countries given by Lord Stormonth Darling in *Cobb* v. *Cobb's Trustees*, 21 Ct. Sess. Cas., 5th Ser. 38 (although I do not concur in the deductions drawn by that learned judge, so far as bearing on purposes other than charitable).

But while charitable trusts are, as matter of legal doctrine, merely one class of trusts, and while their prominence in legal decisions results from nothing more than their being the most numerous class of public trusts, I do not think that it is true that they have been uniformly treated by the courts in Scotland exactly as other trusts would be treated. The courts have, I think, as matter of historical fact, reflected more or less, consciously or unconsciously, the bias which disposes every one favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your lordship's House in the *Morgan case* (*Dundee Magistrates* v. *Morris*), 3 Macq. 134. To this favour for charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class. On the merits of the question now before your Lordships I am unable to hold that the designation of public purposes is a compliance with the rule.

Younger, K.C.—It was arranged between the parties that the costs (subject to your Lordships' approval) should come out of the fund in dispute.

The Earl of HALSBURY, C.J.—We make no order as to costs.

Appeal dismissed.

Solicitors for the appellant, *Faithful & Owen*, for *Davidson & Syme*, Edinburgh.

Solicitors for respondents, *A. & W. Beveridge*, for *Duncan & Black*, Edinburgh.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Jan. 23; March 3.

JACOBS v. MORRIS. (a.)

Principal and agent—Power of attorney—Power to borrow—Loan to agent—Money paid into principal's banking account—Misapplication by agent—Money had and received to use of lender.

A power of attorney authorizing an agent to purchase goods in connection with the business of his principal, and where necessary in connection with any purchases made on behalf of the principal or in connection with his said business, to draw and accept bills of exchange and sign the name of his principal to cheques on the banking account of the principal, does not confer on the agent a general power to borrow.

Money borrowed by the agent under such a power in the name of his principal and paid into the principal's banking account, and then drawn out by the agent and applied to his own purposes, cannot be recovered by the lender from the principal, as money had and received to the use of the lender, unless the principal knew, or could in the ordinary course of business have known, of the transaction, or unless the principal had the benefit of the money so paid into his account.

Marsh v. Keating, 1 *Bing. N. C.* 198, *considered.*

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

Decision of Farwell, J. (49 *W. R.* 365, [1901] 1 *Ch.* 261), *affirmed.*

This was an appeal from the decision of Farwell, J., reported 49 W. R. 365, [1901] 1 Ch. 261.

The plaintiff, Louis Jacobs, was formerly a partner in a firm of tobacco merchants who carried on business in Melbourne under the firm, Jacobs, Hart, & Co. In 1898 the plaintiff became the owner of the business. Since 1882 the firm had had an agency in London, and for the period of two months in 1888 the plaintiff was the London agent.

In 1893 or 1894 Leslie Jacobs, the plaintiff's brother, who was a defendant to this action, became the London agent.

On the 24th of January, 1899, the plaintiff executed a power of attorney by which he appointed Leslie Jacobs attorney "in and throughout the United States and the continents of America and Europe and all other parts of the world (other than Australasia and New Zealand) for me and in my name, or in my said trading name, to purchase, and to make and enter into, sign and execute any contract or agreement with any persons, firm, company or companies for the purchase of any goods or merchandize in connection with the business carried on by me as aforesaid, or for the purchase or acquisition by me of any patent rights, or of the right to the exclusive or partial use of any patent or invention, or for the purchase or acquisition of the right to act as the sole or partial agent of any person, firm, or company, and to make such purchase or acquisition either for cash or on credit, or partly for cash and partly for credit, as my said attorney shall, in his discretion, think advisable." After some other provisions, which it is not necessary to state, the document continued: "And for me and on my behalf, and where necessary in connection with any purchases made on my behalf as aforesaid, or in connection with my said business, to make, draw, sign, accept, or indorse any bill or bills of exchange, promissory note or promissory notes, notes of hand, or bills of lading which shall be requisite or proper in the premises, and to sign my name or my said trading name to any cheques or orders for the payment of money on my banking account in London."

A banking account in the name of the firm had been kept continuously since 1882 with the London and Westminster Bank, but since 1893 that account had been operated upon by Leslie Jacobs exclusively, and he had used it partly for the plaintiff's purposes and partly for his own.

Messrs. Morris (also defendants to this action) were a firm of cigar importers, carrying on business in Cullum-street, London. Ever since 1889 they had had dealings with the plaintiff's firm, and they were well acquainted with Leslie Jacobs.

On the 12th of June, 1899, Leslie Jacobs, purporting to be acting on behalf of the plaintiff's firm, applied to Messrs. Morris for a loan of £4,000. He represented that by the power of attorney, which he produced, he was authorized to borrow on behalf of the firm; that the firm contemplated manufacturing cigarettes; and that he wanted cash to pay for machinery for this purpose and for buying leaf tobacco. Upon the faith of these representations and without looking at the power of attorney, Messrs. Morris agreed to advance the £4,000 at 4 per cent. interest, upon the security of bills of exchange accepted by the plaintiff's firm, and upon the condition that the plaintiff's firm should push the sale of a brand of cigars, of which Messrs. Morris were the owners, in the colonies. Messrs. Morris accordingly handed to Leslie Jacobs two cheques for £2,000 each, each of which was drawn to the order of Jacobs, Hart, & Co., in exchange for which he handed to them four bills of exchange, each for £1,000, and accepted by him on behalf of the plaintiff's firm. The cheques were paid by Leslie Jacobs to the credit of the banking account of the plaintiff's firm, and the amount was subsequently drawn out by Leslie Jacobs and was applied by him to his own purposes. For the purpose of putting the London agent in funds to pay for goods purchased in London on account of the plaintiff's firm, an arrangement was come to between the firm and their Australian bankers, who had a branch in London, to make advances in the following manner: When Leslie Jacobs bought goods for the firm he took the invoice and the shipping documents to the London branch of the Australian bank, together with a bill of exchange drawn by him in the name of the firm upon the firm itself. Upon these documents the London branch handed him a cheque for the net amount of the invoice under a letter of credit given by the Australian bank to the firm, and sent by the firm to Leslie Jacobs. Leslie Jacobs then paid the money into the firm's account at the London and Westminster Bank, and paid for the goods by a cheque drawn in favour of the sellers on the same account. The plaintiff had no knowledge of any borrowing under the power of attorney for the general purposes of the business, and he had no knowledge of the transactions in question in this action until after the money had been misappropriated.

This action was commenced in November, 1899, against Messrs. Morris and Leslie Jacobs, and by it the plaintiff claimed an injunction to restrain the defendants from negotiating the bills for the £4,000 upon the ground that they were accepted without the plaintiff's authority. The plaintiff also brought charges of fraud against Messrs. Morris, but these charges were disproved at the trial. Messrs. Morris counterclaimed against the plaintiff and Leslie Jacobs for payment of the sums due on the bills, with interest at 4 per cent., and, alternatively, for the £4,000 as money had and received by the plaintiff to the use of Messrs. Morris, with interest at 4 per cent.

Farwell, J., held that the counterclaim failed on both points. Upon the construction of the power of attorney his lordship was of opinion that the general words when construed with the prior context did not confer on the attorney a general power of borrowing. His lordship also held that, inasmuch as the plaintiff did not know, and had no means of knowing, that the £4,000 had been paid to the credit of his banking account until after it had been drawn out, the £4,000 could not be claimed as money had and received by the plaintiff to the use of Messrs. Morris.

From this decision Messrs. Morris appealed.

Neville, K.C., Butcher, K.C., and *A. L. Morris,* for the appellants, Messrs. Morris.

Upjohn, K.C., and *Johnston Edwards,* for the plaintiff, Louis Jacobs.

The arguments and authorities cited were the same as in the court below (49 W. R. 365).

Cur. adv. vult.

March 3.—VAUGHAN WILLIAMS, L.J.—I am of opinion that the judgment of Farwell, J., ought to be affirmed. The first question is as to the construction of the power of attorney. Does it include a power to borrow money? It contains no express power to borrow. [His lordship read the power as above quoted, and, with reference to the latter clause of it, said:] This latter clause contains no express power to borrow, but it said that the power to borrow arises by necessary implication from the words "in connection with my said business," to make, draw, sign, accept, or indorse any bill of exchange, promissory note, &c. It is said that these words, unless they have no effect,

must authorize something more than accepting or making bills of exchange in connection with any purchases, because express power to do this is given just above in the earlier words of this clause. This argument seems to me well founded; but it still remains to consider what is the authority to accept bills or give promissory notes which is given by these words beyond the power to do so in connection with purchases. It is a power to accept bills and make notes in connection with "my said business," that is, the business of a tobacco merchant and manufacturer carried on by the donor of the power under the style of "Jacobs, Hart, & Co.," at Melbourne. Now, in my judgment, this authority cannot extend beyond the powers, express or implied, given to Leslie Jacobs by his appointment contained in the power of attorney. The power of attorney does not contain any express power, except the power to purchase and to do certain particularized things in connection with such purchases. In other words, the power of attorney appoints Leslie Jacob the purchasing agent for the business carried on by Louis Jacobs, and gives him certain particularized powers in connection with purchases, and then goes on to give him this power of accepting bills and making notes in connection with the said business. In my judgment the later words are intended merely to cover such powers beyond the mere power to purchase, which is expressly given, as are necessarily implied by the appointment of Leslie Jacobs as purchasing agent. Let us test it in this way. Suppose the authority, whether given by word of mouth or in writing, had been limited or expressed in some such words as these: "I hereby appoint Leslie Jacobs as the purchasing agent in Europe and America for the business of tobacco merchant and manufacturer which I carry on at Melbourne, in Victoria." Would such an appointment create by necessary implication a power in Leslie Jacobs to borrow money? I think not. The implied powers of an agent appointed by a trader are very different from the implied powers of a partner in a similar business. *Primâ facie*, an agent cannot borrow unless he has express authority as is explained by the judgments in *Hawtayne* v. *Bourne*, 7 M. & W. 595. And the distinction between the case of an agent and the case of a partner is well illustrated by the judgments in *Brown* v. *Kidger*, 3 H. & N. 753, 7 W. R. O. L. Dig. 62. But it may be urged that if power to accept bills and give promissory notes in cases other than purchases does not apply to borrowing there is nothing else to which it could apply. I cannot agree. I can quite conceive many debts which might arise in the business of the firm by reason of acts clearly falling within the authority of the agent other than purchases. For instance, the agent might incur a debt for costs to a solicitor, or a debt to an accountant in respect of the examination and adjustment of a trading account; or, to take the case which I understand Farwell, J., to put, of an agreed sum payable to the vendor of goods on a contract which the agent has thought it advisable to pay money to be allowed to rescind. In all these cases it seems to me there is money payable which is not in connection with a purchase; and the words "in connection with my said business" seem to give a necessary authority to accept a bill or give a promissory note in such cases; and I therefore cannot agree that there is nothing but "borrowing" which these words can cover. I think that the power of attorney contains no authority to borrow. I must mention one other argument, which is, as I understand it, this—that the actual practice in the business of this firm shows that the power to borrow is essential to the performance of the duty in England of a purchasing agent acting for an Australian firm, because the business was in fact mainly conducted, if not entirely, by the method of the agent when he bought goods, taking the invoice and the shipping documents to the London branch of the Australian bank, together with the bill of exchange drawn by him in the name of the firm upon the firm itself; and upon these documents the London branch handed him a cheque for the net amount of the invoice, under a letter of credit given by the Australian bank to the firm and sent by the firm to Leslie Jacobs; and that Leslie Jacobs then paid the money into the firm's account in the London and Westminster Bank, and paid for the goods by a cheque in favour of the sellers. I cannot see that this practice shows that a general power to borrow was in any way essential to the conduct of the business. All it shows is that the firm had opened a credit with an Australian bank, who authorized their London branch to advance to Leslie Jacobs the invoice price of exported goods against the shipping documents. This was an advance made under the special direction of the principal in Australia, who opened the credit to be operated upon against shipping documents of goods exported to the firm. This practice seems to me to negative rather than to affirm a general power to borrow for the purposes of the business.

If Leslie Jacobs had no right to borrow money on behalf of Louis Jacobs, this disposes of the counterclaim so far as it relates to the bills of exchange given in consideration of the loan, but it still leaves the claim, as money had and received to the use of Messrs. Morris, for the £4,000 obtained by the cheques of Messrs. Morris which were paid into the account of Louis Jacobs at the London and Westminster Bank. Here, again, I agree with the conclusion at which Farwell, J., has arrived. I agree that Messrs. Morris cannot recover the £4,000 as "money had and received" by Louis Jacobs; but I do not base my conclusion, as Farwell, J., seems to do, on the ignorance or want of means of knowledge of Louis Jacobs, while the £4,000 remained to his account at the London and Westminster Bank, of the fact that it had been paid in to his credit. I prefer to base my decision on the estoppel arising against Messrs. Morris by reason that they had constructive notice, when they lent the money, that Leslie Jacobs had no authority to borrow on behalf of Louis Jacobs, and that it was their conduct in lending the money which enabled Leslie Jacobs to pass the £4,000 through Louis Jacobs's account without his knowledge. I am not sure that in *Marsh* v. *Keating*, 1 Bing. N. C. 198, 2 Cl. & F. 250, either the House of Lords or the judges whose opinion was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person through whose account a sum of money has passed from responsibility, or that knowledge of the fact is essential to liability. Nothing more seems to me to have been decided there than that the defendants could not rely upon ignorance if they had the means of knowledge. Park, J., in delivering the opinion of the judges, says: "If they had not knowledge they have all means of knowledge, and there is no principle of law upon which they can succeed in protecting themselves from liability in a case where, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires": see 2 Cl. & F. at pp. 289, 290. The opinion does not say that knowledge was necessary. The ignorance in such a case seems evidence of negligence, or of the wide limits of actual authority given to an agent appointed by the principal to deal with strangers. I have no doubt myself that the *onus* in such a case is on the person through whose account the money passed; but, whatever may have been the intention of the

decision in *Marsh* v. *Keating*, I am not prepared to say that a man who places his account at a bank under the absolute control of an agent, giving him the power to indorse cheques payable to his order, including cheques crossed with the name of his bankers, and to sign cheques drawn on his account, had not the means of knowledge, at all events after a lapse of time, of what was being paid into and paid out of his account by his agent. I see nothing to prevent, in this case, such an audit in London, to say nothing of accounts rendered to Melbourne, as would have rendered these—I must say, "frauds" by Leslie Jacobs—impossible. This is sufficient to constitute liability whatever view is taken of the decision in *Marsh* v. *Keating*, and this liability arises in the present case, if at all, from the fact that Leslie Jacobs was in fact acting under the general authority actually given by Louis Jacobs when he indorsed Morris's cheque and thus authorized its presentation on behalf of Louis Jacobs by the London and Westminster Bank with whose name it was crossed, and the payment of it to the London and Westminster Bank by the bank on whom Morris had drawn the cheque. It seems to me that Louis Jacobs, by so doing, himself lent the proceeds of the cheque to the London and Westminster Bank. It seems to me that that which was done was done under an actual authority; and I doubt whether one need resort to ostensible authority or estoppel to found a charge against Mr. Louis Jacobs

But in my judgment Mr. Louis Jacobs is not liable for this £4,000 in an action "for money had and received" to the use of Messrs. Morris, because they cannot be heard to say that they did not know that Leslie Jacobs was receiving from them their cheque in favour of Louis Jacobs for a purpose foreign to that for which Louis Jacobs had given authority to Leslie Jacobs to indorse and to pay it into Louis Jacobs's account. If this is so, the loss of Messrs. Morris's money was not caused by an act of Louis Jacobs, but by their own act. It was their own act which enabled Leslie Jacobs to commit the fraud. The only doubt which I have had has arisen from the fact of the prior loans by Messrs. Morris to Leslie Jacobs, which loans (amounting in all, I think, to £3,000) had been discharged in due course by or on account of Louis Jacobs. Messrs. Morris might well say that their course of business, notwithstanding the limits of the power of attorney, held out Leslie Jacobs as an agent of Louis Jacobs with authority to borrow; but I think that the evidence shows that Messrs. Morris doubted the authority Leslie Jacobs to borrow, and were not in fact misled by any ostensible authority in him arising out of previous transactions. Of course, if Louis Jacobs had received the benefit of the money by its being used to pay his debts, he would *pro tanto* have adopted the loan and be liable. Farwell, J., however, has found that Louis Jacobs received no benefit from the £4,000, and there is a general statement by both Louis and Leslie Jacobs to this effect, and they were not cross-examined. I suppose, therefore, that this must be taken to be the fact, although an examination of the pass-book seems to me to lead to a contrary conclusion.

STIRLING, L.J., agreed.—If Messrs. Morris had read the power of attorney they would have known that there was no power to borrow; and also that Leslie Jacobs had power to indorse cheques or draw on the banking account, though only in connection with matters, of which the alleged purpose was not one. If, then, the question was, Was it *ex aequo et bono* that the loss occasioned by the fraudulent act of Leslie Jacobs should be borne by the plaintiff? it seemed to his lordship that it was not. The primary cause of that loss was not anything done or omitted to be done by the plaintiff, but the neglect of ordinary business precautions by the defendants, the Messrs. Morris. It was said however, that the case fell within the decision in *Marsh* v. *Keating*. Farwell, J., had held that the principle involved in the opinion given by the judges who advised the House of Lords in that case, required that two things should be established, first, that Messrs. Morris's money went into the plaintiff's account, and, secondly, that the plaintiff knew or had the means of knowledge, while it remained to the credit of that account, that it was the money of the plaintiff. His lordship agreed with Farwell, J., in taking this view of *Marsh* v. *Keating*, and also agreed with him in thinking that the defendants, Messrs. Morris, had failed in establishing the second point. He thought, therefore, that the decision of the learned judge ought to be affirmed.

COZENS-HARDY, L.J., also agreed that Farwell, J.'s, judgment ought to be affirmed, and adopted Vaughan Williams, L.J.,'s view as to the construction of the power of attorney—that it did not confer a general power of borrowing. With respect to the £4,000 which was paid into the plaintiff's account at a London bank by the attorney, Leslie Jacobs, it seemed that it was all drawn out by Leslie and applied for his own purposes before the plaintiff, who was resident in Australia, knew, or could in ordinary course of business have known, anything about the transaction. And under the circumstances his lordship thought the plaintiff could not be held liable for the sum as money had and received for the use of Messrs. Morris. The truth was that Messrs. Morris must be taken to have had full notice of the terms of the power of attorney and that it did not authorize the borrowing of this £4,000. They advanced the money on the attorney's statement that the power did authorize it. Their omission to read the power was the proximate cause of the loss. As between them and the plaintiff, his lordship thought they were more to blame, and it would not be just to hold the plaintiff liable for an act done by his attorney beyond the scope of his authority in favour of Messrs. Morris, who knew the limits of the authority.

Appeal dismissed.

Solicitors, *Robinson & Stannard; Hollams, Sons, Coward, & Hawksley.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Feb 19.

STEIN v. POPE. (a.)

Bankruptcy—Assignment for benefit of creditors—Lease—Action against assignee for rent—Adjudication of bankruptcy after commencement of action, but before trial—Relation back—Disclaimer—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 43, 44.

The plaintiffs granted a lease to B. B. made an assignment of all her property, including the lease, to the defendant for the benefit of her creditors. A petition in bankruptcy was presented against B, alleging the assignment as the act of bankruptcy. The plaintiffs brought an action against the defendant for rent which accrued due after the assignment. After the commencement of the action, and before the trial, B. was adjudicated

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

bankrupt, and the trustee in bankruptcy disclaimed the lease.

Held, that the plaintiffs were entitled to recover the rent from the defendant.

Appeal from the judgment of Darling, J., on the trial of an action without a jury.

The action was brought by Miss Emily Stein and Miss Olivia Stein to recover £32 10s., a quarter's rent, alleged to be due in respect of two houses in Lower Clapton-road, Hackney. The original lessee was Mrs. Sarah Ann Bates, who held the houses under two separate leases.

On the 31st of May, 1900, Mrs. Bates executed a deed assigning her property, including the leases, to the defendant in trust for the benefit of her creditors.

On the 3rd of August the plaintiffs, as lessors, obtained judgment against the defendant for the quarter's rent on the 24th of June.

On the 27th of August a petition in bankruptcy was presented against Mrs. Bates. The act of bankruptcy alleged was the assignment of the 31st of May. A receiving order was made on the 27th of September.

This action was commenced on the 1st of October for the quarter's rent due on the 29th of September.

On the 18th of October Mrs. Bates was adjudicated bankrupt.

On the 26th of October a trustee in bankruptcy was appointed, and he disclaimed the leases of the two houses.

At the trial it was contended on behalf of the defendant that, inasmuch as by section 43 of the Bankruptcy Act, 1883, the bankruptcy related back to the act of bankruptcy, and by section 44 the property of the bankrupt divisible amongst her creditors comprised all property which belonged to the bankrupt at the commencement of the bankruptcy, the deed of assignment of the 31st of May was void and the leases in question became vested in the trustee in bankruptcy as from that date, and that the defendant was therefore not liable for the rent.

Section 43 provides that "the bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

Darling, J., gave judgment for the plaintiffs for the amount claimed, holding that the defendant was liable for the quarter's rent.

The defendant appealed.

F. Cooper Willis and *Roskill*, for the defendant.

Herbert Reed, K.C., and *C. C. Scott*, for the plaintiffs.

The following cases were cited in argument: *Ex parte Rawlings, In re Forster*, 36 W. R. 144; *Carr* v. *Acraman*, 11 Exch. 566, 40 W. R. C. L. Dig. 277; *Titterton* v. *Cooper*, 30 W. R. 866, 9 Q. B. D. 473; *Doe d. Lloyd* v. *Powell*, 5 B. & C. 308; *Ex parte Vaughan, In re Riddeough*, 33 W. R. 151, 14 Q. B. D. 25.

Feb. 19.—ROMER, L.J., read the following judgment: The plaintiffs are in the position of lessors of certain houses. The lessee, Mrs. Bates, assigned her leases of these houses (with other property) to the defendant by a deed which was an act of bankruptcy on her part. After the assignment, and before the bankruptcy of the lessee, some rent accrued due under the lease in respect of the houses, and the plaintiff issued the writ in this action for that rent against the defendant. But subsequently, and before the action came on for trial, the lessee was made bankrupt, and the bankruptcy had relation back to the above-mentioned act of bankruptcy. The trustee in bankruptcy then disclaimed the leases. Under these circumstances the question arises whether the defendant is liable for the rent. I do not think it necessary in dealing with this case to consider the question as to the effect of the disclaimer, for it appears to me that the defendant is liable for the rent, whatever the effect of the disclaimer may be. It is not, and could not be, disputed that, although the assignment to the defendant was an act of bankruptcy, that fact did not at the time the rent accrued due prevent the defendant from being liable for the rent at the time it accrued due. The assignment at that time stood unimpeached, and could not be impeached, as between the assignor and assignee, and the plaintiffs, as lessors, were entitled to enforce payment of the rent as against the defendant. If at the time the action was brought it had come on at once for trial, the defendant would have had no defence, and judgment must have been given for the plaintiffs. This is not disputed on behalf of the defendant, but it is said for him that owing to the circumstance that the action came on for trial subsequently to the bankruptcy, that lucky fact freed him from his existing liability, because the assignment had by the bankruptcy become void as against the trustee in bankruptcy. In my judgment, the bankruptcy had not the effect of releasing the existing liability for the rent as between the defendant and the plaintiffs, and the delay in the action coming on for trial had not the effect contended for on behalf of the defendant. The bankruptcy, following on the act of bankruptcy, had, no doubt, the effect of making the assignment invalid as against the trustee and the creditors and for all purposes connected with the administration of the lessee's estate in bankruptcy. And in any question as between the lessors and the trustee in bankruptcy the former could not have insisted on the validity of the assignment. See *Doe d. Lloyd* v. *Powell*, where in a somewhat similar case the lessors were seeking to establish as against the assignees in bankruptcy that the assignment had operated as a forfeiture of the lease. But in the present case it is not in any way necessary, in order to give the fullest effect to the rights of the trustee and creditors in the bankruptcy, to hold that by the bankruptcy the defendant has been released from his liability to the plaintiffs. The bankruptcy provisions, which make the assignment an act of bankruptcy and the assignment invalid in bankruptcy, are not provisions for the benefit of the defendant. As a general rule bankruptcy does not affect the rights and liabilities of persons not parties to the bankruptcy, except so far as may be necessary in the interests of the trustee and creditors and the administration of the bankrupt's estate in bankruptcy. Here it is in no wise necessary in such interests to hold that the bankruptcy has freed the defendant from his liability to the plaintiffs. It would indeed be a strange result if the defendant, who was party to the act of bankruptcy, could avail himself of that fact and of the subsequent bankruptcy in order to free himself from liability to the plaintiffs, who were no parties to the act of bankruptcy. In my opinion the court is not bound to arrive at any such result in this case. If, indeed, the effect of the bankruptcy had been to vest the lease in the trustee in such a way as (apart from the right to disclaim) to make him directly liable as assignee for the rent in question to the plaintiffs, there might be a difficulty in the plaintiffs' way. For it might then be said on behalf of the defendant that there could not at one and the same

time be two persons claiming through the lessee directly liable by privity of estate for the rent. But the bankruptcy had no such effect. Even if there had been no disclaimer, the trustee would not have become liable for any rent which accrued due before his appointment: see *Titterton* v. *Cooper*. It appears to me, therefore, that the defendant has not been released or discharged from his liability by the subsequent bankruptcy. At the time the rent accrued due the defendant was assignee of the lease and bound to pay the rent, and he has not escaped from his liability by his delay in payment. If he had paid the rent when it accrued due, as he ought to have done, without any action brought by the plaintiffs, he could not upon the bankruptcy have demanded repayment on the ground that no rent was due, and that he had paid owing to a mistake of fact—namely, the existence of an assignment to him of the lease. To hold the defendant not liable in this case would lead to strange results. By reason of the action of the defendant in taking the assignment of the lease, the plaintiffs would naturally be led to look to him for payment of the rent accruing during the assignment, and might thereby, and by the defendant's delay in payment, have delayed proceedings against the lessee which might have resulted in recovery of the rent from the lessee. And yet the defendant, if he escaped liability, must say that his being party to an act of bankruptcy and his delay in payment have enabled him to throw the loss thereby occasioned on the plaintiffs, who are perfectly innocent parties. And, further, this case could not be distinguished from the case where the bankrupt was not an original lessee, but was herself only an assignee, and in that case after the assignment the lessors could not have sued her, but could only have sued the assignee; or the lessee, who might not have been worth suing. In my judgment the appeal fails, and should be dismissed with costs.

COLLINS, M.R.—I agree in the result; but I desire to reserve my opinion as to what the rights would have been between the parties had bankruptcy supervened before any action had been taken by the lessors against the assignee. In other words, whether, apart from the special circumstances in this case, including a judgment recovered upon the footing of an assignment, the lessor could after bankruptcy have asserted that privity of estate had been established between him and the assignee by an assignment which was in itself an act of bankruptcy, and as such void *ab initio*.

MATHEW, L.J.—I agree with the judgment which has been read by Romer, L.J.

Appeal dismissed.

Solicitors for the plaintiffs, *Debenham & Walker*.

Solicitors for the defendant, *West, King, Adams, & Co.*

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Dec. 19.

MCCHEANE *v.* GYLES. (*a.*)

Practice—Third-party notice—Service—Third party out of jurisdiction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24—*R. S. C., ord.* 11, *r.* 1 (g): *ord.* 16, *r.* 48.

To enable a third-party notice to be served out of the jurisdiction it must be such that if it were a writ it would be capable of being served out of the jurisdiction, and in determining whether the notice could be so served if it were a writ, the court will not have regard to the claim made by the plaintiff in the action, but will only consider the claim actually made by the defendant in the third-party notice.

In an action against the surviving trustee of a settlement leave was refused to the defendant to serve a third-party notice out of the jurisdiction on the executrix and residuary legatee of a former trustee, on the ground that, treating the third-party notice as an original writ, there was no action brought by the defendant against some other person properly served within the jurisdiction, so as to bring the case within ord. 11, *r.* 1 (g).

This was an appeal from the refusal of Buckley, J. to discharge an order for service of a third-party notice on Mrs. Cronyn, a resident in Ireland.

In 1875, the defendant Walter Gyles and John Cronyn, the trustees of the marriage settlement of Mrs. McCheane, the mother of the plaintiff in the present action, invested £1,000 of trust money subject to the trusts of the settlement on what was alleged to be a contributory mortgage of land in Ireland.

John Cronyn died in 1877. Under his will, Mrs. Cronyn, the present appellant, was sole executrix and entitled to receive the income of his estate for life.

The property in Ireland, the subject of the mortgage in question, was sold for a sum insufficient to meet the £1,000 secured thereon.

The plaintiff, who was absolutely entitled to the £1,000 under an appointment by Mrs. McCheane, brought the present action against the defendant Gyles, the sole surviving trustee of the settlement, for a declaration that the advance of the £1,000 on a contributory mortgage was a breach of trust and for repayment of the £1,000.

The defendant took out a summons in the action to add Mrs. Cronyn as a defendant, or in the alternative for leave to serve a third-party notice upon her.

Byrne, J., gave leave to issue a third-party notice and serve the same on Mrs. Cronyn in Ireland, without prejudice to any right the defendant might have to add Mrs. Cronyn as a defendant.

Mrs. Cronyn moved before Buckley, J., to discharge the order for service of the third-party notice upon her.

Buckley, J., dismissed the motion.

Mrs. Cronyn appealed.

Butcher, K.C., and *Darley*, for the appellant.—The provisions for service of a writ out of the jurisdiction apply to service of a third-party notice out of the jurisdiction. Consequently, if a writ cannot be served, neither can a third-party notice. None of the clauses in ord. 11, r. 1, apply to the notice in the present case. The only one that can be said to apply is (*g*), and it has been held that that does not apply to a third-party notice. In any case the matter is in the discretion of the court, and we submit that the court ought not to exercise its discretion in favour of the defendant.

They referred to *In re Salmon, Priest* v. *Uppleby*, 38 W. R. 150, 42 Ch. D. 351; *Speller* v. *Bristol Steam Navigation Co.*, 32 W. R. 670, 13 Q. B. D. 96; *Dubout & Co.* v. *Macpherson*, 38 W. R. 62, 23 Q. B. D 340; *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, 24 W. R. Dig. 205; *Dickson* v. *Law*, 43 W. R. 596, [1895] 2 Ch. 62; *Harvey* v. *Dougherty*, 56 L. T. Rep. 322, 35 W. R. Dig. 161.

Astbury, K.C., and *Austen Cartmell, contra.*—Under ord. 16, r. 11, any person whose presence before the court may be necessary in order to enable the court to settle the question may be added as a party. The object of the rules is to enable the court to determine

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the question at issue once and for all. Under ord. 16, r. 48, where a defendant claims contribution against any person he may issue a third-party notice. Then the service of the third-party notice is governed by the rules as to the service of writs. Under ord. 11, r. 1 (*g*), the appellant could certainly be served out of the jurisdiction with a writ in the present action by the plaintiff, and we submit that she can also be served with a third-party notice by the defendant.

Butcher, K.C., was not called upon to reply.

VAUGHAN WILLIAMS, L.J.—The question is whether or not this case is one in which an order for service of a third-party notice out of the jurisdiction ought to have been made. I have no doubt myself that having regard to the orders and the rules which have been framed under the Judicature Act that order should not have been made. I am sorry to say so, because, speaking for myself, I cannot help thinking that having regard to the terms of the Judicature Act there really was no reason why the orders and rules should not have been framed differently. The terms of the Act are such that the rules might have been framed to cover such a case as this; and I think that, looking at the spirit of the Judicature Act, whenever there was a cause or matter instituted in the High Court, if there were matters connected with and arising out of that cause or matter which could, and conveniently might, be determined in the original proceeding, then the Act meant that the courts should have the power and that it should be their duty to include those matters in the original action. I cannot help thinking myself that the whole third-party procedure is the creature of the Judicature Act, 1873, and in particular of section 24, which begins thus: "In every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following." Then it proceeds to deal with the right of a plaintiff or defendant, sub-section 1 dealing with rights to be given to a plaintiff, then sub-sections 2 and 3 with rights to be given to a defendant. Speaking for myself, I am inclined to think that the intention of the Judicature Act was to make all these matters which are provided for in the sub-sections of section 24 incidental parts of the original action; and under these circumstances I should have thought that the spirit of the Act might very well have been carried out by making the original action—that is, the subject-matter of it, the test as to whether notice of the writ should be served out of the jurisdiction under ord. 11, r. 1, or as to whether notice should issue against a third party as provided for by rule 48 of order 16. But, however much I may think that might have been within the spirit of the Judicature Act, I am quite clear that as the rules stand the service of a third-party notice out of the jurisdiction can only be properly sanctioned when the subject-matter of the claim of the defendant covered by the third-party notice is such that if the claim had been the subject of an independent action, commenced by writ in the ordinary way, an order for service out of the jurisdiction could properly have been made in accordance with the provisions of ord. 11, r. 1.

It is unnecessary for me to go through the lettered clauses of rule 1 of order 11. It is enough for me to say that it has not been seriously contended that the third-party notice covers any claim against the third party coming within any of these lettered clauses except clause (*g*); and all that clause (*g*) deals with really is service of a writ in a case in which "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Now in the present case it may very well be that Mrs. Cronyn is a necessary "or proper party" to an action brought by the plaintiff, but that is not the question. If you had here a third-party notice properly served upon a person within the jurisdiction, then in all probability you might have a third-party notice served on someone who is outside the jurisdiction, but in my judgment there is not the slightest pretence for saying that clause (*g*) has any application at all to the third-party notice in this case. It is a third-party notice in the nature of an action which the defendant proposes to bring against the third party.

I am of opinion that the appeal should be allowed and the order of the court below discharged.

ROMER, L.J.—I agree that this appeal must be allowed. To my mind the case is a simple one depending upon a few of the rules of court. In the first place we are not concerned here with any application by the plaintiff under ord. 16, r. 11, for adding Mrs. Cronyn as a defendant to the action and serving her with the writ out of the jurisdiction under ord. 11, r. 1 (*g*). We could not decide any such application on the present occasion for the simple reason that the plaintiff is not here, and we could not make any order adding a defendant without hearing the plaintiff. It seems that the summons did in the first instance ask in the alternative that Mrs. Cronyn should be added as a defendant, and so far as that goes I think that it should still be open to the defendant to see if he can make anything out of such an application; but that is a question which must go back to the judge for him to consider. We are then reduced to the simple question whether we can make an order for service of the third-party notice out of the jurisdiction. That depends on rule 48 of order 16, which provides that "where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action he may, by leave of the court or a judge, issue a notice (hereinafter called the third-party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper office and served on such person according to the rules relating to the service of writs of summons." That includes the rules applicable to writs out of the jurisdiction. Having once arrived at that point, what we have to consider in this case is "is this third-party notice were it to form a writ of summons capable of being served out of the jurisdiction upon a third party"? In considering that question one must have regard to the parties—that is, not to the claim of the plaintiff in the action, but to the claim of the defendant against the third party. You must treat the claim of the defendant against the third party as if it were a claim on a writ of summons and see if that claim comes within the rules as to the service of writs out of the jurisdiction that is within ord. 11, r. 1. If it does, then leave can be given for the service; if not, leave cannot be given In my opinion it is plain here that there is no case for giving leave because the case cannot be brought within any one of the provisions of ord. 11, r. 1. For the purpose of considering whether service of a third-party notice out of the jurisdiction should be allowed you have nothing to do with the subject-matter of claim in the action itself; you can only look at the nature of the claim made by the notice and the position of the person who is sought to be served. The rules are really plain, and the matter is, in my opinion, free from doubt.

COZENS-HARDY, L.J.—I agree. I will only add this, that in my opinion the Judicature Act, 1873, s. 24, sub-section 3, supports the view taken by

Vaughan Williams, L.J., that the third-party procedure was created by the Judicature Act. Subsection 3 of section 24 provides that the court may grant to a defendant "all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim, pursuant to any rule of court or any order of the court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose." The Act therefore treats the third-party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party.

Then, in the rules, which have the force of statutory authority, we find provisions on the subject of service out of the jurisdiction. Those are in order 11, and on reading those provisions we find that what we have to consider is, what is the proper procedure supposing a defendant has instituted a cause against a third party "for the like purpose," that is, for the same object as that of the third-party notice. If that is so, then it is clear that in the present case the order for service out of the jurisdiction ought to be discharged, for an action for contribution is not mentioned in ord. 11, r. 1, at all.

I say nothing with regard to adding Mrs. Cronyn as a defendant under ord. 16, r. 11, as that question is not now before us. No doubt the judge may in certain cases have a discretion to add a defendant even in the absence of the plaintiff, but such a discretion can only be exercised under very special circumstances. At present we have not to deal with any question of that kind.

Solicitors, *Wansey, Bowen, & Co.*, for *J. A. French*, Dublin; *Bircham & Co.*

High Court of Justice.

Chan. Div. } Buckley, J. } Feb. 25, 26.

In re DAVIS.
HANNEN *v.* HILLYER. (*a.*)

Will — Charitable legacy — Charity which has never existed — General charitable intention — Cy-près— *Class of residuary legatees.*

In the case of a legacy to a charity which has never existed, the court will lean towards finding in the will indications of a general charitable intention. Such indications are furnished by (1) *the interpolation of the legacy in question amongst other charitable legacies;* (2) *a power to the executors to determine questions as to what charities are intended to be benefited; and* (3) *a bequest of residue to the charitable institutions mentioned. The legacy, consequently, does not lapse, but is administered* cy-près. *The institution or authority which administers the legacy* cy-près *is included in the words "charitable institutions which are beneficiaries under this instrument," and, consequently, takes a share of a residuary bequest to such institutions.*

Adjourned summons.

By her will, dated the 30th of March, 1894, Sarah Davis, among other charitable legacies, bequeathed a sum of £500 to "The Home for the Homeless, 27, Red Lion-square, London." The will contained declarations that the receipt of the respective treasurers of the institution named should be a sufficient discharge to her executors for the legacies, and that in the event of any question arising as to the designation of any of the charitable institutions therein-before mentioned, or of any doubt arising as to which one of two or more institutions it was intended to benefit, the decision should rest absolutely with her executor. There was also a gift of residue to be divided rateably "among the various charitable institutions which are beneficiaries under this instrument."

The testatrix died on the 13th of March, 1899.

There was not, and never had been, any institution in London known as "The Home for the Homeless."

The present summons was taken out by the executor, asking how the legacy and share of residue were to be applied. Several societies claimed them, but their claims were disallowed. The question as to the application of the legacy was first argued.

H. M. Humphrey, for the executor.

H. Terrell, K.C., and *Cann*, for the next-of-kin.—The question is whether the testatrix has shown a general or a particular charitable intention; in the latter case the legacy lapses, and is not applied *cy-près: In re Ovey*, 33 W. R. 821, 29 Ch. D. 560. Although the legacy is interspersed with other charitable legacies, it cannot be said that, in respect of it, any general charitable intention has been shown. *Loscombe* v. *Wintringham*, 13 Beav. 87; *In re Clergy Society*, 4 W. R. 664, 2 K. & J. 615; and *In re Maguire*, 18 W. R. 623, L. R. 9 Eq. 632, are distinguishable; in the two former cases the testator clearly had no particular institution in his mind; the last was a case of misdescription of the particular charity intended. *Hoare* v. *Hoare*, 56 L. T. Rep. 147, 35 W. R. Dig. 179, where the gift was to a charity which had never existed, is in our favour.

They also referred to *Clark* v. *Taylor*, 1 W. R. 476, 1 Drew. 642, and *In re Rymer*, 43 W. R. 87, [1895] 1 Ch. 19.

Stone, for the residuary legatees, argued that the legacy had lapsed and had fallen into residue.

He referred to *In re White's Trusts*, 34 W. R. 771, 33 Ch. D. 449.

R. J. Parker, for the Attorney-General.—It is only in cases where charities have existed at the date of the will and have ceased to exist before the date of the death that the courts have held that there is no general charitable intention. It is impossible to say that there is an intention to benefit a particular charity where that charity has never existed. *Hoare* v. *Hoare* is the only case against me, and it depended on its own facts. I rely on *In re Clergy Society* and *In re Maguire*, and ask that a scheme may be directed for the administration of the legacy *cy-près*.

H. Terrell, K.C., in reply.—The direction in the will as to ascertaining which one of two or more charities is intended to be benefited, and the particularity with which she described the object of the legacy, negative the construction that the testatrix meant to benefit any but particular charities; that being the case, there is no distinction between the cases of a charity which has ceased to exist and of one which has never existed at all.

BUCKLEY, J., after stating the facts, said: The question to be determined is whether, upon the whole of this will, there is a lapse by reason of that state of facts, or whether there is an indication of a general charitable intention, so that effect can be given to the bequest although the legatee is non-existent. There is one class of cases which deals with the state of facts

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

where a legacy is given to a charitable institution which has existed, but which has ceased to exist before the death of the testator. In those cases there was held to be a lapse. The authorities for that are the decisions of Kindersley, V.C., in *Clark* v. *Taylor*, of Stuart, V.C., in *Russell* v. *Kellett*, 3 Sm. & Giff. 264, 4 W. R. Ch. Dig. 131, and of Page Wood, V.C., in *Fisk* v. *Attorney-General*, 15 W. R. 1200, L. R. 4 Eq. 521. In the last case the Vice-Chancellor said: "There is the other point which was argued by Mr. Wickens, as to the gift to the charity which no longer exists. I am far from saying that that argument may not, some day or other, require further consideration"; that is to say, the Vice-Chancellor doubted whether, in such a state of facts, you might not be able to find a general charitable intention. Since that decision there have been the cases of *In re Ovey* and, in the Court of Appeal, of *In re Rymer*, and it must now be taken that the indication of Page Wood, V.C., has gone, and that the rule in *Clark* v. *Taylor* is the right rule. Lord Herschell, in *In re Rymer*, [1895] 1 Ch., at p. 34, says, as regards *Clark* v. *Taylor*, "decided forty years ago, but which has been followed often since, that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to be sound." So that if there be a gift to a charitable institution which existed but has ceased to exist, there is a lapse. That is not this case, which is that of a gift to a charitable institution which never existed at all. There are four decisions on that class of case. The principle which underlies them is that where you find a gift to a charitable institution which never existed, the court, which always leans in favour of a charity, is more ready to infer a general charitable intention. Of course it is possible to contemplate that the testator intended to benefit a particular charity which he thought existed, but which did not exist. But the courts have not regarded that as most probable. They have said that he described a purpose and not a person. Now of those four cases I take the first and the last to have less bearing on the present case than the others.

The first case is *Loscombe* v. *Wintringham*. The gift there was to the trustees of "a society instituted for the increase and encouragement of good servants." The first comment is that no society is named by name; a particular sort of society was pointed to, and that was all. It was easy to arrive at the conclusion that the object of the testator was to give to a purpose and not to a person. It was held that there was a good charitable gift. The last case is *Hoare* v. *Hoare*. The facts there were that a settlor granted a certain rent-charge to provide for the payment of the salary of a priest in his private chapel, to apply a certain sum for lighting, and to apply annual sums for teaching, the payment of a schoolmaster and schoolmistress, keeping schools and almshouses in order, and poor labourers' dwelling-houses. The chapel was private and had never been consecrated or dedicated. The court held that this was not a disposition for a general charitable purpose. His purpose was only to devote a sum of money for his own private chapel and estate. The purposes had failed having regard to the definition of them. That case turned on its own facts and does not assist in principle. From the other two cases a principle is to be deduced. In *In re Clergy Society* legacies were given to the Church Building Society, the Clergy Society, the Society for Promoting Christian Knowledge, the Church Missionary Society, and the Clergy Orphan Society—they were all to be charities established in London. There was no Clergy Society established in London. There was one in Gloucester. Several societies came forward. The court came to the conclusion that a good general charitable purpose was disclosed. The principle on which the court proceeded (p. 622) was that, having regard to the position of the gift in question as regards other gifts, there was sufficient to show a general charitable intention. The Vice-Chancellor said: "It was suggested that the bequest must be considered void for uncertainty, because no object can be found to answer the description. In the case before Knight Bruce, L.J., there was a gift to a charity in Middlesex, and there being none which answered the description, it was held that the court had authority to direct a scheme; and, in this case, this legacy being preceded by a legacy to the Church Building Society, and followed by legacies to the Church Missionary Society, I think there was sufficient on the face of the will to show that the testatrix meant to confer a charitable benefit on the clergy of the Church of England." That was the *ratio decidendi* in that case. The other case was *In re Maguire*, decided by James, V.C. In my opinion it was a very strong case. The gift was to the Church Pastoral Aid Society in Ireland. There was no such institution. The preceding gift was to the Church Pastoral Aid Society in England. There was such an institution. I should have thought that there was strong ground for saying that the intention was to benefit a person not a purpose. The Vice-Chancellor thought not. There was a preceding gift to the Additional Curates Aid Society in Ireland. These are all the material facts. The Vice-Chancellor's judgment is this: "The intention of the testatrix to devote this sum to charity, are also the particular object of the charity, and sufficiently indicated by the name of the society itself, and by the place in which the legacy is found among other legacies to charity. There can be no doubt of the intention of the testatrix to provide for the objects embraced by the Spiritual Aid Society," that is to say, the Additional Curates Aid Society—it had changed its name, "and it follows from *Loscombe* v. *Wintringham* and *In re Clergy Society* that this is a perfectly good charitable bequest," and further down, referring to *Fisk* v. *Attorney-General*, he says, "I certainly do not intend myself to go further than Wood, V.C., did, but in this case there is a clear intention by the testatrix to effect a particular object of charity—pastoral aid in Ireland—which is carried out by the society now claiming it. I apprehend the Attorney-General will not object, and there will be an order for payment of the legacy to the Spiritual Aid Society for Ireland to be applied for the purposes of church pastoral aid in Ireland." That Spiritual Aid Society was one to which there had been a gift made. The principle of these two cases is that the court will lean towards finding in a case where a charity never existed at all evidence of a general charitable intention, and will take small indications on the face of the will in order to say that a purpose is meant and not a person. The present gift is interpolated between other charitable gifts. [His lordship then summarized the charitable legacies, and continued:] So that you find this gift to a non-existent society interpolated between gifts to the blind, orphans, deaf and dumb. I find one ground relied on in both *In re Clergy Society* and *In re Maguire*. Then follows the provision of the will that, "in case of any question arising as to the designation of any of the charitable institutions hereinbefore mentioned, or of any doubt existing as to which one of two or more of such institutions it is intended to benefit, the decision shall rest absolutely with my executors" There I find an indication that the testatrix intended that her charitable intention should not fail because she had mistaken the person to whom she directed the legacy to be paid. Then as to the residue she

says: "It shall be divided rateably among the various charitable institutions which are beneficiaries under this instrument." I think there is more room here than in the two cases I have mentioned for the court to infer a general charitable intention. I wish to add that *Loscombe* v. *Wintringham*, *In re Clergy Society*, and *In re Maguire* were considered in *In re Rymer*. Lord Herschell says that those cases form a class which establish a principle which guided the court in *Moggridge* v. *Thackwell*, 7 Ves. 36, and *Mills* v. *Farmer*, 1 Mer. 55, and from the latter case he read the language of Lord Eldon: "But to give effect to a bequest in favour of a charity the court will . . . supply the place of an executor and carry into effect that which in the case of individuals must have failed altogether. This distinction has proceeded partly, perhaps, on principles of the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle, which it is now too late to call in question, is that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode which alone was left deficient." That is the principle on which *In re Clergy Society* and *In re Maguire* were decided. I therefore hold that this legacy is effectual.

On the question of the distribution of the share of residue left to "The Home for the Homeless."

Stone, for the residuary legatees.—The residue should be divided between the other charitable institutions named in the will; the legacy to "The Home for the Homeless" will be applied either by the Crown under the sign-manual or by the court *cy-près*. In either case the individuals or authorities who administer the legacy will not be "beneficiaries under this instrument," and they will not necessarily be "charitable institutions."

He referred to *Moggridge* v. *Thackwell*.

R. J. Parker, for the Attorney-General.

BUCKLEY, J.—A further question is raised as to whether the residue is to be divided rateably among the various charitable institutions which are beneficiaries under the will. It is argued that the authority which may have to effectuate the general charitable purpose as regards this legacy may not be within the words "charitable institutions." The question is whether, having regard to *Moggridge* v. *Thackwell*, the purpose here described is a general indefinite purpose, in which case the king by sign-manual might deal with the fund, or whether there is an object pointed out, in which case the court might deal with it. The purpose seems to me not to be indefinite, but in either case I think it would be a narrow construction of the residuary gift to hold that the authority which is to give effect to the gift is not within the words "charitable institutions which are beneficiaries under this instrument." They are large enough to cover the authority which administers the legacy. I think the residue goes rateably to the institutions named, including the institution or authority which has to administer the legacy.

Solicitors, *William Jessop; Tippets; Smith, Fawdon, & Low; Cheston & Sons; Treasury Solicitor.*

Chan. Div.
Swinfen Eady, J. } Dec. 21.

LEIGH v. LEIGH. (*a*.)

Advowson—Sale of glebe—Private Act (6 & 7 *Vict. c. xvi.*)—*Patron—Infant—Consent to sale—Trustees of settlement—Guardian.*

By a private Act glebe land was vested in trustees, with power to sell with the consent of the patron, "who shall be seised of the advowson thereof in possession, whether for an estate of inheritance or any less estate, and by the guardians of any such patron or patrons, being an infant or infants."

The patron was an infant whose estates had been settled by an indenture which provided (inter alia) *that, during the minority of the patron, the trustees should have power to present to any vacant benefice.*

Held, that the trustees were not entitled to the advowson "for any estate of inheritance or any less estate" within the meaning of the Act; and that the guardian of the infant was the proper person to give the consent to the sale.

This was a summons taken out to determine who had the right to consent to the sale of glebe land of the rectory of Walton-on-the-Hill.

The patron was an infant.

By an indenture of settlement dated the 10th of July, 1901, there was conveyed to trustees the advowson and perpetual right of patronage and presentation of and to the rectory or parish church of Walton-on-the-Hill to hold the same unto the said trustees and their heirs to the use of the plaintiff John Cecil Gerard Leigh (now an infant) in tail male with remainders over." It was also provided "that during the minority of any person who under the limitations hereinbefore contained is or would if of full age be entitled for the time being to the possession or receipt of the rents and profits of the freehold hereditaments hereby settled as tenant in tail male or in tail by purchase, the trustees or trustee may present a fit person to any vacant ecclesiastical benefice either absolutely or subject to such lawful terms as to resignation as the trustees or trustee deem proper."

In 1843 a private Act (6 & 7 Vict. c xvi.) was passed by which the glebe land of Walton-on-the-Hill was vested in trustees with power to sell with the consent of the patron or patrons.

The question now to be determined was whether the trustees of the settlement or the infant's mother, who was his testamentary guardian, was to give the patron's consent to the sale.

Methold, for the trustees, argued that during the minority of the tenant in tail male the trustees were the proper persons to give the required consent.

Arkle, for other trustees.

R. J. Parker, for the infant.

SWINFEN EADY, J.—In my opinion the proper person to give the consent in this case is the guardian under the provisions of the private Act. Section 41 of this Act provides "that all acts, matters, and things by this Act authorized to be done, and every consent required to be signified by the patron of any of the aforesaid rectories or of the said present rectory and of the said vicarage of Walton-on-the-Hill, may be done and signified by the patrons or patron for the time being of the said respective benefices, whether one or more, who shall be seised of the advowson thereof in possession, whether for an estate of inheritance or any less estate, and by any such patron

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

or patrons being a married woman or married women, notwithstanding her or their coverture, and by the guardians or committees of any such patron or patrons being an infant or infants, lunatic or lunatics, idiot or idiots respectively; and that every act, matter, or thing which shall be done, and every consent which shall be so signified, shall be as valid and effectual as if the party or parties by whom or on whose account such act, matter, or thing shall be done and such consent signified was or were seised of the said advowson in fee simple in possession and free from any incapacity."

The infant is tenant in tail in possession of the advowson and the trustees are not entitled to the advowson for any estate of inheritance or for any less estate.

In my opinion the consent should be given by the guardian and not by the trustees.

Solicitors for trustees, *Rowcliffes, Rawle, & Co.*

Solicitors for trustees of the Act, *Field, Roscoe, & Co.*

Solicitors for infant, *Lowe & Co.*

K. B. Div. (Com. Court). (Kennedy, J.) } Feb. 26; March 4.

BOWATER & SONS *v.* MIRROR OF LIFE CO. (LIMITED). TOPICAL TIMES CO. (LIMITED) (*Third Parties*). (*a.*)

Contract—Sale of business—Benefit of pending contracts—Assignment—Indemnity.

An agreement for the purchase and sale of a newspaper business contained a term or condition that the vendors should sell and the purchasers should purchase "the full benefit of all pending contracts and engagements and of all other property to which the vendors are or may be entitled in connection with the said journal."

Held, that the purchasers took the burden of pending contracts, and did not merely acquire an option to take the benefit of such contracts.

Action tried in the Commercial Court without a jury.

By an agreement in writing dated the 21st of July, 1899, between the plaintiffs, who were paper merchants, and the defendants, who carried on the business of publishing a journal called the *Mirror of Life*, the plaintiffs agreed to sell and the defendants agreed to purchase a quantity of paper for the purposes of the said journal.

By an agreement in writing dated the 3rd of July, 1901, between the defendants and the Topical Times Co. (Limited) the defendants agreed to sell and the Topical Times Co. (Limited) agreed to purchase the business of publishing the said journal. One of the terms or conditions of this agreement was that the vendors should sell and the purchasers purchase "the full benefit of all pending contracts and engagements and of all other property to which the vendors are or may be entitled in connection with the said journal."

The plaintiffs sued the defendants for breach of contract in not accepting the aforesaid quantity of paper. The defendants brought in the Topical Times Co. (Limited) as third parties, claiming an indemnity against them under the agreement of the 3rd of July, 1901.

It was admitted that the plaintiffs were entitled to recover, and the only question was as to the defendants' right to an indemnity.

It was contended for the defendants that the agreement of the 3rd of July, 1901, operated as an assignment, and that the defendants were entitled to an indemnity.

On behalf of the third parties it was contended that they had acquired merely the option to take the benefit of this contract, and until such an option had been exercised—that is, until there was an election—no liability passed.

Bray, K.C., and *Woodfin*, for the defendants.

Hume Williams, K.C., and *R. C. Saunders*, for the third parties.

The following cases were cited: *Hardoon* v. *Belilios*, 49 W. R. 209, [1901] App. Cas. 118; *Bridgman* v. *Daw*, 40 W. R. 253.

KENNEDY, J.—On the construction of the agreement I am of opinion that the third parties take the advantages of contracts, not merely an option. An agreement like this is for the purchase and sale of the advantage of contracts entered into by the defendants, and it passes the burden as well. Without an express indemnity there is, in an assignment of business contracts of this kind, an implied indemnity.

Judgment for the defendant as against the third parties.

Solicitor for the defendants, *S. E. Lambert.*

Solicitors for the third parties, *Paddison, Trevor, & Co.*

K. B. Div. (Wright, J.) } Dec. 11.

GENERAL ACCIDENT ASSURANCE CORPORATION *v.* NOEL. (*a.*)

Principal and agent—Contract—Agreement by agent not to interfere with business after ceasing to be employed — Breaches — Liquidated damages — Injunction — Election.

The plaintiffs, an assurance company, appointed the defendant their agent under an agreement, in which it was provided that in the event of the defendant ceasing to act as such agent he should in no way give information about the company's connections or interfere either directly or indirectly with the company's business, or represent any other company doing a similar business within a radius of fifty miles from the headquarters of his agency within one year from the date of his ceasing to act for the plaintiff company, and that in case of the breach of the agreement in that behalf he should forfeit and pay to the plaintiffs a sum of £100 by way of ascertained and liquidated damages.

The defendant having committed breaches of the agreement, the plaintiffs brought an action against him and claimed the £100 liquidated damages and an injunction to restrain him from interfering with their business.

Held, that the plaintiffs were not entitled to an injunction as well as to the liquidated damages, but must elect between the two remedies.

Action tried before Wright, J., without a jury.

The plaintiffs' claim was for an injunction to restrain the defendant from interfering either directly or indirectly with the business of the plaintiffs or from representing any other office in a similar business to plaintiffs' in breach of an agreement made between the plaintiffs and the defendant dated the 15th of January, 1900.

They further claimed £100 as liquidated damages for breach of agreement.

By the aforesaid agreement the plaintiffs appointed

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the defendant to act as their inspector of agents at London or otherwise as the plaintiffs should determine, and the defendant after the date of the agreement acted in that capacity at Oxford.

The agreement contained the following clause: "It is hereby agreed . . . that this appointment is given with the distinct understanding that, should the within-named representative cease to act at any time under this or any other agreement for this corporation, he binds himself and agrees in no way to give information about the corporation's connections, or to interfere either directly or indirectly with the business of this corporation, or to represent any other corporation doing a similar business to this corporation either directly or indirectly within a radius of fifty miles from his headquarters within one year at least from the date of his ceasing to receive remuneration of any kind from this corporation, and in case of the breach of this agreement in that behalf the said representative shall forfeit and pay to the corporation a sum of £100 by way of ascertained and liquidated damages and not by way of penalty."

On the 7th of March, 1901, the plaintiffs determined the agreement, and the defendant then ceased to act for the plaintiffs or to receive remuneration from them.

It was alleged by the plaintiffs in their statement of claim, and admitted by the defendant in his statement of defence, that the defendant since the 7th of March, 1901, had given information about the plaintiff company's connections and had interfered both directly and indirectly with the plaintiffs' business with another company doing a business similar to the plaintiffs within a radius of fifty miles of Oxford.

The defendant pleaded that he was entitled to so act as the plaintiffs had, as he alleged, wrongfully dismissed him.

The defendant further pleaded that the plaintiffs were not entitled to recover liquidated damages and at the same time to have him restrained by injunction as claimed.

Danckwerts, K.C. (*H. Kisch* with him), for the plaintiffs.—The plaintiffs are entitled to the £100 liquidated damages as well as to an injunction, for the defendant admits breaches. No doubt formerly if a covenantee recovered damages at law he could not obtain an injunction in equity, but was put to his election. In the Irish case of *French* v. *Macale*, 2 Dr. & War. 269, the lessee of certain ancient meadow land who had covenanted not to burn the demised premises under a penalty threatened to burn part of the premises, insisting upon his right so to do under the covenants upon payment of the sum specified as liquidated damages, and it was there held that he was not entitled to do so, and that the court would interpose by injunction to restrain him from so doing. In the same way it cannot be said here if the plaintiffs exact the liquidated damage that that will entitle the defendant to do that which he has covenanted not to do. In *Robb* v. *Green*, 44 W. R. 25, [1895] 2 Q. B. 315, it was held that the plaintiff was entitled to damages in respect of the defendant's breach of contract and also to an injunction. The proper interpretation of the agreement in the present case is that the defendant is not to do certain things in breach for it, and if he do so, then he is to forfeit the sum of £100 as liquidated damages; and that the plaintiffs are also entitled to an injunction to restrain him from doing these things in the future. If the plaintiffs are bound to elect they prefer to have an injunction.

S. A. T. Rowlatt, for the defendant.—The plaintiffs are not entitled to both an injunction and liquidated damages. This is clear upon the authorities: *Sainter* v. *Ferguson*, 7 C. B. 716, and *Carnes* v. *Nesbitt*, 7 H. & N. 778, 10 W. R. C. L. Dig. 20. In the present case the £100 liquidated damages is meant to cover all possible breaches of the whole agreement, and if such liquidated damages are paid there cannot be an injunction as well. In *Young* v. *Chalkley*, 15 W. R. 743, 16 L. T. Rep. 286, the plaintiff recovered liquidated damages and under the circumstances the court refused to grant an injunction. [He also referred to *Howard* v. *Woodward*, 13 W. R. 132, 34 L. J. Ch. 47.] If the court hold that the plaintiffs must be put to their election the defendant would prefer to submit to an injunction.

Danckwerts, K.C., replied.

WRIGHT, J.—It appears to be agreed on both sides that this is a case in which an injunction can be granted, and the question is whether, under the clause in the agreement, the plaintiffs are entitled to a double remedy—that is to say, an injunction as regards the future as well as £100 as liquidated damages for breaches in the past. The cases are not in an altogether satisfactory condition on this point, for in *Cole* v. *Sims*, 2 W. R. 151, 23 L. J. Ch. 258, the view that a plaintiff under such circumstances is not entitled to the double remedy appears to receive some qualification.

The conclusion, however, that I have come to is that the current of authority, from *Sainter* v. *Ferguson* down to *Howard* v. *Woodward* and *Young* v. *Chalkley*, is to the effect that when liquidated damages are intended to cover the whole ground the plaintiff must be put to an election between them and an injunction, and if he takes liquidated damages he cannot get an injunction. The cases I have mentioned go to show that a plaintiff is not entitled to both, but must exercise an option.

If the present plaintiffs had elected to take the £100 liquidated damages they could not have had an injunction, for the £100 damages is all they would be entitled to. They have, however, elected to take an injunction, and may have judgment for that, but not for the £100 as well.

Judgment accordingly.

Solicitors for the plaintiffs, *Beyfus & Beyfus.*

Solicitors for the defendant, *Trower, Still, Freeling, & Parkin.*

Prob. Div. & Adm. Div. Divorce. } Feb. 4.

PAINE v. PAINE. (*a.*)

*Divorce — Restitution of conjugal rights — Custody of children—Practice—*Interim *order.*

The Court has power, under section 6 of 47 & 48 Vict. c. 68, to make an interim *order as to custody of the children of the marriage, and to save expense will make such an order at the time of the pronouncing of a decree of restitution of conjugal rights.*

This was a suit for restitution of conjugal rights.

The petitioner, Emily Duncan Paine, *née* Mitchell, was married on the 17th of July, 1894 at the Westminster Registry Office to Claude Hammon Paine, and there was one child of the marriage. The parties lived together until the 19th of September, 1901, when the respondent deserted the petitioner.

Priestley, for the petitioner.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

JEUNE, P., granted a decree of restitution of conjugal rights, and on the application of counsel for an order for custody of the child of the marriage said that while such an order seemed entirely illogical because it assumed that the respondent would not obey the order of the court, nevertheless section 6 of 47 & 48 Vict. c. 68 gave power to make such an order at the pronouncing of the decree, and no doubt the granting of it at that time would, as urged by counsel, save expense. The court, therefore, would give the petitioner the custody of the child until the decree was obeyed.

Solicitors, *Norris & Norris.*

Prob. Div. & Adm. Div. Admiralty. } Feb. 11.

"THE PORT VICTORIA." (a.)

Ship—Admiralty—Action in rem—*Negligence—Expense incurred in avoiding probable consequence of such negligence.*

Where the defendants' vessel was negligently allowed to drag across and foul the chain of the plaintiffs' vessel, causing risk of collision, and the plaintiffs' vessel slipped and put to sea until daylight,

Held, that the plaintiffs were entitled to recover in an action in rem *for the loss of the chain and anchor, together with the coals and stores consumed.*

Action.

The plaintiffs were the owners of the steamship *Norman*, and claimed in an action *in rem* to recover the value of a chain and anchor, coals and stores, lost and consumed by reason of the steamship *Norman* having put to sea in order to avoid a collision with the steamship *Port Victoria*, which was owned by the defendants, in the circumstances hereinafter appearing.

On the 5th of October, 1900, about 3.20 p.m., the steamship *Norman*, a vessel of 7,537 tons register, was riding at anchor in the outer anchorage of Port Natal with about seventy-five fathoms of chain out. At the time in question there was a rough and rising sea, a heavy swell was running with the wind from the east increasing to a moderate gale. In these circumstances those in charge of the steamship *Norman* observing that a vessel, which proved to be the steamship *Port Victoria*, of 3,378 tons register, which had been lying about three-quarters of a mile ahead of them, was dragging across the bows of the steamship *Norman*, the engines of the steamship *Norman* were put slow astern and sixty extra fathoms of chain paid out, but about 5.30 the same was fouled by the steamship *Port Victoria*. Those in charge of the steamship *Norman* then signalled to the steamship *Port Victoria* to slip her chain and keep clear, but she continued to drag, and those in charge of the steamship *Norman* fearing that a collision was imminent slipped their chain and put to sea to cruise about in safety till daylight. The expenses thus incurred and the value of the anchor and cable lost were agreed at £308 1s. 6d., and was the sum claimed by the plaintiffs in the action. The defendants' case was that the steamship *Norman* anchored too close under the lee of the steamship *Port Victoria*, and that the steamship *Norman* did not slip her cable until after the steamship *Port Victoria* was all clear of her.

Scrutton, K.C., and *Mackinnon*, for the plaintiffs, contended (a) that by article 7 of the Regulations relating to the Port and Harbour of Port Natal, 1900, the steamship *Port Victoria*, being a vessel with a single anchor down, ought to have had not less than seventy fathoms of chain out, whereas in fact she had about forty-five fathoms only; (b) that it was by negligent navigation and management of those in charge of the steamship *Port Victoria* that she had dragged her anchor and that those in charge of her failed to see that she was dragging her anchor until she was within one-third of a mile of the steamship *Norman*, and that in order to avoid a collision it was a proper and seamanlike course for the master of *The Norman* to adopt to slip his cable and put to sea until daylight.

Aspinall, K.C., and *Lewis Noad*, for the defendants, contended (a) that an admiralty action *in rem* would not lie to recover the loss here claimed; (b) that the master of the steamship *Norman* became nervous and put to sea unnecessarily.

JEUNE, P., in giving judgment, said that the principle was clear that if a vessel by negligence dragged down towards another, and if it was a natural consequence that the other vessel was obliged to take some step which involved her in expenditure, that was damage for which the former vessel was liable. The court found as a fact that the steamship *Norman* had not been in fault in taking up the position she had, but with regard to the steamship *Port Victoria* the case of negligence spoke for itself, for she had dragged owing to having insufficient cable out, and that, too, in violation of the rule of the local authorities (whatever legal force the rule might have), that vessels riding in that anchorage should have not less than seventy fathoms down. Moreover, the court had come to the conclusion that a bad look-out was certainly kept on the steamship *Port Victoria*, for nobody was aware of her dragging until she was tolerably close to the steamship *Norman*. The court, therefore, having come to the conclusion that the steamship *Port Victoria* was negligent, the question remained whether the expenditure incurred by the steamship *Norman* was the consequence of such negligence. The court thought that it was. All that had been alleged against the master of the steamship *Norman* was that he was unduly apprehensive. The court, however, was unable to share that view, and held that, if anything, he was unduly patient. The court did not see what action he could have taken except that which he did—viz., slipping the cable and putting to sea. The court found, therefore, that the steamship *Port Victoria* was liable for the loss which had occurred and which was the natural consequence of her conduct.

Judgment for the plaintiffs for £308 1s. 6d.

Solicitors, *Parker, Garrett, Holman, & Howden William A. Crump & Son.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 20-23.

"THE BRISTOL CITY." (a.)

Ship—Admiralty — Collision — Compulsory pilotage—Mis statement in pilot's certificate—"Owners"—Merchant Shipping Act, 1894 (57 & 58 *Vict.* c. 60), *s.* 599.

Where a certificate enabling the grantee to act as pilot over the therein prescribed pilotage ground incorrectly stated in the recitals of the certificate the ownership of the vessel therein named.

The Court *held that such certificate was invalid.*

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

The Earl of Auckland, *Lush.*, 164, 387, 9 *W. R. Adm. Dig.* 20 *considered.*

Action.

The plaintiffs were the owners of the steamship *Peri*, and it appeared that on the 26th of March, 1901, a collision occured in the river Avon between their vessel and the defendants' vessel, the steamship *Bristol City*.

At the time of the collision the steamship *Peri* was proceeding up the river, and the steamship *Bristol City* was bound down in ballast for Cardiff to load coals for St. Vincent.

The plaintiffs commenced the present action and the defendants pleaded, *inter alia* that if the collision was caused or contributed to by any negligence in the navigation of the steamship *Bristol City*, which was denied, the vessel was at that time within a district in which pilotage was compulsory by law, and she was, by compulsion of law, in charge of a duly licensed pilot, whose orders the defendants were bound to obey and did obey, and the negligence (if any) was his alone.

On the 20th of November, Jeune, P., sitting with Trinity Masters, tried the action, which resulted in both vessels being found to blame, but so far as the defendants' vessel was concerned it was the fault of the pilot alone.

The pilot on the defendants' vessel held a pilotage certificate dated the 8th of December, 1891, and which was renewable annually, the material parts of which were as follows: "Whereas Alfred Sendall, master of the ship *Jersey City* registered at the port of Bristol, whereof Messrs. Charles Hill & Sons are the owners, has applied to the mayor, aldermen, and burgesses of the city of Bristol, being a pilotage authotity within the meaning of the Merchant Shipping Act, 1854, to be examined as to his capacity to pilot the said ship, or any one or more ships belonging to the same owners, within the district over which the said pilotage authority has jurisdiction, and whereas the said Alfred Sendall has thereupon been examined and having been found competent, the said pilotage authority do, by virtue and pursuance of the provisions of the said Act and of all other powers thereunto them enabling, grant the said Alfred Sendall this pilotage certificate to enable him to pilot the said ship or any other ship or ships belonging to the same owners of which he shall be acting as master or mate at the time, within the district over which the said pilotage authority has jurisdiction, without incurring any penalties for the non-employment of a qualified pilot." The steamship *Jersey City* and the steamship *Bristol City* both belonged to the Bristol City Line, managed by Charles Hill & Sons, but at the date of the original issue of the certificate, Charles Gaythorne Hill, a member of Charles Hill & Sons, was on the register of *The Jersey City* as holder of certain shares and as managing owner, and certain other shares were also held by other members of the firm.

The Bristol City was built in 1899, and the master of *The Jersey City* was transferred to her. At the time of the collision Charles Gaythorne Hill was on the register of *The Bristol City* as managing owner and holder of the whole sixty-four shares. but he was, in fact, merely trustee for beneficial owners.

Aspinall, K.C., and *Dawson Miller*, for the plaintiffs, contended that the plea of compulsory pilotage was bad, on the ground that at the time of the collision the certificate enabled the master to pilot the steamship *Bristol City* within the prescribed pilotage without incurring any penalties for the non-employment of a qualified pilot. His ship therefore was an exempt ship, and therefore her owners were liable.

Laing, K.C., and *Batten*, for the defendants.—The certificate was invalid by reason of mis-statement as to the ownership of the vessel. Further, at the time of the renewal of the certificate, Charles Hill & Sons did not own the steamship *Jersey City*, nor at the time of the collision did they own the steamship *Bristol City*, therefore her master would not be piloting a ship within the meaning of section 599 of 57 & 58 Vict. c. 60. She was not therefore an exempt ship, and her owners therefore were not liable, as the pilot who was in charge by compulsion of law had been found alone to blame.

They cited *The Earl of Auckland*, Lush. 164, 387, 9 W. R. Adm. Dig. 20.

JEUNE, P., in delivering judgment, said that if the certificate had been valid it would have exempted the steamship *Bristol City* to the extent that the pilot on board would not be a pilot taken by compulsion of law, and therefore her owners could not plead compulsory pilotage. But he did not consider that this certificate could be considered good for that purpose. It had been objected that the mis-statement on the certificate at the time of the original issue of the certificate rendered it invalid, and the case of *The Earl of Auckland*, Lush. 164, was cited. But he did not think that case was conclusive on the matter, because the mis-statement there was in the actual material body of the certificate, whereas here the mis-statement was in the recital.

It recited that "Alfred Sendall, master of the ship *Jersey City*, whereof Charles Hill & Sons are owners." But as a matter of fact Charles Hill & Sons were not the owners. The circumstances, therefore, were not exactly the same as here, but when the future effect of the certificate was considered, the court was inclined to think that a matter arose which might well render the certificate bad; for it was not a certificate in favour of Mr. Sendall whilst master of the steamship *Jersey City* only, but in his favour also so long as he commanded any ship belonging to the owners of the steamship *Jersey City*. It was not possible to read the certificate without understanding the words "same owners" to mean the owners mentioned above, namely, Charles Hill & Sons, and if they were not the owners of the steamship *Jersey City* it followed that if Mr. Sendall was transferred to another vessel not owned by them, it would not be according to the terms of the certificate, but if the vessel was owned by them, then the Act of Parliament would be violated, for she would not be owned by the same persons as owned the steamship *Jersey City*. The certificate, therefore, could not be sustained. There was, however, a further ground which to the court appeared conclusive, and that was that the steamship *Bristol City* was not owned at any material time by the same owners as the steamship *Jersey City*. The question then arose, what was the material time as to the ownership of the steamship *Jersey City*? It was either the time of the original issue of the certificate, or the time of the last renewal, or else the time of the collision. One of these three times must be taken, and, perhaps, on the whole, the court ought to look at the ownership of the steamship *Jersey City* at the time of the renewal, but if not then at the time of the original granting of the certificate; but put either way the certificate could not be considered good, because the owners of the steamship *Bristol City* were not either on the 8th of December, 1891, or at the time of the last renewal, owners of the steamship *Jersey City*. There were great difficulties connected with these certificates, because, vessels being owned in sixty-fourths, and as

some of the owners were continually changing, it was very difficult to suppose it could have been intended that a single change in the ownership of one sixty-fourth should render the renewal of the certificate practically useless. With that, however, the court had nothing to do. When the Act was passed there could be little doubt that it was contemplated that ships would be owned by companies or partnerships of a comparatively small number of persons, and possibly it might have been supposed that a fleet of ships would go on being owned by the same persons, but the law left the court no option, for as the Act spoke of "owners" that word must be taken in its ordinary sense, so that there could not be "the same owners" unless all the sixty-fourths belonged to the same person, and the change of the ownership of one sixty-fourth was a change of ownership of the ship. The court found that the certificate was bad, and, therefore, that the steamship *Bristol City* was at the time of the collision, by compulsion of law, in charge of a qualified pilot. The court had already found that so far as that vessel was concerned the pilot was alone to blame; but the defence of compulsory pilotage being only an alternative plea the plaintiffs' suit would, following the usual course, be dismissed without costs.

Solicitors, *Downing, Bolam, & Co.; Ince, Colt, & Ince*, for *Osborne, Ward, Vassall, & Co.*, Bristol.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 21, 22.

KELLY'S DIRECTORIES (LIMITED) *v.* GAVIN AND LLOYD'S. (*a.*)

Copyright—Infringement—Portions of one book printed by different printers—"Cause to be printed"—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 15.

A person who has contracted to print a work for another, but subsequently allows such other person to get a portion printed elsewhere, does not "cause" such portion to be printed within the meaning of section 15 *of the Copyright Act*, 1842, *even though his name appears on the title-page of the work as the printer.*

Decision of Byrne, J. (49 *W. R.* 313, [1901] 1 *Ch.* 374), *affirmed.*

This was an appeal from a decision of Byrne, J. (reported 49 W. R. 313, [1901] 1 Ch. 374).

The facts are very fully reported in the report of the case in the court below, but for the purposes of this report they may be stated shortly as follows:

The plaintiffs are the proprietors and publishers of the Post Office London Directory and other trade and country directories, including a directory known as "Kelly's Directory of the Merchants, Manufacturers, and Shippers of the United Kingdom and Guide to the Export and Import Shipping and Manufacturing Industries of the World," which contains a list of the names of the leading merchants, manufacturers, and shippers in the various towns in Great Britain and Ireland and in the Colonies and abroad. The names for insertion in this directory were obtained by independent inquiries made through canvassers and agents specially employed by the plaintiffs for that purpose. A new edition of this directory is brought out every year, the edition for 1899 having been published in March.

The defendant Gavin had published a book entitled Lloyd's Diary for Merchants, Shippers, and Foreign Buyers for the Year 1900. This book bore on the title-page the words "Printed at Lloyd's, Royal Exchange, London," and contained a list of colonial and foreign importers, and also of export commission merchants. The plaintiffs alleged that this list had been compiled by copying and pirating the names and other particulars therein contained from the plaintiffs' Directory of Merchants, Manufacturers, and Shippers; and they brought the present action against Gavin and Lloyd's, claiming an injunction to restrain any further printing, publishing, or sale of the defendants' book; an account of all profits made by the defendants and delivery up of all unsold copies of the book.

It appeared from the evidence that in spite of the statement on the title-page and in spite of the fact that the defendant Gavin had entered into an arrangement with Lloyd's that they should print this diary for him for a consideration in money, the whole book was not, in fact, printed by Lloyd's, but that the portion of it which contained the alleged pirated lists of shippers had been printed by Messrs. Straker on Gavin's order, and Messrs. Straker had been paid for this work by Gavin.

It was admitted at the trial that Lloyd's were not aware of the fact that these lists of merchants were pirated, and that they had never sold any copies of the infringing diary and had no intention of doing so after it was known to be a piracy, and the only question as against them was whether, having regard to their arrangement with Gavin, they "caused" the diary "to be printed" within the meaning of section 15 of the Copyright Act, 1842, so as to be liable to the plaintiffs for the costs of the action.

At the trial of the action the defendant Gavin did not appear, and the evidence satisfied the court that as against him the plaintiffs had established their case.

As regards Lloyd's, Byrne, J., held on the evidence that they had not "caused" the diary to be printed, and refused to give the plaintiffs costs as against them. But because Lloyd's had permitted the statement "printed at Lloyd's" to appear on the title-page he declined to allow them any costs as against the plaintiffs.

The plaintiffs appealed.

Levett, K.C., and *E. Ford*, for the plaintiffs.—Lloyd's were really partners with Gavin in printing this book. Their case is analogous to that of a newspaper proprietor, who is responsible for a libel which appears in his newspaper, even though he is entirely ignorant of the whole matter.

They referred to *Rex* v. *Gutch, Fisher, & Alexander*, 1 Moo. & Mal. 433; *Russell* v. *Briant*, 8 C. B. 836; *Lyon* v. *Knowles*, 11 W. R. 266, 3 B & S. 556.

Scrutton, K.C., and *Mackinnon*, for the defendants, were not called upon.

VAUGHAN WILLIAMS, L.J.—The question we have to decide is whether upon the evidence in this case the learned judge in the court below was right in coming to the conclusion that Lloyd's neither "printed" nor "caused to be printed" the portions of this book which are pirated. I think the conclusion the learned judge arrived at was perfectly right. It seems to me impossible to say that the defendants Lloyd's either "printed" or "caused to be printed" this book. It is hardly contended that Strakers, the actual printers, could be described as agents of Lloyd's, and the moment we arrive at the conclusion that Strakers were not the agents of Lloyd's, we are forced to fall back on the words

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

"caused to be printed," because Lloyd's could only be said to have printed this book if Strakers were their agents. But it is admitted that the order to Strakers was given by Gavin, and that it was on his credit that Strakers did the work. Gavin is the person they have to sue if they wish to be paid. Of course, if it could be shown that Lloyd's were partners or joint adventurers with Gavin, the fact that Strakers were agents of Gavin would make them also agents of Lloyd's; but it seems to me plain that Strakers were the agents of Gavin, and no such connection has been proved between Lloyd's and Gavin in respect of this printing which was done by Strakers as would make Lloyd's and Gavin partners. The consequence is that the appellants have to rely on the words "caused to be printed"; but when it is asked in what sense Lloyd's "caused" this pirated matter to be printed, the appellant can only say that at one time Lloyd's were under a contract to print the pages in which the pirated matter occur themselves. By a lucky accident they were so busy that they were willing to forego printing these pages themselves, and Gavin was willing that they should forego the printing, one inducement being that he could get the work done more cheaply elsewhere. But that only comes to this, that Lloyd's permitted Gavin to get the work done himself, and if a man who has a right to print chooses to stand aside and lets someone else get the printing done, I do not think that man can be said to cause the work to be printed. In my judgment it is plain that there is no evidence that Lloyd's either printed or caused to be printed this book.

STIRLING, L.J.—I agree. I have nothing to add.

COZENS-HARDY, L.J.—I also agree. I will only add that the attempt to show that Lloyd's either permitted or caused to be printed this book was partly based on the statement on the title-page that the book was "Printed at Lloyd's, Royal Exchange, London." If that statement had been relied on as creating an estoppel against Lloyd's, I could have understood it, but that argument was abandoned as hopeless, and that being so, I agree with Vaughan Williams, L.J., in thinking that there is no evidence that Lloyd's either printed or caused to be printed the portions of this book which are complained of.

Appeal dismissed.

Solicitors, *Scott, Spalding, & Bell; Waltons, Johnson, Bubb, & Whatton.*

High Court of Justice.

Chan. Div. } Feb. 27; March 6.
Byrne, J. }

In re THE LONDON AND NORTHERN BANK (LIMITED).
HADDOCK'S CASE.
HOYLE'S CASE. (a.)

Company—Winding up—Private examination—Solicitor—Terms upon which a solicitor may appear for a witness—Privilege—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

In the liquidation of a company a witness at his private examination under section 115 *of the Companies Act,* 1862, *was represented by a solicitor who was also acting for the defendant in a pending action in which the company was the plaintiff.*

The clerk of such solicitor was held not to be entitled to be present at such examination unless he gave an undertaking to use the information he obtained there for the purpose of that examination only.

The solicitor had had in his possession documents belonging to the company which were wrongfully handed to him by a servant or servants of the company. His privilege as solicitor excused his answering from whom he received such documents.

The London and Northern Bank (Limited) was in voluntary liquidation, and an action by the bank against Sir G. Newnes (Limited) for libel was pending.

After the commencement of this action the liquidator learnt that various documents belonging to the bank had been wrongfully handed by a servant or servants of the bank to the solicitor for Sir G. Newnes (Limited): see *Archer's case, ante,* p. 167, 46 SOLICITORS' JOURNAL, 176.*

The liquidator in the voluntary winding up obtained an order for the private examination under section 115 of the Companies Act, 1862, of *inter alios* Mr. Haddock, for some time secretary of the bank, and Mr. Hoyle, solicitor to Sir G. Newnes (Limited). Mr. Hoyle also appeared for Mr. Haddock at the private examination.

HADDOCK'S CASE.

At Haddock's examination counsel on behalf of the liquidator applied that Mr. Hoyle, being himself a witness, should withdraw. Mr. Hoyle withdrew, and counsel then asked that his managing clerk, an admitted solicitor, should also withdraw; to this counsel for the witness objected, and the registrar ruled that Mr. Hoyle's clerk could only remain on giving an undertaking to treat the whole matter as private, to use the information obtained from the witness's answers for purposes of re-examination only, and to communicate such information to no other person or persons whatsoever except his counsel. Haddock's counsel objected to any such limitation being imposed, and advised Haddock to refuse to answer any question in the absence of his solicitor. The matter was adjourned to the judge for his consideration.

HOYLE'S CASE.

In the course of Hoyle's examination he was asked, "From whom did you receive these documents?" He refused to answer, claiming his privilege as a solicitor, and on that ground the registrar ruled that he need not answer. The liquidator moved to discharge this ruling.

Tindal Atkinson, K.C., and *Stewart Smith,* for the liquidator.

Muir Mackenzie and *Montague Lush,* for Haddock and Hoyle.

Cur. adv. vult.

March 6.—BYRNE, J.—An examination under section 115 must be considered a private proceeding wherein information is sought for the use of the court in the winding up. Under the Winding-up Rules of November, 1895, the notes of the depositions of a person examined under section 115 or any order of the court are not placed upon the bill of proceedings, or open to the inspection of any creditor contributory or other person except the official receiver or liquidator, without the direction of the court. It is not disputed that the witness has a right to be represented by solicitor and counsel; it is argued on behalf of Mr. Haddock in effect that he has a right to be

(a.) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

* These documents had prior to his examination been returned by Sir G. Newnes' solicitor to the bank's solicitors.

represented by a particular solicitor who is to be able to use the information obtained at this examination for the purposes of entirely different legal proceedings. This is putting the rights of the solicitor too high. There is an old case in bankruptcy—*In re Towsey*, 9 L. T. Rep. 613, 12 W. R. Ch. Dig. 23—which seems in point. In that case Mr. Commissioner Goulburn said in his judgment: "If the court appoint a private sitting, and it sees good reason to apprehend that the object of that meeting may be defeated by the presence of a gentleman who is both solicitor for the bankrupt and for the witness, it may order such person to withdraw." The registrar was quite justified in ordering the managing clerk to withdraw unless he gave the required undertaking.

In *Hoyle's case* there was nothing to deprive that gentleman of his solicitor's privilege. The registrar's ruling was perfectly correct, and the motion to discharge it fails.

Solicitors, *Helder, Roberts, Walton, & Thomas*, for *Simpson & Simpson*, Leeds; *G. H. Hoyle*.

Chan. Div. Buckley, J. March 12.

McCHEANE *v.* GYLES. (*a.*)

Practice—Parties—Adding defendant—R. S. C., 1883, *ord.* 16, *r.* 11.

In an action where the defendant is sued in respect of a matter for which he is jointly and severally liable with another person, ord. 16, *r.* 11, *does not enable the court, upon the application of the defendant, to add that other person as a party to the action in order that the defendant may claim contribution from him.*

Summons.

This was a summons in the above action asking for an order that Caroline Eliza Cronyn might be added as a co-defendant to the action, and that the trial of the action might be stayed until twenty-eight days after her appearance.

The plaintiff was sole beneficiary under a settlement of which the defendant and John Cronyn were the trustees. He alleged that they had invested the trust fund upon an insufficient and improper security, and that it had been lost, and he brought this action against Gyles claiming payment by Gyles to him of the sum lost.

Cronyn had died, and his widow, C. E. Cronyn, was his administratrix. She resided in Ireland. Gyles had applied for leave to serve a third-party notice upon Mrs. Cronyn claiming contribution against her as administratrix of her deceased husband in respect of sums recovered against him by the plaintiff. This leave, at first granted by Byrne, J., was refused by the Court of Appeal (see *ante*, p. 376, [1902] 1 Ch. 287) upon the ground that leave to the defendant to serve an original writ could not be granted under the circumstances, and a third-party notice must be treated upon the same principle.

The defendant thereupon made this application for Mrs. Cronyn to be made a defendant.

The plaintiff opposed the application.

Austen-Cartmell, for the applicant.—Mrs. Cronyn, as legal personal representative of her deceased husband, is liable to contribute towards what may be recovered from the defendant if the action succeeds, and the defendant wishes to have her made a defendant in the action so as to be able to serve her with a third-party notice. The court has power to make the the order asked for under R. S. C. ord. 16, r. 11, as was done in the cases of *Wilson* v. *Church*, 26 W. R. 735, 9 Ch. D. 552; *Dix* v. *The Great Western Railway Co.*, 34 W. R. 712, and *Montgomery* v. *Foy, Morgan, & Co.*, 43 W. R. 691, [1895] 2 Q. B. 321. The older cases to the contrary are no longer law.

He also referred to *Dickson* v. *Law and Davidson*, 43 W. R. 596, [1895] 2 Ch. 62.

Douglas, for the plaintiff.—In *Norris* v. *Beazley*, 25 W. R. 320, 2 C. P. D. 80, a similar application, was refused, Coleridge, C.J., saying that the rule was not intended to apply where the person to be added as defendant is a person against whom the plaintiff had no claim, and does not desire to prosecute any, for the convenience of another defendant. The application was also refused in *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, 35 W. R. 173, 34 Ch. D. 261, and in *Moser* v. *Marsden*, 40 W. R. 520, [1892] 1 Ch. 487. If Mrs. Cronyn were made a defendant and the plaintiff had no evidence against her, and the action was dismissed as against her, the plaintiff would have to bear her costs. [BUCKLEY, J.—If I made the order it would only be upon the condition of the defendant giving the plaintiff a proper indemnity as to her costs.]

BUCKLEY, J.—If I could have seen my way I should have been glad to have made the order asked for. If the order could be made it would provide a means whereby the claim of the defendant Gyles upon the legal personal representative of the deceased trustee could be decided in this action. If she is not made a party, as the judgment in this action will not bind her, the same matter may have to be gone into again in another action.

The plaintiff as *cestui que trust* is suing the defendant in respect of a transaction for which the defendant and the deceased trustee were jointly and severally liable. The plaintiff says that Gyles is liable, and that he sues him, and that he is not bound to sue both the trustees, even if he alleges that the other one is guilty of the breach of trust. Now can I as against the plaintiff make an order that Mrs. Cronyn should be joined as defendant? I think I cannot do so. There is, no doubt, a class of cases where such an order has been made. *Wilson* v. *Church* is one of these. There the plaintiff was suing in a representative capacity, and the court ordered a person to be added as defendant whom the plaintiff did not represent. *Dix* v. *Great Western Railway Co.* was decided upon similar grounds. In both of these cases the court could not adjudicate effectually and completely without the presence as parties of the persons sought to be made defendants, and the cases fall under ord. 16, r. 11.

Montgomery v. *Foy, Morgan, & Co.* was a peculiar case. In his judgment Kay, L.J., said, "I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as a defendant that if joined he would have a counter-claim against the plaintiff. This is a peculiar case." It is certainly not an authority for the proposition that if a plaintiff elects to sue one of two persons jointly and severally liable, the one sued may bring in the other as a defendant, so as to claim contribution from him.

Directly you look at the language of the rule you see that if the person sought to be added as defendant is not necessary for the decision of the action he cannot be added under that rule. The question in this case is, was Gyles guilty of a breach of trust in advancing the trust money upon the mortgage in question? Upon that question I can adjudicate

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

effectually and completely without the presence of Mrs. Cronyn, and therefore I have no power to accede to this application. There is another ground for refusing the order asked for. The writ was issued the 25th of March, 1901, the statement of claim was delivered the 3rd of May, 1901, and the defence in August, 1901, and the plaintiff may set the action down for trial next week. Under these circumstances I do not think I ought to delay the action because it would be convenient for the defendant to set up a claim against Mrs. Cronyn. I dismiss the summons.

Solicitors, *Bircham & Co.; Atkinson & Dresser.*

Chan. Div. Buckley, J. } Feb. 24; March 3.

In re PARTINGTON.
REIGH *v.* KANE. (*a.*)

Settled land—Leasehold houses—Repairs which are improvements — Capital or income — Discretion of the court—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22 (2)—*Settled Land Act,* 1890 (53 *&* 54 *Vict. c.* 69), *s.* 15.

As between the tenant for life equitably entitled to the rents and profits of leasehold houses subject to the performance of the covenants in the leases under which they are held, and the persons equitably entitled in remainder thereto, the cost of "improvements" which are also repairs within the covenants contained in the leases, must be borne by the tenant for life.

Clarke *v.* Thornton, 35 *W. R.* 603, 35 *Ch. D.* 307, *distinguished.*

In the exercise of its discretion under section 15 *of the Settled Land Act,* 1890, *the court will not direct such repairs to be paid out of capital if the settlor has provided that they should be paid out of income.*

Cardigan *v.* Curzon-Howe, 9 *Times L. R.* 244, *followed.*

Adjourned summons.

At the time of his death Charles John Partington was possessed of certain leasehold houses which were held by him for the unexpired residues of long terms.

By his will he bequeathed them to his trustees upon trust that they should "by and out of the rents and profits thereof pay the rents and annual sums reserved by the leases thereof respectively, and perform and observe the lessees' covenants, and conditions in the said leases respectively contained, and subject thereto," that they should hold the same premises upon trust for a tenant for life with divers remainders over.

The sanitary authorities served notice to repair the drains; in consequence of such notice works were executed, constituting, as it appeared, an installation of a new drainage system, and costing £415 10s. 1d.

It was admitted by the tenant for life that the repairs were covered by the covenants in the respective leases.

One of the questions to be determined on the present summons, which was taken out by the trustees of the will, was whether this sum of £415 10s. 1d. was to be charged to capital or income.

H. Greenwood, for the trustees.

H. S. Preston, for the tenant for life.—These repairs are "improvements" within section 25 (xviii.) of the Settled Land Act, 1882, because they are not such as an occupying tenant would execute: *In re Tucker's Settled Estates,* 43 W. R. 581, [1895] 2 Ch. 468, at p. 473. Capital money can, therefore, be applied in payment for them under section 21 (iii.), and the application of capital money is to be made according to the direction of the tenant for life: section 22 (2). The fact that the trustees have a power to effect repairs and improvements out of income will not interfere with the right of the tenant for life to have the improvements paid for out of capital: *Clarke* v. *Thornton,* 35 W. R. 603, 35 Ch. D. 307. If the will should be held to impose a trust on the trustees to pay for improvements out of capital, it is in conflict with the Settled Land Act, and the Settled Land Act prevails: *In re Thomas,* 48 W. R. 409, [1900] 1 Ch. 319; *In re Richardson,* [1900] 2 Ch. 778, 49 W. R. Dig. 159. The tenant for life is restrained from anticipation; the trustees have paid the money, but they have no right to be recouped out of her future income.

He also referred to *In re Lever,* 45 W. R. 172, [1897] 1 Ch. 32.

Underhill, for some of the defendants who claimed to be interested in remainder.—Inasmuch as no scheme was submitted prior to the execution of the works it is necessary to apply to the court under section 15 of the Settled Land Act, 1890. Under that section, where the settlor has created a special fund for repairs and improvements, the court may decline to exercise its discretion in favour of the tenant for life: *Cardigan* v. *Curzon-Howe,* 9 *Times* L. R. 244. This case falls within the principle of *In re Betty,* [1899] 1 Ch. 821, 47 W. R. Dig. 211.

B. Fuller, for other defendants who also claimed to be interested in remainder.

Cur. adv. vult.

BUCKLEY, J., after stating the facts, continued: The question I have to determine is whether this sum of £415 10s. 1d. ought to be paid out of the capital of the settled property, or whether the same or any part thereof, ought to be paid out of income. For the purposes of this decision it may be assumed that some part of the work is not mere repair, but would be an "improvement" under the Settled Land Acts. Under the disposition in the testator's will the tenant for life is not entitled to the rents of these premises. The trusts are, out of the rents and profits to pay the rents reserved by, and perform the covenants contained in, the leases, and it is only "subject thereto" that the defendant is entitled as tenant for life. In other words, she is tenant for life, not of the rents of these leaseholds, but of the balance of such rents after first paying, among other things, this sum of £415 10s. 1d. It has, however, been argued before me, on her behalf, that the provisions of the Settled Land Acts override the trusts of the will, and that I ought to deal with the matter as if she were not tenant for life of this balance, but were tenant for life entitled to have the provisions of the Settled Land Acts so applied as to throw the expense of so much as falls within "improvements" upon capital, and thus increase the balance to come to her under the trusts as income. For this proposition the authority relied upon is the decision of Chitty, J., in *Clarke* v. *Thornton.* I do not think that authority supports the contention. The facts there were that the trustees were to enter into possession or receipt of the rents, and to manage the estate, with powers of management sufficient to include the making of improvements, and a trust out of the rents to pay the expenses incurred in management or in exercise of any of their powers. An outlay of £4,396 was required for repairs and improvements. The trustees

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

had not done, or determined to do, the works under their power. There were two applications before the court, the one by the tenant for life in remainder to have these works done at the expense of income, and the other by the tenant for life in possession to have them, or such of them as were not ordinary repairs, done at the expense of certain accumulated rents which were capital. The applications were made in an action which had been instituted for the administration of the trusts of the will. Under these circumstances there were two powers available—that is to say, first, the court might direct the trustees to proceed under their powers in the will, in which case there would have been a trust to pay the expenses out of income; or secondly, the court might not direct the trustees to proceed under that power, but might, under the Settled Land Acts, provide for such as were improvements at the expense of capital. The court took the latter course. There was not in *Clarke* v. *Thornton*, as there is here, a trust coming before the trust for the tenant for life and providing for improvements out of income. There would have been such a trust if the trustees had proceeded, or the court had directed them to proceed, in exercise of their power, an event which did not happen. That decision was followed by Stirling, J., in *Lord Stamford's Settled Estates*, 38 W. R. 317, 43 Ch. D. 84, and, again, in that case, there was no trust for payment of improvements out of income before arriving at the amount payable to the tenant for life. The learned judge, 43 Ch. D. at p. 96, says that in *Clarke* v. *Thornton* "the will had thrown the improvements on the income." By this he meant, I think, that if they were provided for, not under the Settled Land Acts, but by the exercise of the power in the will, they were thrown upon income—not that they were thrown by the will upon income in any event. I think, therefore, that income and not capital, ought to bear the £415 10s. 1d. There is another ground upon which I think this case ought again to be decided in the same way. These repairs and improvements cannot be provided for out of capital under the Settled Land Act, 1882, because they have been executed without first carrying in a scheme for their execution. The application must be made under section 15 of the Settled Land Act, 1890. Under that section there is a discretion in the court: *Cardigan* v. *Curzon-Howe*. How ought I to exercise this discretion when the testator has expressly provided that these expenses shall be borne by income? It seems to me that I ought to throw them where the testator throws them, and direct the trustees to pay these expenses out of income, inasmuch as the works fall within the obligation to perform and observe the lessees' covenants in the leases It is said that the tenant for life is restrained from anticipation. I do not see that any difficulty arises from this fact. There will be no further income coming to her under the trust in the will until there shall have been discharged this amount, the payment of which under the trust has priority over the payment to her. I therefore hold that the £415 10s. 1d. is to be borne by income.

Solicitors, *Ewbank, Partington, & Lewis; Stow, Preston, & Lyttleton; Bannister, Williams, & Ram.*

Chan. Div. } Buckley, J. } Feb. 26, 27.

In re BEAUMONT.
BEAUMONT *v.* EWBANK. (*a.*)

Donatio mortis causâ—*Donor's cheque—Cheque presented but not paid in donor's lifetime.*

The delivery of a donor's own cheque to a donee does not operate as an equitable assignment to the donee of any part of the donor's balance at the bank. Consequently, if the cheque be not paid, actually or constructively, before the donor's death, there can be no donatio mortis causâ *of such cheque; where the donor's account is in debit, even though the banker is willing to honour an overdraft, the mere presentation of the cheque does not amount to a constructive payment.*

Hewitt *v.* Kaye, 16 *W. R.* 835, *L. R.* 6 *Eq.* 198, *and* In re Beak's Estate, *L. R.* 13 *Eq.* 489, 20 *W. R. Ch. Dig.* 4, *followed.*

Bromley *v.* Brunton, 16 *W. R.* 1006, *L. R.* 6 *Eq.* 275, *explained.*

Adjourned summons.

One of the questions raised by this summons was whether a valid *donatio mortis causâ* had been constituted under the circumstances next hereinafter stated.

On the 19th of February, 1901, Mr. Beaumont was very ill and in expectation of death. His niece was called into his room, and he told her that he must draw a cheque in favour of Mrs. Ewbank at once, for fear he should get worse. The niece filled up a cheque for £300, which Mr. Beaumont signed. The niece, by his direction, gave the cheque to Mrs. Ewbank.

His lordship held that the cheque had been effectually delivered to Mrs. Ewbank, and found that it was given in anticipation of death and to take effect if he died.

The cheque was presented on the 23rd of February. Mr. Beaumont's account was overdrawn; the manager of the bank did not pay the cheque.

There was a conflict of testimony as to whether the reason was that the manager doubted the signature, or whether it was that the account was overdrawn.

Although, in his lordship's opinion, it was not necessary to decide the question, he found that the manager was minded to lend the money and out of the money so lent to pay the cheque.

On the 25th of February the deceased died, and the cheque had not been paid.

Robertson, for the executrix.

Sargant, for Mrs. Ewbank.—The circumstances are such that it will be inferred that the deceased gave the cheque in contemplation of death and to take complete effect only in case of his death: *Gardner* v. *Parker*, 3 Madd. 184. There may be a good *donatio mortis causâ* of an instrument which does not pass by delivery, and the court will compel the executor to complete the donee's title: *Duffield* v. *Elwes*, 1 Bligh N. R. 497. There may be a *donatio mortis causâ* of a cheque drawn in favour of the donor: *Clement* v. *Cheeseman*, 33 W. R. 40, 27 Ch. D. 631. In *Hewitt* v. *Kaye*, 16 W. R. 835, L. R. 6 Eq. 198, and *In re Beak's Estate*, L. R. 13 Eq. 489, 20 W. R. Ch. Dig. 4, it was held that there could be no gift of the donor's own cheque; in neither case had the cheque been presented before the donor's death; it was accordingly held that there had been no such *traditio* as to constitute the executor a trustee for the donee of the money represented by the cheque. But presentation of the cheque to the banker, who is the

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

agent of the drawer to pay the money to the drawee, puts the latter in a position to obtain a *traditio* of the money. The drawing of the cheque coupled with its presentation during the donor's lifetime constitutes a good equitable assignment: *Bromley* v. *Brunton*, 16 W. R. 1006, L. R. 6 Eq. 275. In the present case the donor had overdrawn his account; but that is immaterial, for the banker was willing to lend, and credit is as good as cash. The executrix is a trustee for the donee of the difference in the value of the estate due to the cheque not having been cashed. In *In re Dillon*, 38 W. R. 369, 44 Ch. D. 76, Lindley, L.J., thought that the doctrine that there could be no *donatio mortis causâ* of the donor's own cheque required consideration.

He also cited *Veal* v. *Veal*, 8 W. R. 2, 27 Beav. 303, and *In re Mead*, 28 W. R. 891, 15 Ch. D. 651.

Jessel, for the residuary legatee.—If anything, this transaction was an imperfect gift *inter vivos*, which will not be aided by the court. There can never be a *donatio mortis causâ* of the donor's own cheque, because notice of death revokes the authority of the banker to pay the cheque: Bills of Exchange Act, s. 75. *Bromley* v. *Brunton*, so far as it is good law, does not apply; the donor has omitted to put the bank in funds to meet the cheque, and there was no duty on the part of the bank to pay the cheque. So far as *Bromley* v. *Brunton* depends on the view that the delivery of the cheque effected an appropriation of the donor's money it is bad law: *Hopkinson* v. *Forster*, 23 W. R. 301, L. R. 19 Eq. 74; Bills of Exchange Act, s. 53. There is no real distinction between the cases where a cheque has been presented, but not paid, and where it has not been presented at all.

He also cited *Edwards* v. *Jones*, 1 My. & Cr. 226, and *Cain* v. *Moon*, [1896] 2 Q. B. 283, 45 W. R. Dig. 49.

Sargant replied.

Cur. adv. vult.

BUCKLEY, J.—The question to be determined in this case is whether the deceased made a valid *donatio mortis causâ* to his sister, Mrs. Eva Ewbank, of a sum of £300. Subject to a more accurate statement of the facts hereafter, it is sufficient for the moment to say that the act which the deceased did was to hand, or cause to be handed, to his sister a cheque for £300, which, before his death, was not paid. A *donatio mortis causâ* is a singular form of gift; it is, if I may say so, of an amphibious nature—neither a gift *inter vivos*, nor a testamentary gift. It is something done by which the donee is to have an absolute title if the donor dies, but not otherwise. If he dies the donee's title becomes absolute not under, but against, the executor of the donor. To constitute a valid *donatio mortis causâ* the gift must be one intended to take complete effect only in the event of the donor's death. You must find as a fact that the donor did not intend the gift to be absolute unless he died. It is not necessary to find that from express words, but that that is the true inference from the facts of the case. To read from the judgment of Sir John Leach in *Gardner* v. *Parker*, "It was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death there is an implied condition that it is to be held only in the event of death." That, therefore, is a question of fact to answer as best one can. Is it, under the circumstances of the case, to be inferred that it was not a present and absolute gift? In *Duffield* v. *Elwes* Sir John Leach held that a mortgage or bond given as a collateral security could not be made a subject of a *donatio mortis causâ*. That decision was reversed by Lord Eldon sitting in the House of Lords. Lord Eldon there pointed out that in a case of *donatio mortis causâ* the question is not similar to that which arises where a court of equity is asked to give complete effect to an incomplete voluntary conveyance, the reason being that it is of the very nature of a *donatia mortis causâ*, that it is not complete until the donor is dead. The question is not whether the donee has acquired a complete title, but whether he has acquired a right against the legal personal representative of the donor to have his title made complete — that is to say, whether the legal personal representative is a trustee for the donee. Lord Eldon, 1 Bligh N. R., at p. 543, points this out, and concludes: "The opinion which I have formed is that this is a good *donatio mortis causâ*, raising, by operation of law, a trust." Accordingly, on the principle of *Duffield* v. *Elwes*, the following have been held to be good *donationes mortis causâ*: first, a promissory note payable to the order of the deceased, but not endorsed (*Veal* v. *Veal*); secondly, bills of exchange payable to the order of the deceased, which, from the report, I gather, though it is not distinctly so stated, had been endorsed by the donor—but this is unimportant (*Rankin* v. *Weguelin*, 27 Beav. 309); thirdly, bills of exchange in favour of the deceased or order and unindorsed (*In re Mead*); fourthly, a cheque payable to the donor or order and unindorsed (*Clement* v. *Cheeseman*); and lastly, a banker's deposit note of the London and Westminster Bank (*In re Dillon*). In all these cases of mortgage debt, promissory note, bill of exchange, and deposit receipt, the donee had not acquired a complete title, but there had been handed over to him the *indicia* of property; that is to say, the property had been given to him on terms that it was to be his if the donor died, and against the legal personal representative he could say, "You are a trustee for me; you must lend me your name or indorse the bill of exchange or cheque." But how does the matter stand as regards the deceased's own cheque? It is plain law that a donor's own cheque in favour of another, and handed to that other, does not operate as an equitable assignment in favour of the donee of any part of the donor's balance at his bankers: *Hopkinson* v. *Forster*. The cheque is no more than revocable mandate which the donor can revoke, and which, in the event of his death, is *ipso facto* revoked and becomes inoperative. If, before his death, the cheque is presented and paid, the donee receives the money and there is no question of a *donatio mortis causâ* of a cheque. The only question is whether the money was received on the terms that the donee should only keep it if the donor died. But if the cheque be not presented or paid before the donor's death, it is no more than an ineffectual revocable order which is revoked by the donor's death. For that proposition I refer to *Hewitt* v. *Kaye* and *In re Beak's Estate*. In the last-mentioned case there was this additional feature—the delivery of a pass-book, which may be said to be the banker's acknowledgment of a debt; but the Vice-Chancellor held that it made no difference, and was no further disposition of the property than was effected by the delivery. In *In re Dillon*, the case of the deposit note, Lord Lindley said (44 Ch. D., at p. 83): "It is said that here there was no good *donatio mortis causâ* because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case." Now if the doctrine of *Hewitt* v. *Kaye* and *In re Beak's Estate* is to be reconsidered, it must be by a higher court than this. Those authorities are binding on me, and I follow them. But as the parties may wish to carry the case further, I desire to express my own view of the law.

It appears to me that in all these cases of mortgage debt, promissory note, &c., that which was handed over by the deceased to the donee was property or *indicia* of property belonging to the donor. The donor's cheque is not property at all, but is a mere revocable mandate; it is not the handing of the money. If the donee goes to the banker, and the banker does a further act—either a payment of the cheque or a holding of the amount for the donee, there is a *traditio* thus constituted—a delivery of the property. If the cheque is acted on, you may reach an equitable assignment *pro tanto* of the amount standing to the credit of the donor at the bank. But unless you get as far as that, there is no delivery of property at all, but only of an order which, if acted upon, will lead to the passing of the property. The case of *Bromley* v. *Brunton* at first puzzled me. There the deceased gave a cheque to the donee, who presented it at the bank. The donor's account was in credit, but the manager doubted the signature and refused payment on that ground. The drawer died and the cheque had not been paid. The Vice-Chancellor held that there was a complete gift *inter vivos* of the amount of the cheque. That decision must have rested on one of two grounds—either that the cheque was constructively paid when the banker received it, and, in substance, said, "I will pay this, but must see that the signature is correct," so that you get payment referred back to a period before the death of the donor, or that the banker was to be taken to have said, "The account is in credit; I will hold for you the requisite amount to answer the cheque, subject to my being satisfied as to the signature." That may have been, by reason of the act of the banker, a good equitable assignment. The Vice-Chancellor says (L. R. 6 Eq., at p. 277): "The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are, in the hands of the executors, just as much liable to the payment of the cheque as they were in the hands of the banker." I cannot suppose that the Vice-Chancellor meant by that, that a cheque is an equitable assignment. If you insert certain words, and read the sentence in this way, "The effect of the cheque and of the banker's action in respect of it was to appropriate sufficient of the donor's money to meet the cheque; the bank had in effect honoured the cheque," *Bromley* v. *Brunton* is sound law, and does not seem to be in conflict with *Hewitt* v. *Kaye* and *In re Beak's Estate*; and I think all the authorities are rightly to this effect, that a donor's own cheque given, and not acted upon by payment actual or constructive, will not constitute a valid *donatio mortis causâ*.

With that statement of the law, I will proceed to state shortly what are the facts in this particular case. [His lordship then stated the circumstances and arrived at the several conclusions of fact hereinbefore set out:] The legal result is that, in the first place, there cannot have been, within *Bromley* v. *Brunton*, anything which, by coupling the deceased's act and that of the banker, constituted an equitable assignment of moneys in the banker's hands; even if the banker was minded to lend the money, it was a purely voluntary promise; and if, when the cheque came back with the signature confirmed, he had refused to lend it, he would have been within his rights. The donee acquired no rights, but a mere expectation. In the second place, even if the banker remained in the mind to lend, still an agreement to lend is not an enforceable agreement, and the donee acquired no right to the property. I hold that there was no valid *donatio mortis causâ* for two reasons—first, because the mere drawing by the deceased of a cheque and the handing over of the cheque to the drawee, coupled with the subsequent acts, did not amount to such a delivery or *traditio* as is required in order to give the donee a right to the cheque, to become absolute in the case of the death of the donor; secondly, because, even if the delivery might have been sufficient if the account had been in credit, it was not so in this case inasmuch as the account was in debit. I can imagine circumstances such as the following: a cheque is given by a person who is seriously ill; the donee goes to the bank—say, a small country branch—just before closing time, and presents the cheque; the cashier, who may be the only person in charge, says that he wants to catch a train, asks the drawee, as a favour to him, to call in the morning, and says that he will then cash the cheque; the drawee assents, and the drawer dies in the night. If that is so, the bank, by undertaking to pay next morning, appropriates a sufficient amount of the deceased's balance to meet the cheque. That might be a good *donatio mortis causâ*, but here the facts do not come up to anything of that kind. There was not any promise to pay in fact; when the cheque was presented, as the account was in debit, it would have been, not a promise to pay, but to lend. On these grounds I hold that there is no valid *donatio mortis causâ*.

Solicitors, *Lowndes & Sons*, for *A. P. Griffith Davis*, Brighton; *St. Barbe, Sladen, & Wing*.

K. B. Div. (Div. Court).
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — March 5.

DAVIES (*Appellant*) v. BURNETT (*Respondent*). (*a*.)

Licensing law—Club—Sale of liquor to agent of member—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

A member of a bonâ fide *club purchased at the club, by means of an agent, a bottle containing intoxicating liquor to be consumed off the premises. The club had no licence to sell intoxicating liquors.*

Held (*following* Graff v. Evans, 30 *W. R.* 380, 8 *Q. B. D.* 373), *that there was no sale within the meaning of the Licensing Act*, 1872.

Case stated by magistrates under the Licensing Act, 1872 (35 & 36 Vict. c. 94).

This was an appeal by a waiter at the Wolverhampton Working Men's Club, against a fine of ten pounds and costs for selling liquor without a licence.

The facts of the case are as follows:

The North Wolverhampton Working Men's Club, was a club duly registered under the Friendly Societies Act, 1875, but had no licence to sell intoxicating liquors, and had its premises at 72, North-road, in that borough. At 8.35 p.m. on the 9th of August, 1901, one Elizabeth Hickman, the wife of George Hickman, asked the appellant for a bottle of stout, and handed him a ticket as follows:

Name of article and quantity must be stated.

"To the steward of the North Wolverhampton Working Men's Club.
August 9th, 1901.
Please supply bearer with 1 stout
for
Member's signature. } G. Hickman.
Member's No. 355.

The appellant thereupon handed a bottle of stout to Elizabeth Hickman, who paid the sum of twopence

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

for it, and carried it home to her husband. George Hickman was a member of the club, but Elizabeth Hickman was not.

The contention for the appellant before the magistrates was that there was no sale to the member, but merely a transfer of property to one of the members.

For the respondent it was contended that there was a sale to the member and that it opened a door to the evasion of the licensing laws.

The magistrates convicted the appellant, and stated this case.

Hobson, for the appellant.—Here the magistrates have found that the club was a *bonâ fide* one. They have also found that the wife was acting as the agent of the member. It was laid down in the case of *Graff* v. *Evans*, 30 W. R. 380, 8 Q. B. D. 373, that a member of a *bonâ fide* club could obtain liquor off the premises, and that in that case there was no sale, but only a transfer of the special property; and there is no reason why a member should not be able to employ an agent for that purpose. The case of *Woodley* v. *Simmonds*, 60 J. P. 150, was decided on the ground that the club was not a *bonâ fide* one.

A. Powell, for respondent.—If this appeal succeeds the object of the licensing laws will be defeated. The principle of *Graff* v. *Evans* should not be carried further.

Lord ALVERSTONE, L.C.J.—It is with the greatest reluctance that I have come to the conclusion that this appeal must succeed. It is, in my judgment, a very dangerous practice allowing clubs to supply liquor off the premises, and I do trust that the magistrates will do all in their power to stop what opens the door to an evasion of the Licensing Act. But here the magistrates have found that this club was a *bonâ fide* one, and they have also found that the liquor was delivered to the wife of the member as his agent.

It was decided in the case of *Graff* v. *Evans* that a sale off the premises of intoxicating liquor to a member was not a sale within the meaning of the Act, but was a transfer of the property. In view of that case, and in view of the findings of the magistrates I do not think that we can do otherwise than allow this appeal.

DARLING, J.—I am of the same opinion, and I also agree that it is a most inexpedient practice. In this case the messenger was the wife of the member, but there is no reason why he should not have sent a child, and he might thus evade the provisions of the Intoxicating Liquors (Sale to Children) Act, 1901.

CHANNELL, J.—I agree, and I only wish to add this, that if a club were to make a practice of delivering liquor off the premises, it would go far to convince me that it was not a *bonâ fide* club.

Solicitor for the appellant, *W. R. Bennett*, for *A. Tuton*, Wolverhampton.

Solicitors for the respondent, *Indermaur & Brown*, for *Harper & Ryland*, Birmingham.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Feb. 25.

COX (*Appellant*) *v.* BLAINES (*Respondent*). (*a.*)

Bread—Sale of bread—Sale otherwise than by weight—London Bread Act (3 *Geo.* 4, *c. cvi.*), *s.* 4.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

In the sale of bread it is necessary that the weight of every parcel of bread should at least be purported to be ascertained in order to comply with section 4 of the London Bread Act (3 *Geo.* 4, *c. cvi.*).

Case stated by Frederick Mead, one of the London police magistrates.

The facts of the case are as follows:

The respondent was charged on the 12th of July, 1901, with having unlawfully sold, or caused to be sold, bread in other manner than by weight, contrary to section 4 of 3 Geo. 4, c. cvi.

The material words of that section are: "Be it further enacted that from and after the commencement of this Act all bread sold within the limits aforesaid (*i.e.*, the City of London and ten miles of the Royal Exchange) shall be sold by the several bakers or sellers of bread respectively within the said limits by weight, and in any case any baker or seller of bread within the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates before whom such offender shall be convicted shall order and direct."

It was proved at the hearing on the 18th of July at the police-court that one Charles James Murrell, by the direction of the appellant (who is the inspector of weights and measures for the district), went into the shop of the respondent (who carries on business at 64, Hackney-road as a baker) and asked for a half-quartern loaf, for which he paid the sum of 2d. He was supplied with a loaf and two rolls by one Alice Cullam, who placed them in the scales, first the loaf and then the two rolls on the top of it. The said loaf and rolls did not carry the scale down, though they would have done so if they had weighed more than the two-pound weight which was already in the scale. The beam of the weighing machine did not move at all, and the weight of the rolls was not nor had been separately ascertained at the time of such sale to Murrell, except that it was clearly apparent that their aggregate weight, together with the loaf, was less than two pounds. The bread was then taken away from the shop and weighed by the appellant, who ascertained their aggregate weight to be five ounces short of two pounds.

The magistrate dismissed the summons on the ground that the bread was not sold otherwise than by weight; that it was not necessary for the beam to be disturbed in order that there should be a sale by weight; and that it was difficult in a transaction of this sort to ascertain whether bread is above or below a certain weight without determining the exact number of ounces or grains.

F. F. Daldy, for the appellant.—The cases clearly show that the magistrate took a wrong view of the section. The actual weight must be ascertained.

He cited *Jones* v. *Huxtable*, 15 W. R. 900, L. R. 2 Q. B. 460; *Williams* v. *Deggan*, 16 L. T. Rep. 492, 15 W. R. C. L. Dig. 37; *Mitton* v. *Troke*, 20 L. T. Rep. 563, 17 W. R. C. L. Dig.; *London County Council* v. *Read*, 48 W. R. 393, [1900] 1 Q. B. 288.

The respondent was not represented.

Lord ALVERSTONE, L.C.J.—It seems to me that Mr. Daldy is right and there was evidence that there was no sale by weight within the construction that has been put upon the statute by the various cases. I think that the statute was open to the construction, and fairly brought up the distinction between selling or carrying on the trade of selling by weight, and carrying on the trade of selling by any other means. I think the distinctions do amount to this; that

the particular quantity of bread sold for any particular price must be weighed—that is to say, either weighed beforehand by the baker, or if necessary weighed in the presence of the customer on demand. In this case all that appears to have been done was that the bread which could not weigh two pounds was put into the scale, and had no effect upon the scale, and did not move the beam, and therefore the weight was never ascertained at all. I think under those circumstances that there was no evidence upon which the magistrate could have come to the conclusion that there was a sale by weight of this bread, or that its weight was properly ascertained at all. It was a case in which a person asked for a two-pound loaf and something else was delivered, when what ought to have been delivered was bread which had been weighed, or the weight of which had been ascertained.

I was at first impressed with the idea that the view that the real offence was selling as or representing the weight of the loaf to be two pounds when it was not two pounds was an answer, and showed this ought to a sale by weight. But I think that I was wrong, and that this statute, interpreted by the subsequent decisions, means that the weight of the parcel is to be ascertained. That being so, in this case I am of opinion that there is no evidence that the weight of the parcel of bread was ascertained at all. The case must therefore go back to the magistrate.

Darling, J.—I am of the same opinion, and if I add a word to the judgment of my lord it is only because I think it necessary to guard against this: that I do not think our judgment means that in order that there should be a sale by weight it is absolutely necessary that should be an ascertainment of the true weight, because if we held that, then someone who might be prosecuted for not having sold by weight might escape the penalty for the offence by saying, "Oh, yes, I weighed it, but I weighed it with false scales or false weights." It seems to me it is necessary, in order to decide this point, to decide what to "weigh" means. I think that to "weigh" means to affect to ascertain by means of balancing—using what may properly be called a balance—although the instrument may be fraudulently used. Still, one might weigh a thing and sell it, and yet not sell it by its weight. There would be a weighing and a selling otherwise than by weight.

Channell, J.—I agree. It seems to me perfectly possible to put two different meanings on the words in the statute. It might be said that selling by weight meant merely selling by weight as distinguished from selling by measure, or selling by a particular measure for a particular loaf; that is to say, that it went to the mode in which the person was carrying on his business. If a baker were to say, "I am allowed to sell this or that loaf, and to say the price is 2d. or 3d., and you can look at them and take whatever you like according to the price;" it might be held it was merely intended to prevent that; and if the man professed to sell his bread according to weight it must be so sold and not according to some other mode of pricing it, and that it did not really involve the consideration whether the weight which was purported to be sold was a true or a false weight. Of course if he purported to sell as a 4lb. loaf a loaf which did not weigh four pounds, he might be proceeded against on a penalty under some other section of the Act.

I was under the impression it might have been possible to take that view; but the cases which have been quoted, show the contrary. The case of *Jones* v. *Huxtable* clearly involves the contrary. It shows that what is meant by this statute, as interpreted, is that each particular loaf must be sold according to the weight of that particular loaf. It was held that it was a contravention of that enactment to do what was done in this case, even if it was a fraud, or an accident, or carelessness, on the part of the person selling; because here he did not sell this loaf according to the true weight, but sold it as a two-pound loaf when in fact it weighed something less. I think that the magistrate took the first of the two views I have endeavoured to express, but having regard to the authorities which have been cited to us I have no doubt that his decision is wrong.

Appeal allowed.

Solicitor for the appellant, *W. A. Blaxland.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Feb. 25.

Whitaker (*Appellant*) v. Pomfret Brothers (*Respondents*). (*a.*)

Adulteration—Food—Giving of false warranty—Limit of time for laying information—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 20—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *ss.* 19, 20, *sub-section* 6—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

An information under the Sale of Food and Drugs Acts in respect of a false warranty must be laid within six months of the date on which the warranty was given.

Case stated by magistrates.

This was an appeal from a decision of the magistrates of Haslingden dismissing an information on the ground that it was not brought within the time specified in the Summary Jurisdiction Act (11 & 12 Vict. c. 43), s. 11.

The facts of the case as proved or admitted are as follows: The respondents, who are wholesale grocers, sold to one John Milne, a retail grocer, on the 20th of November, 1900, three pounds of white pepper, with a written warranty of its genuineness, and John Milne on the 16th of May, 1901, sold to a subordinate officer of the appellant six ounces of this pepper; and the latter divided it into three parts, and in all other respects complied with section 14 of the Sale of Food and Drugs Act, 1875.

On being analyzed the pepper was found to be adulterated to the extent of 10 per cent. with bleached husks.

An information was then laid against John Milne for selling to the prejudice of the purchaser an article of food—to wit, pepper—not of the nature, substance, or quality demanded by the purchaser.

This summons was dismissed under the provisions of section 25 of the Sale of Food and Drugs Act, 1875, on Milne producing the warranty and proving that he had sold the article in the same state as when he received it.

A summons was then taken out on the 6th of July, 1901, against the respondents, who contended that the warranty was given on the 20th of November, 1900, and that the offence, if any, having been committed on the 20th of November, 1900, the information was not laid within six months as specified in section 11 of 11 & 12 Vict. c. 43.

The appellant contended that the offence was a continuing one; that the warranty ran on till the whole of the pepper had been disposed of; and that

(*a.*) Reported by C. G. Wilbraham, Esq., Barrister-at-Law.

as the information had been laid on the 6th of July, 1901, it was within six months of the sale by John Milne to the appellant's subordinate officer, when the warranty came into force and protected Milne from a conviction.

The magistrates dismissed the information but stated a case.

F. H. Mellor (*Openshaw* with him), for the appellant.—The magistrates have here misconstrued the section. The offence is not committed till a sale is completed by the purchaser.

He cited *Cook* v. *White*, 44 W. R. 409, [1896] 1 Q. B. 284.

F. Mellor, for the respondents.—Every proceeding under this Act is subject to the time limit, and the time runs from the date of the giving of the warranty.

Lord ALVERSTONE, L.C.J.—I cannot help feeling some regret that this appeal must fail, but it seems to me that this matter must, if necessary, be set right by the Legislature. By section 20 of the Sale of Food and Drugs Act, 1875, it was provided that "Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the 11 & 12 Vict. c. 43." Then section 10 of the Sale of Food and Drugs Act, 1879, provides that the prosecution should, in the case of a perishable article, be brought within twenty-eight days of the time of purchase for test purposes. That section was repealed by section 27 of the Act of 1899, but was re-enacted and extended by section 19 of that Act to non-perishable articles bought for test purposes. Therefore, in so far as the actual proceedings had to be taken in respect of the sale, there were limits of time less than the six months. Now, in order to enable the proceedings to be taken against the persons who have given the warranty, you must find something in the Act of 1899 which excludes the operation of section 20 of the Act of 1875 from this particular offence. When the Act of 1899, s. 19, is looked at, the words of that section seem to correspond with the class of offence to which it was intended that the limits laid down by the Act of 1875 should apply. If it was intended to exclude the general limits of time prescribed, special words would be required, or a direction that for the purpose of a summons under this section the date of the purchase by the customer shall be taken to be the date when the false warranty was given. If proceedings were to be taken more than six months after the written warranty is given, a special amending Act of Parliament would be necessary.

DARLING and CHANNELL, JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Snow, Snow, & Fox*, for *Harcourt Clare*, Preston.

Solicitors for the respondent, *Williamson, Hill, & Co.*, for *Marsden & Marsden*, Blackburn.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Feb. 24.

GEE *v.* OLDHAM JUSTICES. (*a.*)

Licensing law—Transfer—Off-licence — Condition of original grant that if licensee retired, licence should not be renewed—Application for transfer—Jurisdiction of magistrates to entertain application—Beerhouse Act, 1830 (11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 64).

An off-licence was granted to the occupier of a grocer's shop upon the condition that the licence should be given up upon the applicant leaving or ceasing to carry on the grocery business upon the premises. The licensee sold his business, and the purchaser applied to the licensing justices for a transfer of the licence to him.

The justices refused to grant the transfer, on the ground that they were debarred from so doing by the condition upon which the licence was granted.

Held, that the condition was not an absolute bar to the transfer of the licence, but only a matter to be taken into consideration when considering whether or no in their discretion they would grant the transfer.

Special case stated by the Chairman of the Quarter Sessions for the Hundred of Salford.

The material facts may be shortly stated thus:

On the 23rd of August, 1894, Samuel Turner applied at the General Annual Licensing Sessions for the Borough of Oldham for a certificate or licence to sell by retail, at a house situate at 52, Abbey-hills-road, in the borough of Oldham, beer, to be consumed off the premises in pursuance of the Act 11 Geo. 4, and 1 Will. 4, c. 64, and the statutes amending the same. The licence was granted to the applicant on the conditions—(1) That the premises should be closed during the whole of Sunday; and (2) that the licence should be given up upon the applicant leaving or ceasing to carry on the grocery business at the premises in question. This last condition was suggested by the justices and assented to by the applicant.

The applicant's lease expired on the 23rd of July, 1899, and upon its expiration he became a tenant from year to year and still continued to carry on the grocery business.

The licence granted to him was renewed from year to year upon the same conditions, and remained in force until the 24th of December, 1900. On that day Gee applied to the licensing justices of Oldham (the present appellants) for a transfer of the licence to him from Samuel Turner, who was about to give up possession of the premises and to cease to carry on the business of a grocer, which business Gee was willing to continue to carry on.

The appellants refused to grant the transfer, on the ground that it was contrary to the second of the conditions upon which the licence was granted.

Against this decision Gee appealed to the court of quarter sessions, which decided that the justices had no power lawfully to refuse the transfer on the ground that it was in contravention of the condition referred to.

From this decision the licensing justices of Oldham appealed.

The question for the opinion of the court was whether the court of quarter sessions was right in so holding.

R. B. D. Acland, for the appellants.

F. H. Mellor, for the respondent.

Lord ALVERSTONE, L.C.J.—In this case it seems that an objection was taken before the licensing justices that they had no power to grant the transfer because of the pre-existing condition upon which this licence had been granted. The justices adopted that contention and held that they were debarred from dealing with the matter. In my opinion they were wrong. The condition, although a circumstance that could be taken into consideration by the justices, did not prevent them from entertaining the matter of the transfer. If I am right in this view, then the quarter sessions have set the matter right by holding as they did that the condition was not a bar to the licensing justices hearing the case, and in their

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

discretion granting or refusing the licence, but was only a circumstance which, like any other circumstance, they ought to take into consideration.

DARLING and CHANNELL, JJ., concurred.

Appeal dismissed.

Solicitor, *Chester & Co.*, for *H. Booth & Sons*, Oldham; *Thomas Waite & Son*, for *R. M. Sixsmith*, Oldham.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Feb. 24.

ST. STEPHEN'S, CHURCHWARDENS OF (*Appellants*) *v.* GREAT NORTHERN AND CITY RAILWAY CO. (*Respondents*). (*a.*)

Metropolis — Rating — Deficiency in rates — Distress warrant—Company to pay all consolidated and other rates on lands and buildings during construction of railway—Buildings partially pulled down when company acquired land—Jurisdiction to rate—Appeal—Great Northern and City Railway Act, 1892, *s.* 69.

The respondents, on the 1st of January, 1900, *acquired under their private Act, land upon which buildings formerly known as* 30, *Finsbury-pavement, had previously existed, but did not take actual physical occupation until October*, 1900. *The buildings had been pulled down about May*, 1899, *at which time the respondents had no interest therein.*

In the valuation list in force in January, 1900, *being the quinquennial list made in* 1895, *these premises were assessed at* £292 *rateable value. In* 1899 *a supplemental valuation list was made for the parish by which this property was proposed to be taken out of rating, as it was then vacant land. The list was duly confirmed on the 24th of November*, 1899, *but did not come into operation until the 6th of April*, 1900. *On the 4th of April*, 1900, *a provisional list continuing the property in the valuation list was made and duly confirmed. A poor rate was duly made on the 8th of May*, 1900, *and another on the 5th of November*, 1900, *and the respondents were rated upon the rateable value at which the premises were assessed in the provisional list—viz*, £292.

Upon the respondents being summoned to show cause why they had not paid, and refused to pay, the rates, the respondents objected that at the time the rates were made the land was vacant land not built upon. The justices dismissed the summons.

Held, that the justices were right, the question of non-liability having been properly raised before them, the point raised involving a question of jurisdiction to rate, and not merely a matter of appeal.

Appeal from a decision of two justices sitting at the Guildhall, London, on a case stated from which it appeared that complaint was made on behalf of the appellants that the respondents being duly rated and assessed in poor rate amounting to £45 had refused to pay.

The justices dismissed the summons and declined to grant a distress warrant.

The following facts appeared from the case:

The respondents were incorporated under the Great Northern and City Railway Act, 1892.

Under that Act and the Acts incorporated therewith the company were authorized to acquire lands for the purposes of the works thereby authorized.

By section 69 of the Great Northern and City Railway Act, 1892, it was enacted as follows: "The company shall in respect of all lands and buildings acquired by them under the powers of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such land and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant, and shall continue liable to and pay all such consolidated sewer and other rates and contributions until the undertaking shall be completed, and assessed or liable to be assessed to the before-mentioned rates and contributions, or until such of the said lands and buildings as may not be required for the purposes of the undertaking shall have been otherwise duly assessed or liable to be assessed and become liable to the before-mentioned rates and contributions."

The respondents on the 1st of January, 1900, acquired certain land in the parish of St. Stephen, upon which premises consisting of a shop, offices, and warehouse, formerly known as 30, Finsbury-pavement, had previously existed, but did not take actual physical occupation until October, 1900. The shop, offices, and warehouse were pulled down about May, 1899, at which time the railway company had no interest therein.

At the time the respondents acquired the land in January, 1900, no business of any kind was carried on upon it. It was a piece of vacant land.

In the valuation list in force in January, 1900, being the quinquennial valuation list made in 1895, the premises were assessed at £292 rateable value.

In 1899 a supplemental valuation list was made for the parish pursuant to the Valuation (Metropolis) Act, 1869, by which this property was proposed to be taken out of rating, as it was then vacant land. The list was duly confirmed pursuant to the said Act on the 24th of November, 1899, but did not come into operation until the 6th of April, 1900.

Before that date—viz., on the 4th of April, 1900, a provisional list continuing the property in the valuation list was made for the parish, which was confirmed by the Assessment Committee of the City of London Union, in which the parish is situate, on the 31st of October, 1900. In this provisional list premises therein described as No. 30, Finsbury-pavement were inserted at the rateable value at which the premises formerly known as No. 30, Finsbury-pavement were assessed and rated before the shop, offices, and warehouse were demolished—viz., £292.

A poor rate was duly made and published on the 8th of May, 1900, and another on the 5th of November, 1900. The rate-books were produced, in which the respondents were rated in respect of premises described as "shop, offices, and warehouse," upon the rateable value at which the premises described as No. 30, Finsbury-pavement were assessed in the said provisional list—viz., £292.

Payment of the sums claimed under the said rates was duly demanded, but the amount was not paid.

At the dates of the said rates respectively, the undertaking of the respondents had not been completed and assessed or become liable to be assessed to consolidated sewer and other rates, nor had such of the lands and buildings acquired by the respondents as were not required for the purposes of the undertaking been otherwise assessed or become liable to be assessed or become liable to the said rates and contributions.

On behalf of the respondents it was contended before the justices:

(*a*) That their liability (if any) in respect of the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

said property was enforceable only by action to recover the amounts charged by the said rates, and was not enforceable before justices. The cases of *The Fourth City Mutual Building Society* v. *The Churchwardens and Overseers of East Ham*, [1892] 1 Q. B. 661, and *Farmer* v. *London and North-Western Railway Co.*, 36 W. R. 590, 20 Q. B. D. 788, and section 69 of the Great Northern and City Railway Act, 1892, were referred to.

(*b*) That at the time the rates in question were made the land was vacant land, and the respondents were not liable to be assessed in respect of it.

(*c*) That the respondents were only liable to be rated (if at all) in respect of the land as if they were assessed in respect of it in the valuation list in force for the parish at the time they acquired the land.

On behalf of the appellants it was contended before the justices that under section 69 of the respondents' Act, the respondents were liable to pay the rates whether the lands and buildings were occupied or not, and that, as the respondents had not appealed, the justices were bound to enforce the payment.

The justices overruled the contention of the respondents that the amount could only be recovered by action, but they held that they had jurisdiction to go behind the rate-book and inquire into the validity of the rate, and they declined to issue a distress warrant on the ground that at the time when the rate was made there were no such premises in existence as were described in the rate-book, and had not been when the respondents acquired their interest, the property being then only vacant land.

Walter Ryde, for the appellants.

R. Cunningham Glen, for the respondents.

Lord ALVERSTONE, L.C.J.—We have here to construe a most obscurely worded section, but it seems clear that it was enacted in respect of other rates than the poor rate, which is dealt with by the Lands Clauses Act, 1845, which is incorporated into the respondents' private Act. The intention of the Legislature was to make the railway company pay what the previous owners of the property taken by the railway company for the purposes of their undertaking would have paid, in order that there should be no deficiency in the rates. The appellants said that because in the valuation list of 1895 this property stood at £292, the company must be taken to be liable for that sum, as they had taken over the land. But the section does not say so, and their argument overlooks the fact that before the company acquired the land the buildings had ceased to exist. It is not contended that the former owners of the buildings would have been liable after the buildings had been pulled down and the land had become vacant, and to make the company liable some words to that effect must be put in the section which are not there.

It was argued that the question of the respondents' liability ought not to have been raised by way of answer to an application for a distress warrant, and that it was only ground for an appeal to quarter sessions. If an objection raised in answer to an application for a distress warrant means that the justices have no jurisdiction to make the objector liable in respect of the rate in question, that is an objection which the magistrate might entertain, but if it rested on another ground, such as might be the subject of an appeal, the magistrate could not entertain it. In my judgment the objection is one that goes to the jurisdiction to rate the company in respect of shops and offices which in fact did not exist when the rate was made.

As to the contention of the respondents that if they could be rated or assessed they could only be proceeded against for non-payment by action, without expressing any final opinion, it seems to me that the decision of the magistrate on this point was right in view of the words of the section. It seems clear that the section has not made the respondents liable on the hypothetical theory that they were still occupying houses and shops that had been pulled down prior to the date they went into occupation of the land.

DARLING, J.—I agree. It is clear that the people from whom the company bought might have escaped payment of this rate. If the company are liable, then there must be something in their Act which makes them liable when other owners of the property would not have been. It seems to me clear that the company are not liable under the section, because they never acquired the buildings at all.

CHANNELL, J., delivered judgment to the same effect.

Solicitors, *Roche & Son*; *Le Brasseur & Oakley*.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Feb. 24.

HOARE (*Appellant*) v. TRUMAN, HANBURY, BUXTON, & Co. (LIMITED) (*Respondents*). (*a*.)

Factory — Non-textile — Bottling and aerating beer — Mechanical power used in aid of the manufacturing process—Factory and Workshop Act, 1878 (41 & 42 *Vict.* c. 16), *s.* 93.

On premises used for the purpose of aerating and bottling beer the aerating process was produced by mechanical power, but the bottling process was not worked by mechanical power;

Held, that such premises were a non-textile factory within section 93 *of the Factory and Workshop Act*, 1878.

Law *v.* Graham, 49 *W. R.* 622, [1901] 2 *K. B.* 327, *distinguished.*

Case stated by Mr. Haden Corser, a metropolitan police magistrate.

The respondents were charged that they on the 7th of June, 1901, then being the occupiers of certain premises, the same being a non-textile factory within the meaning of the Factory and Workshop Acts, 1878 to 1895, at Wilkes-street, Spitalfields, did unlawfully employ a young person of the age of fifteen, one Samuel Williams, from 7 a.m. to 9.30 p.m.

The following facts were proved or admitted: The appellant is one of his Majesty's Inspectors of Factories and Workshops. The respondents were on the 7th of June, 1901, the occupiers of certain premises situate in Wilkes-street, including a building used as bottling stores.

On the 7th of June, 1901, Samuel Williams, a young person within the meaning of the Factory and Workshop Acts, 1878 to 1895, was employed in the bottling stores from 7 a.m. to 9.30 p.m. —*i.e.*, beyond the period of employment permitted by section 13 of the Factory and Workshop Act, 1878, or section 36 of the Factory and Workshop Act, 1895. If the bottling stores were a textile factory within section 93 of the Act of 1878, then the respondents on the 7th of June, 1901, infringed the provisions of section 13 of that Act. The respondents contended that the bottling stores were not a non-textile factory, on the ground that mechanical power was not used in aid of any manu-

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

facturing process carried on there. The bottling stores were used by the respondents for the purpose of aerating and bottling beer, and the gas engines situate in the bottling stores were used by them in the manner hereinafter mentioned. The beer was so aerated and bottled for the purpose of adapting it for sale as bottled beer. It was brought in barrels into the bottling stores. It was then forced out of the barrels into a cooling tank by means of an air-pump driven by mechanical power—viz., a gas engine. Thence it was forced by an air-pump driven by mechanical power into a mixing cylinder situate in a room adjoining and communicating with that in which Williams was employed. The mixing cylinder contained a mechanical mixer driven by mechanical power—viz., a gas engine. Attached to and communicating with the mixing cylinder were high-pressure cylinders containing carbonic acid gas which were brought already charged with such gas into the bottling stores. By the action of the mixer the beer and carbonic acid gas were mixed and the beer was aerated. It was William's duty, which he was performing during his employment on the 7th of June, 1901, to place an empty bottle in the bottling machine and to pull down by hand into the neck of the bottle by means of a lever the nozzle of a tap communicating by a pipe with the mixing cylinder. The beer flowed through the pipe from the tap, owing to the pressure of the gas with which it had been aerated, and filled the bottle. The bottling machine was not worked by mechanical power. The bottles before being filled were drained and soaked by hand and afterwards rinsed out by a brush driven by a gas engine on another floor of the premises.

The magistrate dismissed the information, on the ground that the premises were not a non-textile factory within section 93 of the Factory and Workshop Act, 1878, as the work done by Williams was manual work only, and it was immaterial how the beer was conveyed to the bottling machine.

The inspector appealed.

The question was whether the magistrate ought to have convicted the respondents.

H. Sutton and *G. S. Robertson*, for the appellant.—The magistrate dismissed the information, thinking erroneously that the case of *Law* v. *Graham*, 49 W. R. 622, [1901] 2 K. B. 327, was an authority for his holding that the respondents' premises were a textile factory. But *Law* v. *Graham* is distinguishable. The lad here was engaged in filling the bottles after the beer had been changed by the process of aeration into a different article from that which it was commercially when it was brought upon the premises. This beer was therefore manufactured on the premises, and there being manual labour and at the same time mechanical power used for that purpose, the terms of the section are fulfilled.

Travers Humphreys, for the respondents.—Here there is no manufacturing process carried on. The beer was manufactured before it came on the premises at all. It was merely bottled off. In *Law* v. *Graham* it was held that the mere fact that the bottles were cleaned by machinery upon the premises did not make those premises a non-textile factory within the meaning of that term in section 93 of the Factory and Workshop Act, 1878. Even if the bottled beer could be said to have been manufactured on the premises, mechanical power was not used in the process, for the machine used to clean the bottles had nothing to do with the bottling process. The magistrate found that fact in favour of the respondents, for he found that the bottling machine was worked by manual labour.

Lord ALVERSTONE, L.C.J.—It seems to me that when the words of the section are looked at, it is clear that the magistrate in this case arrived at a wrong decision, and therefore this appeal must be allowed and the case remitted with an intimation that he ought to have convicted. [His lordship read section 93 of the Act of 1878, and proceeded:] Now, that section shows that a non-textile factory means any premises wherein any manual labour is exercised by way of trade or for the purpose of gain or for or incidental to the adapting for sale of any article, and wherein or within the precincts of which steam, water, or other mechanical power was used in aid of the manufacturing process carried on. Now, what are the facts here? It is found in the case that upon their premises and in the curtilage, within the words of the section I have just read, carbonic acid gas and beer were mixed together by mechanical means and were then together put into bottles—in short, that these bottling stores were used by the respondents for the purpose of aerating beer and bottling beer, and a gas engine was used for that purpose. The magistrate held, on the authority of *Law* v. *Graham*, that this was not a manufacturing process, and that if it was, the mechanical power was not used in aid of it; he seemed to think that inasmuch as the work done by the lad employed in bottling was manual, it was immaterial to consider how the beer was conveyed to the bottling machine, and that the other processes used at the stores did not bring the place within the Act. In *Law* v. *Graham* the court held that the magistrate was right in hold that washing the bottles was not adapting the beer for sale, but that is clearly no authority in the present case. In my judgment, there being manual labour, and at the same time mechanical labour used for the purpose, the requirements of the section are fulfilled. This appeal therefore succeeds.

DARLING and CHANNEL, JJ., concurred.

Appeal allowed.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondent, *Clapham, Fitch, & Co.*

K. B Div. (Darling, J.) — Jan. 20, 21.

DAVIS *v.* STODDART. (*a.*)

Gaming—Coupon competition—Money paid in respect of a wagering contract and received by a person keeping a betting-house—Right to recover money so paid—Gaming Act, 1845 (8 & 9 *Vict. c* 109), *s.* 18—*Betting Act,* 1853 (16 & 17 *Vict. c.* 119), *s.* 5—*Gaming Act,* 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

Section 1 *of the Gaming Act,* 1892, *which provides that no action shall be brought or maintained to recover money paid in respect of any contract or agreement rendered null and void by* 8 & 9 *Vict. c.* 109, *does not impliedly repeal section* 5 *of the Betting Act,* 1853, *which provides that any money received by any person, being the owner or occupier of a betting-house, as a deposit on a bet shall be deemed to have been received to or for the use of the person from whom the same was received, and such money may be recovered in any court of competent jurisdiction; and therefore a person who has paid money in a coupon competition in respect of horse-races may, under section* 5 *of the Act of* 1853, *maintain an action for the recovery of such money.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

This was an action tried before Darling, J., and a special jury.

The action, which was brought by the plaintiff Davis against the defendant, Ada Jane Stoddart, the proprietor of a newspaper called *Sporting Luck*, in the Mayor's Court and removed to the High Court, was to recover the sum of £127 10s. 8d., sent by the plaintiff to the defendant at various dates in respect of certain coupon contests on horse-races and other events, as money received by the defendant for the use of the plaintiff.

By his statement of claim the plaintiff alleged that when the sums sent by him were received by the defendant she was the occupier of an office at 10, Red Lion-court, Fleet-street, in the City of London, which premises she used for the purpose of money being received by or on her behalf as consideration for her promise to pay thereafter money on a contingency relating to a horse-race or the game of football.

Each number of the newspaper contained a notice of a coupon contest the nature of which was that the defendant undertook to pay a certain specified sum of money to any person who should correctly guess the result of certain horse-races or football matches then shortly about to be run or played, and should write the guesses upon coupons and should return them so filled up to the defendant's office with a certain sum of money. Each number of the newspaper contained a sheet of coupons in which any person taking part in the contests filled in his guesses of the results of the races and matches which were the subject of the competition. No. 1 coupon in each sheet was allowed to be used free of charge, but the sum of one penny was charged for each of the extra coupons.

The plaintiff alleged in his claim that he took part in the coupon contests on various dates, and altogether sent to the defendant by cheques which were received and endorsed by the defendant or her agent, and paid into her banking account, the sum of £127 10s. 8d.

The plaintiff contended in his statement of claim that the money so received by the defendant must be deemed to have been received by her to or for his use, and that such money was accordingly recoverable under section 5 of the Gaming Act, 1892.

The defendant by her statement of defence denied the various allegations in the statement of claim, and alternatively pleaded that the plaintiff's claim was in respect of a contract by way of gaming and wagering, and was void under 8 & 9 Vict. c. 109 and the Gaming Act, 1892.

At the trial of the action the learned judge put the following questions to the jury:

1. Was the defendant, between October, 1899, and November, 1900, an occupier of the premises?

2. Did the defendant, between October, 1899, and November, 1900, use the premises for the purpose of money being received by or on her behalf upon the coupon conditions set out in *Sporting Luck*?

3. Did the defendant receive money upon the terms set out in the statement of claim?

The jury answered each of the above questions in the affirmative.

Upon those findings judgment was reserved in order that it might be argued for which party judgment was to be entered.

Avory, K.C. (*R. Nevill* with him), for the plaintiff, now asked for judgment.

M. Shearman and *G. H. Stutfield* for the defendant.—Section 5 of the Betting Houses Act, 1853, is impliedly repealed by the Gaming Act of 1892. Section 5 of the Act of 1853 provides that "Any money or valuable thing received by any such person as aforesaid," which either means any such person referred to in section 4, or else those referred to in the earlier sections—"as a deposit on any bet or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing or the value thereof may be recovered accordingly with full costs of suit in any court of competent jurisdiction." That section refers back to section 4, which says: "Any person being the owner or occupier of any house, office, room, or place opened or kept or used for the purposes aforesaid," that is, for the purpose of betting, "or either of them, or any person acting for, or on behalf of, any such owner or occupier, or any person having the care or management, or in any manner assisting in conducting the business thereof, who shall receive directly or indirectly any money or valuable thing as a deposit on any bet, on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race or any other race," shall be liable to a penalty. The decision in *Reg.* v. *Stoddart*, 49 W. R. 173, [1901] 1 Q. B. 177, is to the effect that unless this transaction is protected or covered by an exemption it is a contract by way of gaming or wagering. Then, by the Gaming Act of 1892, which is an Act to amend 8 & 9 Vict. c. 109, it is enacted by section 1 that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." This contract is rendered null and void by 8 & 9 Vict. c. 109. It is betting pure and simple, and therefore comes within 8 & 9 Vict. Between 1845 and 1853 this money could not have been recovered, because the Act of 8 & 9 Vict. c. 109 could have been successfully pleaded in answer to an action of this nature. The Act of 1853 created an exception, and said that in a certain class of gaming and wagering contracts an action shall be permitted to be brought to recover the money deposited. Then comes the Act of 1892, which sweeps in all contracts rendered null and void by 8 & 9 Vict. The Act of 1892 provided no exemption or exception reserving the rights under the Act of 1853, and consequently the provisions of section 5 of that Act are repealed. The Act of 1892 is an extremely stringent Act, and was passed in order to get rid of the decision in *Read* v. *Anderson*, 32 W. R. 950, 13 Q. B. D. 779. The Act of 1892 goes a good deal further than merely doing away with the decision in *Read* v. *Anderson*. [He then referred to *Tatam* v. *Reeve*, 41 W. R. 174, [1893] 1 Q. B. 44, and *Carney* v. *Plimmer*, 45 W. R. 385, [1897] 1 Q. B. 634.] As a further point, these coupons are betting transactions and nothing else. Every sum of money which is sent by the competitors in respect of these competitions is a deposit on individual wagers. Each bet or guess is separate, and each single penny is a separate deposit. A transaction of this sort is ready-money betting, and it comes within the first part of the section and not within the second part. Therefore, when there is no evidence of resorting, no evidence of these transactions having taken place with resorters, where, on the contrary, the whole of the business is done by correspondence, as in this case, the case does not come within the Act. *Reg.* v. *Brown*, 43 W. R. 222, [1895] 1 Q. B. 119, supports this contention.

In sections 4 and 5 the distinction is drawn between a deposit on a bet and money received as consideration for this promise, undertaking and assurance to pay; therefore when the second part of section 1 speaks of money received as consideration for a promise to pay, mere ready-money betting is not referred to. The two things are entirely different, and the two sections draw a clear distinction between ready-money betting and receipt of money as consideration to pay thereafter. The Legislature would not have referred to the two things if they both meant the same. Therefore this transaction does not come within the Act and section 5 cannot apply.

H. Avory, K.C.—The answer to the objection taken on behalf of the defendant is to be found in the words of section 5 of the Act of 1853, which says that money paid as in this case shall be deemed to have been received to or for the use of the person from whom it was received, and the Act of 1892 has no application to this case. Neither would section 18 of the Act of 1845 have had any application, for that provides that no suit shall be brought to recover money won on a wager. The Act of 1892 only carries the Act of 1845 a little further by providing that the ordinary case of the commission agent shall be on the same footing as the case of a principal was under the Act of 1845, and this is made clear by the decision in *O'Sullivan* v. *Thomas*, 43 W. R. 269, [1895] 1 Q. B. 698: see judgment of Wright, J. That case is precisely this case. Section 5 of the Act of 1853 put this money exactly in the position of a revocable deposit. The contention on behalf of the defendant if upheld, would defeat the very object of the Act of 1853, which was to place money paid under the circumstances such as exist in this case in the position of money paid on a revocable deposit. There is no implied repeal of that Act by the Act of 1892. Judgment should therefore be entered for the plaintiff.

DARLING, J.—In this case the finding of the jury amounted to a verdict for the plaintiff for the amount claimed unless Mr. Shearman and Mr. Stutfield are right in one or other of the points of law which they have raised. The matter arises in this way. The contract to pay the money which had been paid would not have arisen, and there would have been no contract to pay the money which is sued for in this case unless section 5 of 16 & 17 Vict. c. 119, had been passed. The money having been paid could not have been recovered. But that section enacted that the money might be recovered back upon a contract—I will not say on an implied contract, but on a statutory contract—because it enacts that the money so paid "as aforesaid shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly with full costs of suit in any court of competent jurisdiction." Therefore that is not a contract which is made in the ordinary sense between the parties to the bet at all. The contract made between the parties to the bet of their own volition is a void contract and could not be sued upon, but in order to make it more unlikely that people would make that kind of contract and even, by what they assume to be the bonds of honour, abide by it, the Legislature passed this section which, in my opinion, created what I have called a statutory contract—not an actual contract made by the parties, not a contract implied by law, but a contract arising out of the very words of the statute—that the money shall be deemed to have been received to the use of the party who paid it, and may be recovered by him. Now, that being so, the matter would have been perfectly clear, and the plaintiff would have obviously been entitled to judgment if it had not been for the Act of 1892. That Act says this: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null or void by the 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." I do not myself think that this transaction is a promise, express or implied, which is rendered void by 8 & 9 Vict. c. 109; and if it is not so, then that section which says that no action shall be maintained upon it does not apply at all. For the reasons which Mr. Avory has given I do not think that this contract comes within the words of the section.

But further than that, I think I am bound to look at the course of legislation. There is no doubt about it that the Act of 1892 was passed primarily to repeal the effect of the decision in *Read* v. *Anderson*. It was not passed to make betting easier, or to make it more certain that people who made bets and carried on a betting business might do so with profit. It was passed with quite other reasons. But further than that, there are these words in the case of *O'Sullivan* v. *Thomas* which Mr. Avory has cited. Wills, J., says: "I am not sorry to be able to come to the conclusion at which we have arrived; an opposite construction would make the Act of Parliament"—that is the Act of 1892—"which certainly was not passed out of sympathy with the betting fraternity, their charter." And so here. If I were to hold that the effect of the Act of 1892 had been to repeal section 5 of the Act of 1853, it would, as far as it went, be to say that the Act of 1892 legalized, for the benefit of people carrying on a betting business, the retention in their hands of money which they had received on gambling contracts, and thereby would put a profit in their pockets, when it is notorious that the whole feeling and intention of the Legislature at that time was to do the precise contrary. I think therefore that the case of *O'Sullivan* v. *Thomas*, particularly the judgment of my brother Wright is in point, and that I should be bound to hold as I do in this matter, having regard to the decision in that case.

In my opinion, therefore, section 1 of the Act of 1892 has not repealed section 5 of the Act of 1853, and, therefore, as far as that goes, my judgment ought to be for the plaintiff.

Now there is the other point which is raised by Mr. Stutfield. That point is that all this, is really a system of ready-money betting, that there must be some resorting, and that there was no resorting here, because all this took place by means of correspondence. If that were a good point, then Mrs. Stoddart was wrongly convicted in the case of *Reg.* v. *Stoddart*, and the decisions in several of these cases which have been decided by the Court for Crown Cases Reserved and by the Divisional Court are wrong. It may be that they are. This point might have been taken in those cases, but it never has been taken. In my judgment, even if it had been taken, it would not have been a good point. It seems to me that upon the words of section 1 of the Act of 1853 there is ample reason for saying that the decisions in *Hawke* v. *Stoddart*, *ante*, p. 93, and *Reg.* v. *Stoddart* are right. I am inclined to think that, even if counsel had been allowed to take this point when *Hawke* v. *Stoddart* was argued, it would not have availed them, and the decision would have been precisely the same. However that may be, I am bound, of course, by those decided cases, and on that ground I give judgment against the defendant in this case.

Judgment for plaintiff, with costs. Stay of execution granted.

Solicitors for the plaintiff, *Malkin & Co.*

Solicitor for the defendant, *W. B. Glasier.*

Prob. Div. & Adm. Div.
Probate.
(Jeune, P., and Barnes, J.) March 4.

HILL *v.* HILL. (*a.*)

Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39)—*Liability of husband to maintain step-children.*

The court of summary jurisdiction has power when making an order for maintenance under the Summary Jurisdiction Act, 1895, *to take into consideration the fact that the applicant has children dependent upon her by a former marriage, since the husband is liable under the Poor Law Acts to maintain them.*

This was an appeal from an order of the justices of Southampton, made on the 19th of April, 1901, and confirmed on the 31st of January, 1902, directing Frederick Penton Hill, the appellant, to pay his wife, Matilda Alice Hill, the sum of 30s. a week, 17s. being for the maintenance of the wife, and 13s. for the maintenance of her children by a former husband. The order was made under the Summary Jurisdiction (Married Women) Act, 1895. The grounds of the appeal were (1) that the husband ought not to have been ordered to maintain his step-children, and (2) that the order for 30s. a week was excessive, inasmuch as 30s. a week was over one-third of his weekly earnings.

Pritchard, for the appellant.—The order for maintenance is an order made to secure the support of the wife and not for the children. A husband is not liable for the support of his children, therefore *a fortiori* he is not liable for his step-children. His liability at common law is to be differentiated from his liability under the Poor Law Acts, for under the Poor Law he becomes liable to maintain them when, but not till, they become chargeable to the parish. If, therefore, an order to maintain makes provision for the children plus the wife, and, notwithstanding payment by the husband to the wife, the children should then become liable to the parish, the husband would be in danger of being ordered to pay twice over for his children. [BARNES, J.—His defence would then be that he had paid for their support, and that the order requiring him to pay so much to the wife should be reduced.] It is unreasonable to place him in that position at all: *Mortimore* v. *Wright,* 6 M. & W. 482; *Tubb* v. *Harrison,* 4 T. R. 118; *Cooper* v. *Martyn,* 4 East. 76; 4 & 5 Will. 4, c. 76, s. 56, and 43 Eliz. c. 2, s. 6, were cited. The amount awarded was excessive. The cases of *Cobb* v. *Cobb,* [1900] P. 294, W. R. Dig. 106; and *Nott* v. *Nott,* [1901] P. 241, 49 W. R. Dig. 52, show that the principles which govern this court, and which ought to govern the justices in making an order, had not been conformed to.

Barnard, for the respondent.—The justices were right in including the step-children in the husband's liability to maintain them. So long as their mother lives the husband of that mother is liable to maintain them. She has an implied authority to pledge her husband's credit to supply necessaries for such children. There is authority to show that the husband is impliedly liable at common law as well as under the Poor Law Acts: *Bazeley* v. *Forder,* L. R. 3 Q. B. 559, 16 W. R. C. L. Dig. 54. [He cited also 4 & 5 Will. 4, c. 76, s. 56; 31 & 32 Vict. c. 122, s. 37; 58 & 59 Vict. c. 59, s. 5, sub-section (*c*).] As to the contention that the amount allotted is excessive and that the allotment has not been made in accordance with the principles governing this court, there is no case to show that this court must never allot more than one-third of the joint income. The court had in certain cases granted more.

JEUNE, P., in delivering judgment, said that he did not think it now necessary to decide what was the exact liability of a husband at common law for the children of his wife by a former marriage, as it was clear that liability for them did attach to him by virtue of the Poor Law Acts. The Matrimonial Causes Act, 1886, clearly rendered a husband liable not only for his wife but for his wife's family and the Summary Jurisdiction (Married Women) Act, 1895, extending the section in the former Act, which it repealed, did so without making any exceptions, and in section 4 of the later Act the words used are "any married woman whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain," shall . . ." The words "whom he is legally liable to maintain," in his opinion, brought in the step-children, and therefore he was inclined to say that the husband was bound to provide for them. But it was not necessary to go as far as that, for section 5, sub-section (*c*), gave power to the court of summary jurisdiction to make an order containing a provision that the husband "should pay to the applicant personally," and therefore it was surely to be inferred that the justices were justified in taking into account that the payment was for herself and her children. The only question, therefore, left was whether the amount that had been ordered was a proper one. With regard to that, he thought that the principles on which this court acted were a very proper guide for the justices to follow, but this court was not bound to give any particular amount, but it took into consideration all the circumstances of each particular case. In the present case this court did not think that the amount awarded was excessive.

BARNES, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Bramall, White, Sanders, & Roberts,* for *Page & Gulliford,* Southampton.

Solicitor for the respondent, *W. W. Stocken.*

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Vaughan Williams and Mathew, L.JJ.) April 14.

HOLLAND v. BENNETT. (a.)

Practice—Writ—Service out of jurisdiction—"Breach of contract within jurisdiction"—Action for wrongful dismissal—Letter posted abroad to plaintiff in England—Ord. 11, *r.* 1 (e).

The plaintiff was employed by the defendant, who was a foreigner residing abroad, as the London correspondent of a newspaper, of which the defendant was the proprietor. The defendant wrote and posted abroad a letter addressed to and received by the plaintiff in England giving him two weeks' notice to terminate the employment. In an action for breach of contract and wrongful dismissal,

Held, that the alleged breach occurred abroad and not within the jurisdiction, and that therefore leave could not be given under ord. 11, *r.* 1 (e), *to serve notice of the writ on the defendant out of the jurisdiction.*

Cherry *v.* Thompson, 20 *W. R.* 1029, *L. R.* 7 *Q. B.* 573, *and* Hamilton *v.* Barr, 18 *L. R. Ir.* 297, 35 *W. R. Dig.* 163, *followed.*

Appeal from an order of Bucknill, J., at chambers.

The plaintiff was, in February, 1901, appointed by the defendant London correspondent at a weekly salary of the European edition of the *New York Herald*, of which the defendant was the proprietor.

The defendant was a foreigner having a place of residence in France, but none in England.

On the 26th of October, 1901, the defendant wrote and posted a letter at Naples addressed to and received by the plaintiff in England, giving him notice that he terminated his employment at the expiration of two weeks from that date.

The plaintiff thereupon commenced an action against the defendant for breach of contract and wrongful dismissal, and as he was unable to serve the writ in England he obtained leave to issue a concurrent writ and to serve notice thereof on the defendant out of the jurisdiction. Notice of the writ was accordingly served on the defendant at Nice.

The defendant entered a conditional appearance, and applied at chambers for an order to set aside the notice of the writ of summons and the service thereof on him. The master made an order setting aside the notice and the service on the ground that there was no breach within the jurisdiction of the contract sued on.

Bucknill, J., affirmed this order, and gave leave to appeal.

The plaintiff appealed.

By ord. 11, r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

Tindal Atkinson, K.C., and *P. Rose-Innes*, for the plaintiff.—The contract was clearly one to be performed within the jurisdiction. The only question, therefore, is whether the alleged breach occurred within the jurisdiction. The breach did not occur when the letter was posted at Naples. It occurred when the letter was received by the plaintiff in England. *Cherry* v. *Thompson*, 20 W. R. 1029, L. R. 7 Q. B. 573, is relied upon by the other side, but that was a decision upon section 18 of the Common Law Procedure Act, 1852, containing very different words from those in ord. 11, r. 1 (e). It was an action for breach of promise of marriage, the marriage to take place in Germany, and a letter was written and posted by the defendant in Germany and received by the plaintiff in England in which the defendant declined to carry out the engagement. It was held that the breach of the contract to marry occurred in Germany. That decision cannot apply to ord. 11, r. 1 (e), nor can it apply to an action for wrongful dismissal. It is said that the Postmaster-General is the agent of both parties, and that therefore the breach was complete when the letter was posted at Naples. No case, however, has said that a foreign postmaster-general is to be considered as the agent of both parties. It might be that a letter of dismissal posted at some distant place abroad would take weeks to arrive in this country, and in such a case the plaintiff might be performing his duties between the times of the posting and receipt of the letter, and yet according to the defendant's contention the plaintiff would have been dismissed when the letter was posted, and would be entitled to no salary for the intermediate time. Such a contention ought not to be adopted. The breach, therefore, was not complete until the notice of dismissal was communicated to the plaintiff in England, and therefore the breach occurred within the jurisdiction.

Norman Craig (*J. E. Bankes, K.C.*, with him), for the defendant.—It may be conceded, for the purposes of the argument, that the contract was one to be performed within the jurisdiction. But the alleged breach did not take place within the jurisdiction. The breach was complete when the letter was posted at Naples. The act constituting the breach occurred there, the letter itself being only evidence of the breach. The courts in Ireland had followed the decision in *Cherry* v. *Thompson*, and had applied it to an action for wrongful dismissal: *Mathews* v. *Alexander*, Ir. R. 7 C. L. 575; *Hamilton* v. *Barr*, 18 L. R. Ir. 297, 35 W. R. Dig. 163. The latter of those decisions was upon a rule containing similar words to those in ord. 11, r. 1 (e).

P. Rose-Innes replied.

VAUGHAN WILLIAMS, L.J.—Without in any way saying that the decision in *Cherry* v. *Thompson*, or the decisions of the Irish courts in *Mathews* v. *Alexander* and *Hamilton* v. *Barr*, are wrong, it is impossible for us now to arrive at any conclusion different from that arrived at in those cases. It is a matter of great importance, with regard to the practice in cases of this kind that the decisions should be uniform, and nothing has been suggested in argument to convince us that we ought to hold that those decisions are wrong. There was, therefore, upon the above cases, a complete breach of the contract when the letter was posted at Naples, and the order of the learned judge was right.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Spencer Cridland & Co.*

Solicitors for the defendant, *Lewis & Lewis.*

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 25.

In re GREAT NORTHERN AND CITY RAILWAY CO. (*a.*)

Practice—Appeal from chambers—Court of Appeal—Matters of practice and procedure—Order for question of compensation to be tried in the High Court—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 41—*Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.

Where a judge at chambers has made an order, under section 41 *of the Regulation of Railways Act,* 1868, *for the trial of a question of compensation in the High Court, the appeal from such order lies to the Divisional Court, and not direct to the Court of Appeal.*

Appeal from an order of Bucknill, J., at chambers.

A question having arisen between the Great Northern and City Railway Co. and Richard Long as to the amount of compensation, if any, payable by the railway company in respect of lands of Richard Long, which he as claimant alleged to have been injuriously affected by the exercise of the company's statutory powers, the company made an application under section 41 of the Regulation of Railways Act, 1868, for an order that the question should be tried in the High Court before a judge of the King's Bench Division and a special jury.

Bucknill, J., granted the application, but gave the claimant leave to appeal.

The claimant appealed accordingly to the Court of Appeal.

Danckwerts, K.C. (*George Cave* with him), for the railway company, took the preliminary objection that no appeal lay to this court.—The subject-matter of this appeal is not a question of practice or procedure within the meaning of section 1, sub-section 4, of the Judicature Act, 1894. It is settled that the meaning of that sub-section is that an appeal lies from the judge at chambers direct to this court only on a question of practice or procedure in connection with a cause or matter in the High Court. The question between the claimant and the railway company would in the ordinary course be heard and determined by the Under-Sheriff of Middlesex and a jury under the provisions of the Lands Clauses Consolidation Act. The order of Bucknill, J., directing the question to be tried in the High Court was not in itself a matter in the High Court. In *Watson* v. *Petts*, 47 W. R. 68, [1899] 1 Q. B. 54, the order sought to be appealed from was the refusal of a judge at chambers to grant a prohibition to restrain a county court from exceeding its jurisdiction. It was held that the appeal did not lie to this court, because the question whether the judge should or should not grant the prohibition was not a question of practice or procedure in connection with a cause or matter in the High Court. The same principle was followed in the case of *Stevenson* v. *London Joint Stock Bank*, referred to in 109 Law Times, p. 76. There it was held that a refusal to grant a *certiorari* to remove a cause from the Mayor's Court into the High Court was not a matter of practice or procedure within the meaning of the section. The appeal in this case, therefore, lies not to this court, but to the Divisional Court.

C. C. Scott, for the claimant.—The appellant has adopted the course followed in the case of *Donisthorpe* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 45 W. R. 386, [1897] 1 Q. B. 671, though in that case the objection of want of jurisdiction was not taken. Bucknill, J., having ordered that the question of compensation should be tried in the High Court, the question is now transferred from the Under-Sheriff's Court into the High Court, and it is, therefore, now a matter in the High Court. In each of the two cases cited on the other side the application was refused, and so the matter never got into the High Court at all.

COLLINS, M.R.—In my opinion this objection is fatal. In *Watson* v. *Petts* the question was whether an appeal lay to this court from the refusal of the judge at chambers to grant a prohibition to a county court. This court held that appeal did not lie, on the ground that the application to the judge at chambers was not a matter of practice or procedure in the High Court. Here, when the application was made to the judge at chambers, there was no proceeding in the High Court. It is said that the proceeding has come into the High Court, because the result of the application was that the question of compensation was transferred to the High Court. But that is applying a wrong standard; the answer to the question whether a proceeding is a proceeding in the High Court cannot depend on the result of the proceeding, and if we heard this appeal we should have to say whether the order for transfer was rightly made. In my opinion this class of case is excluded from our jurisdiction by the decision in *Watson* v. *Petts*. The appeal therefore lies to the Divisional Court, and not to this court.

ROMER and MATHEW, L.JJ., concurred.

Preliminary objection allowed.

Solicitors for the company, *Le Brasseur & Oakley.*

Solicitors for the claimant, *Geo. Brown, Son, & Vardy.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 10.

WRIGHT *v.* GLYN. (*a.*)

Principal and agent—Authority of agent—Ostensible authority—Holding out—Authority to pledge credit—Master and coachman—Authority of coachman to order forage.

The defendant employed a coachman under an arrangement whereby the coachman was to be paid a weekly sum, including the cost of foraging the defendant's horses. The coachman ordered forage for the defendant's horses from the plaintiff without mentioning the arrangement, and the plaintiff supplied forage accordingly for several months, giving credit to the defendant. The defendant duly paid the agreed weekly sums to his coachman, and did not know from whom he ordered forage.

Held, that the mere relation of master and coachman did not of itself involve as a matter of law ostensible authority on the part of the coachman to pledge the master's credit for forage supplied for the master's horses, and that there was no evidence of a holding out by the defendant of his coachman as having such authority.

Appeal from the judgment of Grantham, J., at the trial of an action without a jury.

The action was brought by the personal representative of J. F. Trigg, deceased, who carried on business as a corn merchant, to recover £95 2s. 6d.,

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the price of forage supplied by Trigg to the defendant between April and October, 1898.

The evidence was to the following effect:

The defendant had entered into an arrangement with his coachman or groom, a man named Dimont, by which the latter was paid a weekly sum to include both his own wages and the cost of foraging the defendant's horses.

In April, 1898, Dimont called at Trigg's place of business and saw Bates, the manager, and ordered the forage in question on behalf of his master without mentioning the arrangement.

Bates after making inquiries with regard to the defendant supplied the forage from time to time, giving credit to the defendant. Bates admitted in cross-examination that he knew that some owners of horses in London paid their coachmen to forage their horses.

The defendant regularly made the agreed payments to Dimont, and at the end of November, 1898, left England for South Africa, and about the same time Dimont left his service.

On the defendant's return in 1901 he became aware for the first time of the claim against him for the price of the forage.

It was contended for the plaintiff that the defendant was liable, inasmuch as he had had the benefit of the forage supplied, and he had not given Trigg any notice of the arrangement between himself and Dimont, whereby Dimont's ostensible authority was limited.

For the defendant it was argued that there had been no holding out of Dimont as having authority to pledge his master's credit, and reliance was laid on the admission by Bates that he knew that some owners of horses in London paid their coachmen to forage their horses, and it was contended that knowledge of this fact put him on inquiry as to whether there was such an arrangement in the present case.

Grantham, J., on the authority of the cases of *Rimell* v. *Sampayo*, 1 C. & P. 254, and *Precious* v. *Abel*, 1 Esp. 350, gave judgment for the plaintiff.

The defendant appealed.

Danckwerts, K.C., and *Loehnis*, for the defendant.

Theobald Mathew, for the plaintiff.

The following cases were cited: *Rusby* v. *Scarlett*, 5 Esp. 76; *Stubbing* v. *Heintz*, Peake's Nisi Prius Rep. 66; *Payne* v. *Lord Leconfield*, 30 W. R. 814; *Pole* v. *Leask*, 33 L. J. Ch. 155; *Alexander* v. *Gibson*, 2 Camp. 555; and *Farquharson* v. *King*, 49 W. R. 673, [1901] 2 Q. B. 697.

Cur. adv. vult.

March 10.—COLLINS, M.R., read the following judgment: This is an action brought by the plaintiff as representative of one Trigg, deceased, a corn merchant, for £95 2s. 6d., being the price of forage supplied by the deceased on the order of the defendant's coachman and consumed by the defendant's horses. The defence is that the coachman had no authority to pledge his master's credit for the forage. Grantham, J., has given judgment for the plaintiff, and the defendant now appeals. The facts lie in a very short compass, and the evidence consists of certain affidavits made under order 14, supplemented by the evidence at the trial, of Bates the manager of the deceased, and that of Mr. Glyn, the defendant. The coachman was not called. It appears that one Dimont, the coachman or groom—he is called sometimes one and sometimes the other in the evidence, and it does not seem to be material which was his true capacity—was employed by the defendant under an arrangement that the defendant should pay him a certain sum per week per horse, and that he should for such payment supply forage and shoeing. It appeared from Bates's evidence that Dimont had called and said he wanted to open an account for forage for Mr. Glyn; that he thereupon took the order and made the usual inquiries about Mr. Glyn, and then delivered the goods, and continued to supply them till the defendant's horses left town in the following November; and he swore that he gave credit to the defendant, to whom in November he forwarded a statement of account at his address in London. The defendant had then left England for South Africa and had never had any dealings whatever with the plaintiff, nor was he aware till his return from South Africa from whom Dimont had ordered forage, or that it had not been paid for. The agreed payments to Dimont had been regularly made. Bates admitted that he was aware that some of his customers—perhaps 10 per cent.—had arrangements with their coachmen similiar to that made by the defendant, but, he added, "the coachmen then say so." The question, therefore, is, on these facts, Has the plaintiff proved his claim against the defendant? I am of opinion that he has not. There can be no question as to the law in the matter. In order to fix the principal for an order given by a person purporting to be his agent, it is quite clear that either actual or ostensible authority to contract for the principal, or ratification, must be proved. Here express authority is distinctly negatived, and the case for the plaintiff must rest on ostensible authority alone. It certainly cannot be said, as a matter of law, that a coachman or groom has ostensible authority to pledge his master's credit for forage for his horses. The mere relation of master and coachman does not of itself involve as a matter of law such authority. If that be so, it becomes a pure question of fact—Was there evidence of a holding out by the defendant of Dimont as having his authority to pledge his credit? It seems to me there was none. The defendant is never introduced into the discussion at all by any act done by him except that of taking Dimont into his service. Bates acted on the representations made to him by Dimont, and on nothing else. He took the risk of those statements being true or false; and though he learnt that Dimont was the defendant's coachman, and was aware that arrangements, such as that here proved, sometimes existed between coachmen and their masters, he took no trouble to ascertain from the defendant whether any such arrangement existed between him and Dimont. Unless, therefore, the fact that Dimont stated with truth that he was the defendant's coachman amounts to a holding out by the defendant of Dimont as having authority to pledge the defendant's credit for forage, there is literally no evidence to fix the defendant in this case. We are not at liberty to try this case upon any facts except those which appear in evidence; and we certainly cannot assume, as we were invited to do by plaintiff's counsel, that it must be taken as common knowledge that coachmen have *primâ facie* authority to pledge their masters' credit for forage, and that the *onus* is thrown on the defendant of making the fact of any limitation of any such authority known to persons who supply forage. Could it be said that where the master himself makes a contract with a corn merchant for the foraging of his horses the coachman has, nevertheless, ostensible authority to bind the master by other contracts made with other persons to supply it, or that, where the master supplies his own forage, the coachman, by virtue of his position as such, has ostensible authority to order it elsewhere? Suppose the contract with the coachman were that he should supply horses, carriage, and forage for a lump sum, could he, nevertheless, make the master liable to the corn merchant on the footing of ostensible

in the case of a deed, a notice requiring payment of the mortgage money served on the mortgagor, and assuming that there would have been default in payment for three months after such service—all of which assumptions I doubt—I yet think that the presence of these provisions in the Conveyancing Act would not justify us in departing from the law as it appeared to be established before the passing of that Act. Let me now consider the reason of requiring a notice as a condition of the implied power of sale. It may be said that the object of the notice is to put the mortgagor in default, and that it is this which is, in essence, the condition of the power of sale. Perhaps so. But in what respect is the mortgagor to be in default before the pledge can be sold against him? The debt is due, and an action could, *ex hypothesi*, be brought against him. Moreover, why is it that the notice must be "reasonable," as by all the authorities it must be? To my mind the answer is plain—to give the mortgagor a reasonable opportunity to redeem. In my judgment none of the letters did give the mortgagor in this case this opportunity. Of course he had the right to redeem whether or not a notice was given. This is not the opportunity intended to be given by a notice; there is nothing in the letters to put a certain end to the indefinite credit. There is nothing in the letters to lead the mortgagor to suppose that he must redeem by a definite day or suffer a sale of the pledge. On the contrary, the letters plainly tell him that the subject-matter of pledge has ceased to exist. It is unnecessary to look at any of the letters prior to the purchase of the last 300 shares—that is to say, prior to November, 1897. [His lordship then read certain correspondence between the plaintiff and the defendants in May, 1898, and continued:] The defendants are here waiting for instructions to sell, and certainly make no demand for immediate payment or for payment by a fixed date. Then comes the notice from the secretary of the company of the proposed amalgamation meeting, accompanied by a letter from the defendants. This is followed by an amalgamation notice from the liquidators of the 16th of August, together with a registered letter of the defendants of the 22nd of August. It seems to me that up to this date there is nothing in the letters of the defendants making such a demand as to raise an mplied power of sale in case the mortgagor, the plaintiff, should not comply with it. On the contrary, the letters ask for instructions to sell, or for money to take up the substituted shares in the new company; and when one looks at the letter of the 22nd of August, it seems to me impossible that anything in this letter containing the misstatement as to the mortgagor's position can operate to raise an implied power of sale. The mortgagor might have been willing and able to redeem if he had known that he could, as a dissentient shareholder, have insisted on being paid out at the then value of the shares. This, in my judgment, brings the case within the principle of the decision in *Pigott* v. *Cubley*, 12 W. R. 467, 15 C. B. N. S. 701, in which a misstatement by the pledgee in his claim of the amount due prevented the implied power of sale arising, and made the sale wrongful. This misrepresentation as to the security being forfeited if the shares in the new company were not taken up, and the view of the defendants that they were entitled to treat themselves as unsecured creditors, although they in fact exchanged the shares for shares in the new company, continued until the sale of the new shares in March, 1899. Moreover, in the account sent with the demand for payment, at a time when 1,050 shares were still unsold, but when the 700 shares had been surrendered, there is a misrepresentation in effect by omission, bringing the case within the principle of *Pigott* v. *Cubley*. The mortgagor was entitled, when he knew of the surrender of the old against the new shares to elect to take the new shares, but he was not bound so to do; and until he did so, the position was that the mortgagee had realized the old shares by surrender and was bound to give credit for the value. I am inclined to think that, even if there had been such notice of default as to raise an implied power of sale prior to the taking up of the new shares by the mortgagees in September, the power of sale would not have continued and extended to the new shares which the mortgagor had no opportunity of redeeming; but this is unimportant, as I am clearly of opinion that there never was such notice and default as to raise an implied power of sale either by the letter of the 31st of May, or by any letter subsequent to it; and that no notice is material prior to the date of the purchase of the last 300 of the 700 shares. It follows that, in my opinion, the sale of the 1,050 shares substituted as security for the 700 was wrongful, and that the plaintiff is entitled to damages; but I think that those damages are limited to the price realized by the shares less the amount due to the defendants for principal, interest, and proper charges; but as the £55 brought into court was not sufficient to answer the plaintiff's claim, I think that the plaintiff is entitled to judgment, with costs. Farwell, J.'s order as to costs is based on the assumption that the defendants were entitled to sell. Perhaps I ought to add that the reason why I think, notwithstanding the decision of Wills, J., in *Michael* v. *Hart*, that the damages in this case must be limited to the value of the shares at the date of the wrongful sale, and do not extend to the highest value between the wrongful sale and the trial, is that the circumstances of this case do not bring it within *Michael* v. *Hart*, assuming that decision to be right. In the present case the evidence shows that the plaintiff never was in a position to redeem the shares until the sale; and it is the merest speculation to assume that the plaintiff would have kept the shares till May (the time of the highest price) and then sold out, especially as the mortgagee could by notice have compelled him to redeem or have the shares sold.

STIRLING, L.J.—This case was decided in the court of first instance and has been argued in this court on the basis that the relation between the plaintiff and the defendants was that of mortgagor and mortgagee; and I think that it must now be dealt with on that footing. I agree with Farwell, J., in thinking that the statement of the law at p. 275 of Robbins on Mortgages is correct. The passage is as follows: "If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock and repay himself principal and interest, without any authority from the mortgagor and without commencing an action of foreclosure." This, however, leaves open the question, What are the rights of the mortgagee where no day has been appointed for payment? And I have nowhere found any authoritative statement of the law on his head. Some light may be derived from what has been said by learned judges as to the rights of a pawnee or pledgee of chattels in like circumstances. Thus Bowen, L.J., says in *Ex parte Hubbard*, 35 W. R. 2, 17 Q. B. D. 690; "There is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money either at the time appointed or after notice by the pledgee." In *In re Morritt*, 35 W. R. 277, 18 Q. B. D. 222, Cotton, L.J., says:

"A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale." He afterwards says, with reference to the position of a mortgagee of personal chattels, "Where there is no express power of sale given by the mortgage, he has, after default in payment, and after he has given to the mortgagor a reasonable time to pay the money due, a power to sell and give a good title to the purchaser, though, of course, the mortgagor has, at any time before sale, a right, on payment of the money due, including expenses, to prevent the sale and redeem the chattels." According to those authorities it would seem to me that where no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mortgagor, and default must be be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case. A notice demanding payment of an excessive sum has been held to be bad: *Pigott* v. *Cubley*. The notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage; and I think it is at least desirable that it should fix a day for that purpose and also convey to the mind of the mortgagor that if he fail to avail himself of the opportunity the mortgagee will be in a position to put in force his rights.

The transaction between the plaintiff and the defendants commenced with a purchase of 400 shares on the 29th of July, 1897. The plaintiff remitted to the defendants a part only of the purchase-money, and the shares were transferred to and registered in the names of two of the defendants. On the 31st of August, 1897, the defendants wrote to the plaintiff a letter containing the following passage: [His lordship then read the passage above set out, and continued:] By a letter dated the 12th of October, 1897, the plaintiff acknowledged the receipt of this letter of the 31st of August, and excused himself for not having sent money to the defendants; but he raised no objection to the exercise of the right claimed by them. I think that he hereby gave his consent to the defendants' continuing to hold the shares on the terms stated in that letter, and that, on non-payment by him on the 15th of September, 1897, of the amount then due to the defendants, the defendants became entitled to sell those 400 shares. Subsequently to the last mentioned date, further purchases of shares, amounting to 300 in all, were made by the defendants on behalf of the plaintiff, who again remitted to them part only of the purchase-money; and the shares were transferred and registered in the same way as the original 400. The last of these purchases was made on the 11th of November, 1897. All the unpaid purchase-money remained due on the 31st of May, 1898, on which day the defendants wrote to the plaintiff a letter in which they expressed their desire that he would not further delay in fulfilling his promise to liquidate his indebtedness to the defendants, which they stated amounted at the end of March to £577 10s. 6d., and carried an accruing 6 per cent. interest. They informed him that the shares were then only worth a doubtful 10s. per share. On the 7th of June the plaintiff replied to the effect that he had not received some money due to him in London, and this was the cause of the delay, but he expected to receive it in the course of the month, and then he would settle with them. Shortly after this time a scheme of reconstruction of the company under section 161 of the Companies Act, 1862, was resolved on. Under this each assenting shareholder was to receive in exchange for every two £1 shares held by him three shares in a new company of £1, but with only 17s. paid up; and the 9th of September was fixed as the last day for assents by shareholders. Correspondence took place between the defendants and the plaintiff with reference to this scheme in June and July; but I pass by this and come to an important letter by the defendants to the plaintiff, dated the 22nd of August, 1898. [His lordship then read the letter, and proceeded:] I think that, when fairly construed, this letter amounts to notice to the plaintiff that unless he should by the 9th of September remit to the defendants both the amount of his indebtedness to them in respect of the shares and also the amount which would become payable on the new shares, the defendants would deem themselves at liberty to enforce payment of the debt. On the 3rd of September the plaintiff wrote to the effect that he was unable to remit any money, asked the defendants to regard his interests respecting the shares, and expressed the hope that they would obtain at least the sum they had paid. On the 9th of September the defendants replied to this letter, and said that unless they received a remittance in response to a telegram sent to the plaintiff ("must have cash remittance") they must reluctantly take steps to recover their debt. This remittance was stated to be of the moneys due to the defendants, with a further sum to cover the amount payable on claiming and taking up the shares. On the same day notice was given that time for assenting to the reconstruction scheme was extended to the 23rd of September. On the 15th of September the defendants wrote to the plaintiff informing him of this extension, and said: "We must inform you that if you fail to remit you will lose all interest in the shares, and we must proceed against you to recover the sums we have paid on your account" On the 19th of September the plaintiff wrote to the effect that it was quite impossible for him to remit as desired by the defendants, and there, so far as the plaintiff is concerned, the correspondence ceased until July, 1889, though letters demanding payment were sent by the defendants on the 3rd of October and the 15th of November, 1898.

We were invited by the learned counsel for the defendants to hold that the letter of the 22nd of August, 1898 (if no other), was such a notice as entitled them to sell the shares, and I have come to the conclusion that it was. It fixes a day for payment—viz., the 9th of September, 1898. The period between the date of the letter and the day fixed for payment is two days longer than the period fixed by the letter of the 31st of August, 1897, which was assented to by the plaintiff, and was, I think, perfectly reasonable, both in itself and also when regard is had to the preceding correspondence. It also clearly intimates to the plaintiff that if he fails to comply with the terms of it the defendants will proceed to enforce their rights. It is said that this letter contains such misrepresentations as to invalidate it as a notice. These are, first, that the defendants speak of the shares as liable to forfeiture, in the event of the plaintiff not assenting to the scheme; and, secondly, that they describe themselves as unprotected by any security. Literally, no doubt, these statements are incorrect. If the plaintiff did not assent to the scheme, he would have been entitled to receive the value of his shares, which was ascertained to be a little over 1s. per share. The defendants had a security, and if they had sold the old shares in the market they would have obtained in the market

about the same sum per share. Although in these respects the letter is not strictly accurate, I think that the statements contained in it are correct, and that it was not invalidated as a notice by any inaccuracies in it. There was no misleading; the letters of the plaintiff show that he was impecunious, and the sum of £30 would not have enabled him to redeem a debt of over £500. The subsequent correspondence extended the time for payment to the 24th of September, and it does not seem to me that the subsequent letters of the 3rd of October and the 15th of November, written by the defendants, deprived them of any right which they had thus acquired. I say this because, as I understand, the learned judge who heard the case and saw the witnesses has found as a fact that the defendants, although they made a serious and regrettable mistake as to their legal position, nevertheless acted in good faith, believing themselves to be owners of the shares substituted for those originally bought. In my judgment the defendants had, under the letter of the 22nd of August, 1898, power to sell all the 700 shares at any time after the 24th of September, 1898, and also, as regards the first 400 shares, the power derived from the letter of the 31st of August, 1897. Both these powers were available over the new shares substituted for them respectively. I do not think that the fact found by Farwell, J., that the defendants sold *bonâ fide*, believing themselves to be absolute owners, precludes them from defending themselves on the ground of a power of sale which they were entitled to exercise; and I think that *Henderson* v. *Astwood* is an authority in support of that view. In my opinion, the judgment of Farwell, J., was right, and the appeal ought to be dismissed.

COZENS-HARDY, L.J.—The difference of opinion between my two colleagues has made me approach this case with anxiety; but, after mature consideration, I think Farwell, J.'s, judgment was correct and ought to be affirmed. The plaintiff alleges in his statement of claim that 700 shares, which were purchased for the plaintiff by the defendants acting as his brokers, were, in accordance with a verbal arrangement between the plaintiff and the defendants, transferred into the names of two members of the defendants' firm "by way of mortgage to secure the sum so due from the plaintiff." This allegation was not admitted by the statement of defence, but it was admitted before Farwell, J., and the argument before us has proceeded on that footing. Assuming the true relation between the parties to be that of mortgagor and mortgagees of shares, I think it is settled law (*Wilson* v. *Tooker*) that the mortgagees have a power of sale, provided that a reasonable time has elapsed after notice requiring payment. The notice need not state that the mortgagees will sell, it is sufficient that the notice requires payment of the mortgage money. On this point section 20 of the Conveyancing Act, 1881, may be referred to. It clearly expresses that which is implied when judges speak of the necessity of reasonable notice, without saying what the notice should comprise. Now in the present case I think the letters written by the defendants from April to September, 1898 (which his lordship specifically referred to), were, both separately and collectively, good notices requiring payment of the mortgage debt. I do not rely upon the letter of the 31st of August, 1897, because at that date only 400 shares had been purchased; and the letter could only have relation to those 400 shares. No time being originally fixed for payment of the mortgage debt, it was payable on demand, and each and all of the letters I have referred to must be regarded as a demand for payment. It is true that in *Tucker* v. *Wilson* there was a definite time fixed originally for payment; but, in my opinion, that was not essential to the decision. The position of a mortgagee is at least as good as, and I think in some respects better than, the position of a pawnee. In *In re Richardson, Shillito* v. *Hobson*, 34 W. R. 286, 30 Ch. D. 396, Fry, L.J., at p. 403, states the law as follows: "The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed, if there be a time fixed, or in default of payment after reasonable notice, if no time be fixed." And in *Ex parte Hubbard, In re Hardwick*, Bowen, L.J., uses similar language: "In all such cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed or after notice by the pledgee." I may observe that the letters to which I have referred, with one exception, do not contain any statement, accurate or inaccurate, as to the amount due; but although a mistake as to the amount due may destroy the effect of the notice, as between pledgor and pledgee—*Pigott* v. *Cubley*—I think that is not the law as between mortgagor and mortgagee. In order to restrain a mortgagee from selling, in the absence of fraud, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into court, or tender to the mortgagee, the amount claimed to be due. Having regard to the nature of the property, a fortnight, or at the outside a month, would in the present case be a reasonable time. If, therefore, the defendants had sold the 700 shares in February and March, 1899, I should have felt no difficulty in this case. But some difficulty is occasioned by the fact that the 700 shares have ceased to exist, and that under a so-called reconstruction scheme the defendants applied for and obtained an allotment of 1,050 shares in a new company in respect of these 700 shares, and that they were foolish enough to fancy that they could claim the benefit of those shares as their own property not subject to any rights of the plaintiff, and that they sold those new shares in February and March, 1899, not as mortgagees, but as absolute owners. Now it is clear that those 1,050 new shares were as much subject to the mortgage as the original 700 shares. It is precisely similar to the case of a renewed lease granted to the mortgagee. This is the plaintiff's allegation. It follows that the substituted property is subject to the same power of sale as the old property was subject to. Nor can I see that it makes any difference that the defendants sold under the belief that they were no longer mortgagees. Farwell, J., has found that they were not fraudulent; and this being so, if authority is wanted, I think the decision in the Privy Council in *Henderson* v. *Astwood* suffices to show that the sales in February and March, 1899, may be supported as sales under their power as mortgagees. I cannot help expressing my regret at the conclusion at which I have arrived, because I am convinced that in fact the relation between the parties was not that of mortgagor and mortgagee. The plaintiff was in Spain, and the defendants were in London. The verbal arrangement pleaded is a mere fiction. The relation between the parties was simply that of client and brokers; and if the plaintiff had sued the defendants on that footing, as at present advised, I think he might have recovered damages for wrongful conversion. The rights of a broker, in respect of a broker's lien, or under the rules of the Stock Exchange, are not the same as the rights of a mortgagee under an express contract of mortgage. In the view which I take it is unnecessary to consider what would have been the proper measure of damages if the conversion of the shares had been wrongful.

Solicitors, *E. F. Weldon; Morley, Shirreff, & Co.*

High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 11, 17.

In re LEAS HOTEL CO. (LIMITED).
SALTER *v.* LEAS HOTEL CO. (LIMITED). (*a.*)

Company—Debenture—Goodwill—"Property"—Debenture-holder's action—Jurisdiction to appoint manager.

The goodwill of a hotel business is the property of the company to which the hotel belongs, so that if all the "property" of the company is charged by its debentures the goodwill of the hotel business is included therein, and a manager of the business can be appointed in a debenture-holder's action.

Jennings *v.* Jennings, 46 *W. R.* 344, [1898] 1 *Ch.* 378, *and* In re David and Matthews, 47 *W. R.* 313, [1899] 1 *Ch.* 378, *applied.*

Motion for the appointment of a receiver and manager in a debenture-holder's action.

The debentures were thirty in number and were issued on the 5th of March, 1898. Six of them were held by the plaintiff.

By the terms of each debenture the company charged "all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever both present and future," with payment of £100 and interest at 6 per cent., but the goodwill and business were not expressly mentioned.

The writ in the action was in the usual form.

P. F. S. Stokes, for the plaintiff.—Though the goodwill and undertaking of the company are not expressly mentioned, yet the words of the debenture are sufficiently wide to include them, and therefore a manager of the hotel can be appointed: *Peek* v. *Trinsmaran Iron Co.*, 24 W. R. 361, 2 Ch. D. 115; *Makins* v. *Percy Ibotson & Sons*, 39 W. R. 73, [1891] 1 Ch. 133; *Whitley* v. *Challis*, 40 W. R. 291, [1892] 1 Ch. 64; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, 43 W. R 486, [1895] 1 Ch. 629; *Jennings* v. *Jennings*, 46 W. R. 344, [1898] 1 Ch. 378; *In re David and Matthews*, 47 W. R. 313, [1899] 1 Ch. 378.

Hon. F. Russell, for the company, offered no opposition.

KEKEWICH, J.—On the whole I think I have jurisdiction to appoint a manager. The question whether I have such jurisdiction depends entirely on the question whether the goodwill or business of the company is charged by the debentures. [The learned judge here read the words from the debenture before cited, and continued as follows:] The company is carrying on the business of a hotel, and the question is whether these words include that business. The test in all these cases is whether in the event of the realization of the security the business or goodwill can be sold under the order of the court, or, in other words, whether the plaintiff under the order of the court can make a good title to a purchaser. That again depends on the question whether the goodwill or business is expressly or by implication included in the property charged, so as to make it part of the security. That was clearly pointed out by the Court of Appeal in *Whitley* v. *Challis*, and it has been pointed out again and again in many cases. But nevertheless it seems continually to be forgotten in practice that the duty of a manager is only to manage for the purpose of realization, and until he can conveniently realize. Notwithstanding that, I have frequently before me applications that the manager shall go on managing for the purpose of making a profit; but I always insist on realization at the earliest convenient moment and upon management only to that end. *Whitley* v. *Challis* was a peculiar case. The security there was extremely like an ordinary mortgage, and quite different from the usual form of a debenture. It was a mortgage of a building agreement and of all the premises comprised therein and the hotel or building to be thereafter erected. There were no additional words which could be construed as passing the business carried on in the hotel, and for that reason, and because the business could not be sold by a mortgagee by the intervention of the court, the Court of Appeal refused to appoint a manager, and explained their decision at length on that ground. On the other hand, I have before me the two cases of *Jennings* v. *Jennings* and *In re David and Matthews*. The former was a partnership case, and Stirling, J., in deciding it, had to consider whether the goodwill was comprised in the words "assets of the partnership," and he held that it was. He says: "What the certificate speaks of is 'the assets' of the partnership; the goodwill is not expressly mentioned. It was not disputed that the word 'assets' includes the goodwill so far as it constitutes property." He treated the goodwill as "property." If it is property of a partnership clearly it is property of a company. On that he not only says, as I understand, that goodwill is included under assets, but takes care to show that it is assets because it may be treated as property. In *In re David and Matthews* Romer, J., had different words to construe—namely, the words "effects and securities"—and the learned judge, following *Jennings* v. *Jennings*, thought that those words were sufficient to cover the goodwill. Here the words are "all property and effects whatsoever." If as regards a partnership the words "partnership assets" or "effects" cover goodwill, it would seem that the word "property" must also cover goodwill. Then is there any distinction between the case of a partnership and that of a company? I know of none. A company is simply a partnership on special terms authorized by the Legislature, and what is true of a private partnership must be true of a joint stock company. I therefore think that the goodwill passed under this debenture, and grant this application accordingly.

Solicitors, *Dod, Longstaffe, Son, & Fenwick; F. G. Lewis.*

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

Chan. Div. Joyce, J. — Feb. 28; March 4, 5, 15.

GODWIN AND ANOTHER *v.* SCHWEPPE'S (LIMITED). (*a.*)

Easement—Light—Building estate—Deviations from building agreement—Implied grant of light—Derogation from grant—Conveyancing Act, 1881, *s.* 6 (2).

The grantee of a house with the lights under the words imported into the grant by the Conveyancing Act, 1881, *s.* 6 (2), *is only entitled to such an easement of light as is consistent with the intention of the parties to be implied from the circumstances existing at the time of the grant and known to the grantee.*

O. entered into a building agreement with S., a builder, a plan on the usual lines being attached to the agreement with the sites of the proposed buildings plotted out upon it. S., having built some of the houses in accordance with the agreement, with the assent of O., built upon

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

certain of the remaining plots a block of mansions not in accordance with the building scheme. S. constructed the mansions with a party-wall, one-half of which was upon the adjoining plot, his intention being to add a corresponding block upon the adjoining plots. This intention was never carried into effect. The plots on which the first block had been erected were conveyed by O. to S. in fee simple, the conveyance containing no express grant of light. S. the next day mortgaged the premises to X., who had full knowledge of the building agreement and of the manner in which the mansions had been erected. O. subsequently sold the plots adjoining the party-wall to S., who in turn conveyed the same to the defendants. X. subsequently sold the block of mansions, under his power of sale, to O., who made a settlement of the property, under which he was himself interested.

On an action being brought by the trustees of the settlement to restrain the defendants from building in such a manner as to obstruct the lights of the mansions,

Held, that the plaintiffs were not entitled under the Conveyancing Act, 1881, *s.* 6 (2), *to any greater easement of light than such modified easement as was contemplated by O. and S. at the time when the first block of mansions was erected.*

Birmingham Banking Co. *v.* Ross, 36 *W. R.* 914, 38 *Ch. D.* 295 *applied.*

This was an action instituted in respect of the obstruction of the access of light to certain windows which were not ancient lights.

The facts of the case were as follows: One Oxley, being owner of a building estate at Hammersmith, on the 19th of January, 1884, entered into a building agreement with a builder named Sage. The property was plotted out in the usual manner for a building estate, upon a plan attached to the agreement. The plots were numbered from 1 to 44 inclusive.

By the agreement (clause 3) Sage covenanted "to build, cover in, and completely finish within twelve calendar months from the date thereof on each of the parcels of ground numbered 1 to 9 inclusive on the said plan, and within twenty-seven months from the date thereof on each of the parcels numbered 10 to 19 inclusive in the plan a good and substantial dwelling-house or shop with proper vaults, areas, and drains thereto and of the actual cost of £1,000 each. . . . And also within twenty-seven calendar months from the date thereof to erect on each of the said parcels of ground numbered 20 to 44 inclusive a coach-house and stable premises, dwelling-house or cottage . . . of the actual cost of £300 each."

By clause 10 of the agreement Oxley covenanted, so soon as the buildings had been completed, to grant to Sage a lease of each parcel of ground for a term of ninety-nine years from Christmas, 1883, at a fixed rent for each plot of ground, but it was provided also (by clause 14) that in the event of failure to obtain the necessary sanction of the Metropolitan Board of Works to the formation of a certain road marked out upon the plan, a fresh scheme should be settled by arbitration. There was also reserved to Oxley power under certain conditions to re-enter the premises and to complete the buildings covenanted by Sage to be erected; and by clause 17 Sage was, upon certain terms, to be allowed to purchase the fee simple of the premises agreed to be demised.

The plots numbered 1 to 8 were built upon and purchased by Sage pursuant to the option contained in clause 17. Sage then proposed to Oxley to erect upon plots 10, 11, 12, and part of 30 (to which they were adjacent) a block of mansions, ultimately and now known as Addison-mansions. This was assented to, and these mansions were erected by Sage with the concurrence of Oxley. It was in respect of certain windows in the western side of these mansions that the present action was brought.

To the west of the site of the mansions were the rest of plot 30 and plots 29, 28, 27, and 26, hereinafter referred to collectively as "the adjoining ground." They now formed the site of the buildings (stables and a carriage or van house) complained of in the action as obstructing the access of light to the windows of the mansions.

According to the building agreement the several plots forming the adjoining ground were amongst those which were to have built upon them "a coach-house and stable premises, dwelling-house or cottage" as might be agreed, and in default of agreement as might be settled by arbitration, in which last event the buildings were to be a "mews or workmen's residences or private houses."

When the building of Addison-mansions was commenced Sage contemplated the erection of another and corresponding block of mansions upon the adjoining ground, and he at the same time laid the foundations therefor in such ground with the concurrence of or without objection from Oxley. Addison-mansions were built with about half of the western wall, from the northern end to the middle of the western side of the mansions constructed as a party wall, having chimney breasts and apertures for fireplaces on the outside. Then there was a return wall of about four feet in length at right angles to this party wall; then a wall parallel to the party wall and with the return wall forming the two sides, or one end and one side of an area or open space not intended to be built upon. The southern end of this area abutted upon the road and the western side was open to the adjoining ground.

These foundations on the adjoining ground were obviously and admittedly laid so as to leave or provide a similar and equal area on the adjoining ground in such a manner that the two areas together would make a space or court, in the shape of a parallelogram with no buildings thereon.

The mansions having been built, Sage exercised his option to take a conveyance in fee instead of a lease. That conveyance was made by an indenture dated the 5th of May, 1886. Attached to the conveyance was a plan upon which the two areas were plainly shown and also the party wall, which was there so described. The conveyance contained no specific grant of light, but by virtue of section 6 (2) of the Conveyancing Act of 1881, the deed operated to convey with the mansion all light appertaining or reputed to appertain thereto or at the time of the conveyance enjoyed therewith.

On the following day, the 6th of May, 1886, a mortgage was made by Sage to Sim and others, the same solicitor acting for Sage and the mortgagees. The description of the parcels and the plan were, in all material particulars, identical with those on the conveyance. The mortgagee had full notice of the mortgagor's title, of the building agreement, and of the actual condition of the buildings.

On the 28th of September, 1886, this mortgage was transferred to other mortgagees (there being a further advance); and the deed of transfer contained a plan identical with that on the conveyance.

In 1891 the mortgaged premises were sold under the power of sale in the mortgage, Oxley himself being the purchaser. The present owners, the plaintiffs in the action, were the trustees of a settlement of the property made by Oxley, and under which he was interested.

The defendants were the owners of the adjoining ground. They derived their title under a conveyance by Oxley to Sage in 1887, and a subsequent conveyance by Sage. Neither of these purported to

reserve any right to light in favour of the mansions, which were then vested in the mortgagor.

The defendants erected upon the adjoining ground stables and a carriage or van house. These buildings were both further away from the mansions and of less height than the corresponding block of mansions originally contemplated would have been if erected.

Younger, K.C., and *Rolt*, for the plaintiffs.—We claim these lights under an express grant imported into the conveyance of the 5th of May, 1886, by virtue of the Conveyancing Act, 1881, s. 6 (2). In that deed there was no reservation of light by the vendor Oxley. At the time of that conveyance there was no building scheme in existence. This one block of mansions had been allowed to be built so as to cover several lots; and the time within which the buildings had, under the agreement, to be erected was passed. And where you have an express grant there cannot be an implied reservation: *Wheeldon* v. *Burrows*, 28 W. R. 196, 12 Ch. D. 31. The mere fact of land being building land is not in itself, in the absence of express reservation, sufficient for the purpose: *Birmingham &c. Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295, as explained by *Broomfield* v. *Williams*, 45 W. R. 469, [1897] 1 Ch. 602. It was the view of Cotton, L.J., in the former of those cases that both parties knew there was an obligation on the grantee to erect buildings which would necessarily obstruct the light. Here the mansions were erected by the grantee, and it was he and not the grantor who built the party wall: *Pollard* v. *Gare*, [1901] 1 Ch. 834, 49 W. R. Dig. 55. If at the date of the conveyance of the 5th of May, 1886, Sage had any interest in the adjoining ground (which we deny) still he was precluded from obstructing our light by reason of the mortgage of the 6th of May, 1886.

They also cited *Lawrence* v. *Horton*, 38 W. R. 555.

Hughes, K.C., and *Harman*, for the defendants.—This is a much stronger case than *Birmingham Banking Co.* v. *Ross*. That Sage undoubtedly built under the building agreement is shown by the form of the conveyance to him. At that time it is clear that he intended to build on the adjoining land a block of buildings to correspond with Addison-mansions. He had an equitable interest in that land under the building agreement. As both the plots of land were subject to the same agreement the case is quite different from that of the sale of a building on the edge of a vendor's land. The right to light was limited by the circumstances existing at the time of the grant, and it was obvious that no building could be erected on the adjoining ground without in some way interfering with the light to the mansions. If the question had been raised at the time, Sage could only have had a limited grant of light: *Birmingham, &c., Banking Co.* v. *Ross*; *Broomfield* v. *Williams*; *Burrows* v. *Lang*, 49 W. R. 564, [1901] 2 Ch. 502. The building agreement was in fact never abandoned at all, though Sage postponed for a time the erection of the corresponding block of mansions. That it was the intention of the parties to erect such a block at some time or other is clearly shown by the manner in which the party-wall was marked upon the plan to the conveyance. Section 6 (2) of the Conveyancing Act, 1881, has only a restricted meaning when dealing with a newly-erected house: *Beddington* v. *Attlee*, 35 W. R. 799, 35 Ch. D. 317; *Birmingham, &c., Banking Co.* v. *Ross*; *Myers* v. *Catterson*, 38 W. R. 488, 43 Ch. D. 470. The existing buildings do not form nearly so serious an obstruction to the plaintiff's lights as the contemplated block of mansions, if erected, would have done.

Cur. adv. vult.

March 15.—JOYCE, J. (after stating the facts as above): It is contended on behalf of the plaintiff (and it is to Oxley's interest at the present time to support this contention) that the grant of light by him under the general words imported by the Conveyancing Act, 1881, into the conveyance of the 5th of May, 1886, operated against himself as an absolute and unlimited grant of light for the windows in the western side of Addison-mansions. In other words, it is contended that by such conveyance Sage was, and the persons who derive title under him to the adjoining ground now are, precluded from erecting thereon, either the corresponding block of mansions of which the foundations were laid, or any building against their moiety of the party wall, or any such stables or buildings as contemplated by the building agreement. In short, they contend that they may not erect any building that would in any manner whatsoever interfere with the access of light over the adjoining ground to the windows of the mansions looking into the area or open space.

What, then, was the legal effect of the conveyance and mortgage of the 5th and 6th of May, 1886, in reference to any right of light, there being no express general words in either of those deeds?

Easements and privileges legally appendant or appurtenant to property pass by a conveyance of the property simply without any additional words, but before the Conveyancing Act of 1881 easements and privileges which were used and enjoyed with or reputed to appertain to the property without being legally appendant or appurtenant did not pass by a conveyance of the property without being expressly mentioned.

It was decided in *Booth* v. *Alcock*, 21 W. R. 743, L. R. 8 Ch. App. 663, that a lease or grant of a house, together with all lights thereto belonging or therewith used or enjoyed, is not a lease or grant of all light then actually falling upon the windows of the house, but only of such right to light as the lessor or grantor then had. That is to say, general words in a grant are to be restricted in equity as well as at law to what the grantor had then power to grant.

As far back as the case of *Swansborough* v. *Coventry*, 2 Moo. & Scott 362, the law is laid down by Tindal, C.J., that "it is well-established by the decided cases that when the same person possesses a house having the actual use and enjoyment of certain lights and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot—nor can anyone who claims under him—build upon the adjoining land so as to obstruct or interrupt the enjoyment of these lights."

But in the very important case of the *Birmingham, &c., Banking Co.* v. *Ross*, it was determined that, although a grantor shall not derogate from his own grant, this rule does not entitle the grantee of a house with the lights under the words imported into the grant by the Conveyancing Act, 1881, to any easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. The expression "lights enjoyed" in the statute is confined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued.

In truth there is not in the conveyance of the 5th of May, 1886, any express grant of the right of light now claimed. It is only a question of how far under the circumstances the maxim that the grantor cannot derogate from his own grant applies and operates. And upon consideration, I think that the present case is governed by the decision in the *Birmingham*,

&c., Banking Co. v. *Ross.* The adjoining ground as well as the site of the mansions was the subject of the pre-existing building agreement between the grantor and the grantee, the mansions had been built by the grantee and their respective rights were to be looked for in the building agreement: see judgment of Rigby, L.J., in *Broomfield* v. *Williams.*

Under the circumstances, having regard in particular to the provisions of the building agreement, comprising and affecting as it does the plots which form the adjoining ground, the existence of the foundations laid in such adjoining ground, the obvious existence and the condition of the party-wall and the areas shown in the plan on the conveyance of the 5th of May, 1886, I have come to the conclusion that the conveyance of the 5th of May, 1886, did not, as against Oxley, pass to Sage any right to have the access of light to the windows of the mansions looking into the area over the adjoining ground unobstructed by any future building on the adjoining ground and not within the area contemplated as to be left thereon. I am confident that no such result was intended, nor do I think that the possibility of such a result could have entered into the contemplation of either of the parties.

If I am right in my view of the effect of the conveyance of the 5th of May, 1886, it follows that the mortgage of the 6th of May, 1886, did not pass to the mortgagees as against Oxley and persons claiming through him any greater right or easement than was granted or created against him by the conveyance and I am of opinion that, under the circumstances, and especially having regard to the plan upon the mortgage, and the obvious condition of the premises, the mortgagees could not, if so minded, have prevented Oxley and Sage or their assigns from erecting upon the foundations in the adjoining ground the contemplated block of mansions corresponding to the block first erected. In other words, there did not, in my opinion, result from such mortgage any implied obligation on Sage not to interfere with the lights of the mansion to the extent required for building upon the adjoining ground pursuant to the building agreement, or even of building the corresponding block of mansions, and I cannot see why the transferees of the mortgage, or any purchaser from them, should be in a better position than the original mortgagees.

Whatever rights Oxley and Sage together had after the mortgage to build upon the adjoining ground is now vested in the defendant. It is plain that the present stables and buildings of the defendant on the adjoining ground do not form nearly so serious an obstruction to the access of light to the windows in question as the corresponding block would have done if erected on the same site. Consequently, in my opinion this action by the persons deriving title under the mortgagees against the assigns of Oxley and Sage through the deed of 1887 fails, and must be dismissed.

Solicitors, *Morgan, Upjohn, & Leech; Leonard & Pilditch.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Nov. 21.

REX *v.* STEPNEY BOROUGH COUNCIL. (*a.*)

Local government—Metropolitan borough—Abolition of office—Compensation—Statutory duty of borough council—Mandamus—*London Government Act*, 1899 (62 & 63 *Vict.* c. 14), *s.* 30—*Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *s.* 81—*Local Government Act*, 1888 (51 & 52 *Vict* c. 41), *s.* 120.

A metropolitan borough council is bound, having regard to section 120 *of the Local Government Act*, 1888, *to exercise its own discretion in considering and determining the amount of compensation payable to an official for abolition of his office, and a* mandamus *will lie to compel the borough council to exercise this statutory duty, even although the same section provides for an appeal to the Treasury from the decision of the borough council by the person aggrieved.*

A rule *nisi* had been obtained by William Jutsum calling upon the Mayor and Aldermen of the Borough of Stepney to show cause why a *mandamus* should not issue against them to assess the compensation due to him for the loss of his office as Clerk of the Vestry Council of Mile End.

By the London Government Act, 1899, s. 30, sub-section 1, it was provided that any borough council is empowered to abolish any office it may deem not necessary, but any officer is to be entitled to compensation; by sub-section 2 of the same section it is provided that sub-section 7 of section 81 of the Local Government Act, 1894, shall apply to existing officers affected by the Act as if references in that sub-section to the district council were references to the borough council; sub-section 7 of section 81 of the Local Government Act, 1894, provides that section 120 of the Local Government Act, 1888, shall apply to the case of existing officers affected by the Act of 1894 as if references to the county council were references to the district council.

Mr. Jutsum's office was abolished by the Stepney Borough Council on the 9th of January, 1901, the Vestry of Mile End being by Order in Council included in the new Borough of Stepney.

The Treasury, on being applied to, stated that it was the habit of the Treasury to calculate the amount of the compensation allowance of a Civil Service official as if his whole time had been required, and to deduct one-fourth of the amount in cases in which the whole time of the official was not required.

The Council assessed the compensation to Mr. Jutsum on this basis, he not having been required to devote his whole time to his duties of vestry clerk.

Mr. Jutsum obtained a rule *nisi* calling upon the borough council to assess the compensation due to him, contending that they had not carried out the provision of section 120 of the Local Government Act, 1899.

Courthope Munroe (*Leese* with him) showed cause. —The borough council followed the rule laid down by the Treasury, and they were right to do so. But even if they were wrong it is now well established that when there is an equally convenient remedy the court will not interfere by *mandamus*, and such a remedy is provided by sub-section 4 of section 120 of the Local Government Act, 1888, providing for an appeal to the Treasury.

He cited *Peebles* v. *Oswaldtwistle Urban Council*, 45 W. R. 454, and *Reg.* v. *Inland Revenue Commissioners, In re Natham*, 32 *W. R.* 543, 12 Q. B. D. 461.

Boydell Houghton, for the respondent.—The remedy is not equally convenient. The applicant is entitled to have his case heard by the local authority, and this they have not done. The *mandamus* ought to go, as the local authority have not really assessed compensation.

Lord ALVERSTONE, L.C.J.—I have come to the conclusion after some doubt that this *mandamus* must be made absolute. It is now well-established that if an inferior body do not discharge the duty laid

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

upon them a *mandamus* will lie to make them discharge it, or if an inferior court do not entertain a case which it ought to entertain, a *mandamus* will lie to compel it to do so. It is also clear that when there is an alternative remedy the court has a discretion as to granting the remedy by *mandamus*, and as a rule the court will not grant the *mandamus* when there is an alternative remedy. The duty of the local authority is to have regard in fixing the compensation "to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquired by virtue of this Act, or of anything done in pursuance of or in consequence of this Act to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body." I read all these provisions in order to show that it is intended that the council shall exercise their own discretion in assessing compensation. Then there comes the additional condition that the amount shall not exceed the amount which under the Acts and rules relating to the Civil Service is paid to a person on abolition of office. If there were evidence before us of anything to show that there was a statute, or that there were statutory rules or binding rules of the public service applicable to this case, we could not say that the local authority had not acted in accordance with the statute. But on the materials before us it is quite plain that whether there be such rules or not, as to which we know nothing, the local authority have not acted in accordance with any rule, but have followed the Treasury practice. I think it quite impossible that an arbitrary deduction of 25 per cent. would be a sufficient regard to all the circumstances of the case, on the conditions on which the appointment was made, or the nature of his office or employment. In some cases it might be less than 25 per cent., in some cases it might be very much more. That being so, it was *primâ facie* the duty of the borough council to have regard to and consider this particular case. Then it is said that the applicant is a person aggrieved, that he can appeal to the Treasury, and it is compared to cases where a tribunal has gone wrong in law which the Court of Appeal would deal with. But it seems to me that the remedy is really a remedy against an improper exercise of discretion by the lower tribunal as well as an improper refusal, and that the Treasury have the right of considering the case and deciding whether the amount should be altered or not. It seems to me that under ordinary circumstances the local authority ought to exercise their discretion upon the circumstances of each particular case, and that it is not an adequate remedy to say that the Treasury can fulfil the same function and discharge the same duty even though they have not had the assistance of the local authority. Therefore, apart from any statutory rule, it would be the duty of the local authority to consider for themselves what the deduction should be. I wish it to be distinctly understood that I am not suggesting that the Treasury are not perfectly competent to deal with the matter on an appeal under sub-section 4; but I think that it was intended that the local authority should exercise its discretion upon the particular case of compensation, and that it was that discretion which was to be the subject of appeal, and that the appeal was to be made by a person who was aggrieved. If there were any evidence before me that the borough council themselves thought that 25 per cent. was the right deduction or had exercised a discretion in that matter, I should not be a party to granting this *mandamus*; but as they have acted on something which I do not think is binding upon them, I think they ought to be ordered to entertain the case, having regard to the particular circumstances, before any question of alternative remedy arises.

DARLING, J.—I am of the same opinion. Very much the most forcible answer made to the application for this *mandamus* was that there was an equally adequate and equally convenient remedy provided by sub-section 4 of section 120—which is, that, is if the claimant is aggrieved by the refusal of the county council to grant any compensation, or by the amount of the compensation, there shall be an appeal to the Treasury, who shall consider the question and determine if any compensation, and if so what amount, ought to be granted. If the borough council had really gone into the case and used their own judgment upon it, or had granted the applicant an amount with which he was dissatisfied, and if in that case, instead of going to the Treasury he had come and asked for the *mandamus*, I think we ought to have refused him it, and to have said, "No, you shall not have a *mandamus* because you have got an equally convenient and adequate remedy—go to the Treasury." But I do not think that the council really did consider the question at all for themselves. They came to the conclusion that because the section as to compensation said that they might grant compensation "which should not exceed the amount which under the Acts and rules relating to her Majesty's Civil Service is paid to a person on abolition of office," all they had to do was to write to the Treasury and find out what they were in the habit of giving, and then simply to say "That is your compensation." As a matter of fact it has not been proved that they acted upon any rule of the Treasury at all, nor has it been proved that there was a rule. They acted upon what the Treasury told them was their practice. I do not think, therefore, that they acted upon any real judgment of their own. They asked somebody else for a measure, they borrowed a measure from somebody else and they tried to measure what they were to dole out with that, without applying their own judgment to what they were to give at all. Therefore I think that they have not taken the first step here which would entitle Mr. Jutsum to appeal to the Treasury, and our *mandamus* simply means that they must take that first step. If they do take that first step and arrive at precisely the same result for reasons which they do not give, it seems to me that we cannot interfere.

CHANNELL, J.—I agree, but I am not sure that I agree for the same reasons. I think, firstly, that the *mandamus* ought to go because the local authority have not in fact exercised their discretion upon the matter. They have thought that they were bound by a practice of the Treasury, as though it were a rule under the Act. If it had been, it would have been binding upon them. They thought that this rule of practice was a rule by which they were bound, consequently they exercised no discretion. In my opinion, if they said, "We know we are not bound by this absolutely, but we think it right to follow the Treasury practice," and had so followed it, they would have exercised a discretion, but they were mistaken in thinking they were bound. Consequently it is a case for a *mandamus* calling on them to exercise their discretion unless there is some rule of this court under which you could not issue a *mandamus*.

The one that has been suggested is that there is another adequate remedy. It is clearly settled that the court does not grant a prerogative writ of *mandamus* where there is a remedy equally convenient and adequate. For a long time I thought that there was another remedy equally convenient and applicable, and I now think there is another remedy. I do

not entertain the slightest doubt that Mr. Jutsum has another remedy, but I do not think, after some consideration, that it is equally convenient. I think that the local tribunal is the best one to investigate in the first instance the particular facts about this gentleman's employment. They will know much better than the Treasury can know the number of hours or days, it may be, that he was employed in the office, and I think that though the applicant can at the present time go to the Treasury and get them to decide finally the amount of the allowance which he ought to have—and very likely he will have to go to them in the end, and the Treasury will ultimately have to decide the matter—yet I do not think that that is an equally convenient remedy where the local authority have not exercised their discretion, because if he goes to the Treasury now he will have to go without that preliminary investigation which might or might not be useful to him in going there.

Solicitors for the appellant, *Jutsum & Jones.*

Solicitor for the respondent, *Edward Betteley.*

Prob. Div. & Adm. Div. Divorce. } March 21.

BRENNAN (OTHERWISE ROBERTS) *v.* BRENNAN (*a.*)

Divorce—Nullity of marriage—Domicil—Matrimonial residence—Jurisdiction.

In suits for nullity of marriage the true test of jurisdiction is the matrimonial residence as distinguished from domicil, which is the test in suits for dissolution.

This was a petition for a decree of nullity of marriage.

Margaret Roberts, on the 19th of September, 1898, went through a ceremony of marriage with Christopher Brennan at St. Matthew's Church, Douglas, in the Isle of Man.

In April, 1901, the respondent Brennan told the petitioner that she was not his wife, and on inquiry being made it was ascertained that on the 20th of January, 1896, the respondent was married to Annie Eliza Horsefall, at St. Peter's Church, Liverpool, and she was alive on the 19th of September, 1898.

Pritchard, for the petitioner.—The domicil of the husband is Irish. If, therefore, this was a suit for dissolution of marriage, this court would have no jurisdiction to entertain it. Suits for nullity, however, are on a different footing to dissolution suits, and domicil is not the true test of jurisdiction, but only matrimonial residence. In 1776 Sir George Hay, in *Harford* v. *Morris*, 2 Hagg. Cons. 423, said: "The ecclesiastical court certainly has jurisdiction in all cases whatsoever with respect to the marriage of English subjects, wherever celebrated. If celebrated in any foreign country, and it can be shown that such marriage was contrary to the general law, or to the principles that obtain everywhere with respect to marriage, that it was incestuous or liable to any other impediment under which by the law of nations, it is not allowed to marry, then upon such objection it is proper to bring a suit of this nature before the ecclesiastical judge, and wherever such marriage was celebrated it may upon such objection be set aside. The ecclesiastical court has complete jurisdiction to decide the marriages of English subjects by the English law, and therefore, if there was anything to show the marriage void by the general law respecting marriages or by any particular law of the realm, or that a marriage celebrated in evasion of the law of the realm was to be set aside; if that proposition was anywhere tenable certainly this court has full jurisdiction to enter into the cause of nullity upon those accounts." It is therefore clear from that case that the old ecclesiastical courts had jurisdiction to entertain such a suit, and by section 22 of the Matrimonial Causes Act, 1857, this court in all suits and proceedings other than to dissolve any marriage "is to proceed and act and give relief on principles formerly acted upon by the ecclesiastical courts." In *Armytage* v. *Armytage*, [1898] P. 178, 46 W. R. Dig. 48, Gorell Barnes, J., referred to the following passage in Shelford's Law of Marriage and Divorce (1841), p. 486: "In matrimonial causes the power of the court is *in personam*, and depends upon the locality of the person cited. Though a defendant may usually reside out of the kingdom—yet if he is served with a citation within the jurisdiction of an ecclesiastical court in England, as that of the Consistory Court of London, in a suit for nullity of marriage that court has jurisdiction to try the validity of the marriage wherever it might have been contracted." By section 42 of the Act of 1857 service of the petition may be effected out of the jurisdiction, and in this case the respondent was in fact served in Ireland. Moreover, the decree of the court is merely a declaratory decree, and it would be a great hardship if the court were to refuse to make it, for the petitioner is not bound to come to the court at all: *Morse* v. *Morse*, 2 Hagg. Eccl. 608.

Counsel also referred to *Niboyet* v. *Niboyet*, 27 W. R. 203, 4 P. D. 1.

JEUNE, P., in delivering judgment, said that though the judgment of the Court of Appeal in the case of *Niboyet* v. *Niboyet* had been reversed and was held to be wrong as applicable to suits for dissolution of marriage, the reasoning would, as he understood it, have been right if it had been applied to suits for nullity of marriage. He was of opinion that the contention that the doctrine of domicil in cases of nullity did not apply, but that of matrimonial residence did, was well founded, though undoubtedly jurisdiction in dissolution suits was determined by the domicil of the parties. It seemed clear also that such a case as this could have been brought in the ecclessiastical courts, because the view taken by them as to their ability to entertain such a suit would have depended upon the matrimonial residence of the parties, and that being so, this court also would have jurisdiction to entertain the suit, and there would therefore be a decree *nisi.*

Solicitors, *Pritchard, Englefield & Co.*, for *Earle, Sons, & Co.*, Manchester.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. } March 4.

"THE MYSTERY." (*a.*)

*Ship—Collision—Damage—Dock master—Master of vessel—Master and servant—*10 *Vict. c.* 27, *s.* 53—*Co-defendants—Costs.*

The master of the vessel M., *which was about to enter a dock, obeyed certain orders given negligently by a lock foreman, and in consequence* The M. *collided with another vessel,* The A. *Under a bye-law of the dock company the lock foreman was a deputy or assistant of the harbour master of the dock.*

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

In an action for damages by the owners of The A. *against the owners of* The M. *and the dock company,*

Held, that, having regard to section 53 of 10 Vict. c. 27 (Harbour Clauses Act, 1847) and the bye-law of the dock company, The M. *was bound to obey the orders of the lock foreman, and, therefore, that the dock company were alone liable for the damage sustained by* The A.

Held, also, that the relationship of master and servant did not exist between the owners of The M. *and the dock company.*

This was an appeal by the defendants the owners of the ketch *The Mystery*, from a judgment in an action brought in the City of London Court by the owners of the steamship *William Adamson* for damage done by the defendants ketch *The Mystery* under the following circumstances. It appeared that on the 28th of October, 1901, about 2 p m., the weather being bright and clear with a fresh breeze from the south-west and the tide at the last of the flood, *The William Adamson*, a steamship of 1,986 tons gross, was awaiting to enter the Victoria Dock of the London and India Dock Co. The dock master, who was standing on the pier-head, was giving the directions necessary for the vessel to enter the dock, when at the same time a lock foreman, who was on the lower pier, ordered the ketch *Mystery*, which was lying head down the river just below the pier-head to pass her stern rope ashore so that it might be made fast, and he directed her to haul on it over her port quarter so as to swing round with the tide and get into position to enter the dock. The lock foreman also ordered four barges, outside of which *The Mystery* had been lying, to execute a similar manœuvre and swing in the same way. *The Mystery*, being caught by the wind on her port bow, swung rapidly round, and her forward rope being unable to check her, she struck with her bowsprit the wheel of *The William Adamson*, thereby doing her the damage for which the plaintiffs now sought to recover from the owners of *The Mystery*. The London and India Dock Co. were subsequently added as defendants. The second order of the lock foreman was held to be an improper order, and judgment was given against the dock company, and in the absence of any statutory provision exempting the owners of *The Mystery* from the liability for the tort committed by them, judgment was given against them also. Section 53 of 10 Vict. c. 27 enacts: "The master of every vessel within the harbour or dock or at or near the pier or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master made in conformity with this and the special Act; and any master of a vessel, who, after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction shall be liable to a penalty not exceeding £20."

Scrutton, K.C., and *Dawson Miller*, for the owners of *The Mystery*, the appellants.

Pickford, K.C., and *Bucknill*, for the dock company.

Aspinall, K.C., and *Balloch*, for *The William Anderson*, the respondents.

JEUNE, P., in delivering judgment, said that inasmuch as the dock foreman was a deputy or assistant of the dock master within the meaning of rule 2 of the bye-laws of the defendant dock company, and those in charge of *The Mystery* were bound to obey his orders under 10 Vict. c. 27, s. 53, therefore the dock company were alone liable for the damage sustained by the plaintiff's vessel. Moreover, the relationship of master and servant did not exist between the dock company and the owners of *The Mystery*, so as to render the owners of *The Mystery* responsible for the lock foreman's negligent order. Further, that the plaintiffs acted reasonably in making both the owners of *The Mystery* and the dock company co-defendants; and inasmuch as the dock company threw the blame on the owners of *The Mystery*, and they themselves were found alone to blame, the costs of the owners of *The Mystery*, in the court below and on appeal, must fall on the dock company.

GORELL BARNES, J., concurred.

Judgment accordingly.

Solicitors, *Clarkson, Greenwell, & Co ; Turner, Son, & Foley ; Charles E. Harvey.*

Privy Council.

(From the King's Bench for Lower Canada, Province of Quebec.)

Dec. 18.

THE CANADIAN PACIFIC RAILWAY CO. v. ROY. (a.)

Railway Company—Negligence—Tort—Act authorized by statute—Canada (Quebec), Law of.

In the absence of negligence or misconduct, a corporation authorized by statute to carry on a particular business, is not responsible for any damage caused by its doing so in a normal and reasonable manner; for when the Legislature has legalized the acts contemplated and carried out, they cannot constitute an actionable wrong.

This was an appeal by special leave from the Court of King's Bench for Lower Canada, Province of Quebec.

The facts sufficiently appear in the judgment of their lordships.

Blake, K.C., for appellants.

Gonin, K.C., for respondent.

The judgment of their lordships (Earl of HALSBURY, L.C., Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, LINDLEY, and Sir FORD NORTH) was delivered by the

Earl of HALSBURY, L.C.—This is an appeal by the Canadian Pacific Railway Co. against a judgment of the Court of King's Bench for Lower Canada affirming a judgment of the Superior Court of Quebec whereby that company were held to be liable to damages to the extent of 300 dols. for injuries to the plaintiff's property alleged to be caused and now admitted to have been caused by sparks escaping from one of their locomotive engines while employed in the ordinary use of its railway.

Some questions were raised in the courts below, and to some extent referred to here, whether the judgment could be supported upon the ground of the appellants having been guilty of negligence in their management of the engine or its appliances being defective. No such question is now before their lordships. By arrangement that question has been withdrawn and their lordships are not to be taken as giving any opinion whether there was any evidence of negligence or if there was how that issue ought to be determined.

The serious and important question sought to be raised in this appeal is whether the railway company authorized by statute to carry on their railway undertaking in the place and by the means that they do

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

carry it on are responsible in damages for injury not caused by negligence but by the ordinary and normal use of their railway.

Both courts below have held that in the Province of Quebec the railway company is so responsible, and the question is whether that is the law. The argument appears to be founded on the suggestion that Quebec has a civil law of its own and that in that province all corporations like all other persons are responsible for causing damage to their neighbours by a fault—that is to say, any actionable wrong—whether arising from imprudence or want of skill; and that another article of the code provides that civil corporations constituting by the fact of their incorporation ideal or artificial persons, are as such governed by the laws affecting individuals saving the privileges they enjoy and the disabilities they are subjected to. If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation without reference to what they are authorized to do in that capacity, the argument would be well founded; but the fallacy of the suggestion in supposing that that immunity is claimed because they are a corporation. If it were so there would be no difference between the law of England and the law as so expounded in the Province of Quebec, but the ground upon which the immunity of a railway company for injury caused by the normal use of their line is based, is that the Legislature which is supreme has authorized the particular thing so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable wrong in England any more that it can constitute a fault by the Quebec code. The principle has been lucidly expounded by Lord Hatherley in the case of *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, at p. 438, 26 W. R. Dig. 259, thus: "If a company in the position of the defendants there" (*Cracknell* v. *The Corporation of Thetford*, L. R. 4 C. P. 629) "has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers. I say the proper mode of executing those powers, because it appears to me that it is very neatly and appositely put by FitzGerald, B., in giving his judgment in the Court of Exchequer Chamber, in this form. FitzGerald, B., says: 'The substantial question raised on the pleadings in the first and second counts of the declaration appears to me to be whether these acts by the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence.'"

And Lord Cairns, in the case of *The Hammersmith Railway Co.* v. *Brand*, 18 W. R. 12, L. R. 4, H. L. 171, at p. 215, points out that it would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done by a railway company, and at the same time leave it to be restrained by injunction from doing the very thing which the Legislature has expressly permitted to be done. Lord Cairns said: "It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequences would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company."

This permission of course does not authorize the thing to be done negligently, or even unnecessarily to cause damage to others. Much was argued by the learned counsel for the respondent as to the peculiar jurisprudence of Quebec, but in truth there is no such difference between the law of England and the law of Quebec in this respect as he seemed to suppose. The law of England equally with the law of the province in question affirms the maxim *Sic utere tuo ut alienum non lædas*; but the previous state of the law, whether in Quebec or France or England, cannot render inoperative the positive enactment of a statute, and the whole case turns not upon what *was* the common law of either country, but what is the true construction of plain words authorizing the doing of the very thing complained of. The Legislature is supreme and if it has enacted that a thing is lawful such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty, and it seems to their lordships it comes within the express language of the code (article 356).

But it is said that the Dominion Railway Act itself expressly maintains the liability of railway companies under provincial law for damages caused by their operation, and section 92 is referred to. This may be disposed of in a sentence. That section refers to compensation under the Act and not to damages in an action at all, which is what the question is here.

Section 288 is more plausibly argued to have maintained the liability of the company notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their lordships are of opinion that it cannot be so construed.

Mr. Blake for the appellants having waived their right to recover the damages or costs awarded in Canada to the respondent, their lordships will humbly advise His Majesty that the judgment of the King's Bench affirming the judgment of the Superior Court of Quebec ought to be reversed except as to costs. In the exercise of the discretion expressly reserved to their lordships by the Order in Council granting leave to appeal, their lordships direct the appellants to pay the respondent's costs of this appeal.

Solicitor for appellants, *S. V. Blake.*

Solicitors for respondent, *Fox & Preece.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 12.

FOULGER v. ARDING. (a.)

Landlord and tenant—Lease—Covenant by lessee to pay taxes, rates, and impositions—Expenses of abating nuisance—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 4.

A lease of premises for a term of years contained a covenant by the lessee to "pay and discharge all taxes, rates, including sewers, main drainage assessments, and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted may be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises, or any part thereof, on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair either by lessor or lessee. During the continuance of the term a notice was served on the lessor, under section 4 *of the Public Health (London) Act,* 1891, *requiring him to abate a nuisance arising on the premises, and for that purpose to execute certain structural alterations, and he duly complied therewith.*

Held, that the lessor was entitled, under the covenant, to recover from the lessee the expenses incurred in complying with the notice.

Decision of the Divisional Court (49 *W. R.* 442, [1901] 2 *K. B.* 151) *reversed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Lawrance, J.), on the hearing of an appeal from a decision of the deputy-judge of the Wandsworth County Court: 49 W. R. 442, [1901] 2 K. B. 151.

The action was brought to recover damages for the breach of a covenant in a lease.

By an indenture of lease dated the 27th of June, 1892, Sir Henry Doulton demised to Robert Ellwood a house and premises known as Parklands, in the parish of Streatham, for a term of years. By the lease Ellwood covenanted to "pay and discharge all taxes, rates, including sewers, main drainage assessments, and impositions whatsoever, which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises, or any part thereof, on the landlord, tenant, or occupier of the said premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." The lease contained no repairing covenant, either by the landlord or the tenant.

By an indenture dated the 1st of April, 1895, Sir Henry Doulton assigned his reversionary interest in Parklands to the plaintiff, and in June, 1896, Ellwood assigned his lease to the defendant.

On the 25th of August, 1900, during the continuance of the term, the sanitary inspector for the parish of Streatham, an officer of the Wandsworth District Board of Works, served on the plaintiff a notice under the Public Health (London) Act, 1891, s. 4, sub-section 1, requiring him, as the owner of Parklands, to abate a nuisance arising on the premises from a foul and offensive privy, defective soil-pipe or connections to water-closets, and other defective sanitary arrangements, by removing the old foul and offensive privy, building a proper water-closet, laying a new 4-inch drain, properly ventilated, making good the defects in the soil-pipe or branches, and by executing other works of a like character necessary to prevent a recurrence of the nuisance.

The necessary work was carried out at the cost of £35 by the plaintiff, who then claimed to be repaid that sum by the defendant. The defendant disputed his liability, and the plaintiff brought an action in the county court to recover the sum.

The county court judge gave judgment for the plaintiff, holding that the defendant was liable under his covenant to bear the expense in question.

On appeal the Divisional Court reversed the decision of the county court judge, and gave judgment for the defendant.

The plaintiff appealed to the Court of Appeal.

Bray, K.C., and *Clavell Slater*, for the plaintiff.

Colam, for the defendant.

The following cases were cited: *Tidswell* v. *Whitworth*, 15 W. R. 427, L R. 2 C. P. 326; *Thompson* v. *Lapworth*. 16 W. R. 312, L. R. 3 C. P. 149; *Crosse* v. *Raw*, 23 W. R. 6 L. R. 9 Ex. 209; *Hartley* v. *Hudson*, 4 C. P. D. 367, 28 W. R. Dig. 119; *Rawlins* v. *Briggs*, 27 W. R. 138, 3 C. P. D. 368; *Budd* v. *Marshall*, 5 C. P. D. 481, 28 W. R. Dig. 118; *Aldridge* v. *Ferne*, 34 W. R 578, 17 Q B. D. 212; *Melhado* v. *Woodcock* 9 Times L. R. 48; *Smith* v. *Robinson*, 41 W. R. 588, [1893] 2 Q. B. 53; *Brett* v. *Rogers*, 45 W. R. 334, [1897] 1 Q. B. 525; *Farlow* v. *Stephenson*, 48 W. R. 213, [1900] 1 Ch 128; *Arding* v. *Economic Printing and Publishing Co.*, 79 L. T. Rep. 622, 47 W. R. Dig. 93; *Allum* v. *Dickinson*, 30 W. R. 930, 9 Q. B. D. 632; *Wilkinson* v. *Collyer*, 32 W. R. 614, 13 Q. B. D. 1; and *Badcock* v. *Hunt*, 37 W. R. 205, 22 Q. B. D. 145.

COLLINS, M.R.—The cases on this subject have run very fine, but I have come to the conclusion that the appeal should be allowed. I do not propose to go through the cases which have been cited in detail, but I prefer to confine myself to a broad view of the matter.

The question is whether the covenant contained in this lease has the effect of throwing upon the tenant an obligation which, if it had not been for the covenant, might have fallen upon the landlord. The obligation arose under the provisions of the Public Health (London) Act, 1891, s. 4, and was in respect of the structural condition of the premises demised, which were found to be in such a condition as to let in the powers of the sanitary authority. A notice under the section was sent to the landlord, calling on him to rectify the defect which was found to exist and to carry out certain sanitary arrangements. The landlord did the work himself, and the question is whether the tenant is bound under the covenant to recoup him. The words of the covenant are that the tenant will "pay and discharge all taxes, rates, including sewers, main drainage, assessments, and impositions whatsoever, which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises, or any part thereof, on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever." I will in the first place point out that certain possible difficulties which might have arisen have been removed. It is now clear on the authorities that a defect which was inherent in the premises at the time of the granting of the lease may be the subject-matter of the obligation thrown on the tenant by such a covenant. And it is also clear that such a covenant

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

may apply to capital charges, such as the cost of structural alterations. If we were unincumbered by authorities, could any one doubt that an obligation imposed on a landlord in respect of a structural defect which he was called upon to remedy was an imposition imposed on the landlord in respect of the premises? It seems to me quite clear that such an obligation comes within the words of the covenant. But, it is said, if the covenant has such a wide meaning as that, how can a line be drawn anywhere? Must not the covenant also cover such a case as that of a house being beyond the building line and there being a consequent obligation to pull it down? In answer to that objection it is contended that a tenant could not by any possibility be supposed to have intended to have undertaken such an obligation as that, and that in a contract between landlord and tenant the parties ought to be supposed to be dealing with such matters as might reasonably be expected to come within the purview of their contract. That seems to me to be a sound argument. In more than one case the word "outgoings" has been used, and has been relied on as being the widest word that could be used. I think the use of that word is open to the same observation. But it is admitted that the cases show that "outgoings" would cover the present case. It was not said in any of the cases that, because the word "outgoings" might possibly cover a wider area than it was sought to bring within it, therefore it did not cover the narrower area which it was sought to bring within it. I cannot say that the word "impositions" is not wide enough, and I see no reason to prevent the court from putting upon the word the meaning which the appellant contends for. It was pointed out that there was no case in which it had been held that the word "impositions" covered such an obligation as the present, and it was contended that not one of the decisions was based on the use of that word. That may be so, but, on the other hand, there is no decision that the word "impositions" cannot cover such an obligation. In my opinion it is wide enough to cover this class of obligation. It seems to me to be reasonable to suppose that the parties had in their contemplation the possibility of such an incident happening as occurred in this case and of such an obligation arising in consequence.

The general current of the authorities is in favour of the view which I am taking. For a long time the cardinal distinction which was generally observed was that which was drawn between *Tidswell* v. *Whitworth* and *Thompson* v. *Lapworth*—viz., that between an obligation on the landlord personally and an obligation on the landlord in respect of the premises. In the later cases greater emphasis was laid on the presence or absence of particular words in the description of the obligations contained in the covenants. *Brett* v. *Rogers* was one of this class of cases, the last being *Farlow* v. *Stevenson*. I think it is sufficient for the plaintiff to show that the covenant contains a word apt to describe the quality of the obligation in question, and that a charge has been imposed on him in respect of the premises. I therefore cannot agree with the judgment of the Divisional Court, and I think the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. The authorities are, in my judgment, in an unsatisfactory condition. I am sorry that the line taken in *Tidswell* v. *Whitworth* was not followed up. But, as the cases now stand, it seems to me that the defendant is liable. If the covenant had contained the words "duties imposed," it is admitted that it would have covered this obligation. I think that a duty imposed is the same thing as an imposition, and that "imposition" is even a larger word than "duty." It ought not to be held to cover anything beyond what could reasonably be supposed to be within the contemplation of the parties; but it seems to me impossible to say that the liability to make a new closet could not have been within the contemplation of the parties. On the contrary, it appears to me that such a liability was within the contemplation of the parties and within the scope of the covenant.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Foulger & Robinson.*

Solicitor for the defendant, *G. Aplin Nichols.*

From K. B. Div. (Collins, M.R., and Romer, L.J.) — March 3.

SACHS v. HENDERSON. (a.)

Practice—Costs—Action founded on tort—Wrongful removal of fixtures after agreement for lease—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

The plaintiff in his statement of claim alleged that by an agreement in writing he agreed to take and the defendant to grant a lease of a house from a future date, that at the date of the agreement certain fixtures were affixed to and were part of the house, and that after the date of the agreement and before the plaintiff took possession under the lease the defendant wrongfully removed some of the fixtures; and the plaintiff claimed damages. The defendant in his defence (inter alia) *brought into court, with a denial of liability, the sum of £20 as sufficient to satisfy the claim. The plaintiff took this sum out in satisfaction, and carried in his bill of costs for taxation.*

Held, that the action was founded on tort within the meaning of section 116 *of the County Courts Act,* 1888, *and the plaintiff was entitled to costs on the High Court scale.*

Appeal by the plaintiff from an order of Jelf, J., at chambers, affirming the taxation of the plaintiff's costs on the county court scale.

The statement of claim alleged that by an agreement in writing in October, 1899, contained in certain letters, the plaintiff agreed to take, and the defendant agreed to grant, a lease of a house and premises from the 25th of March, 1900; that at the date of the contract certain fixtures were affixed to and were part and parcel of the said house and premises; that on the 21st of March, 1900, the lease was duly executed and the plaintiff went into possession on the 31st of March, 1900; and that after the date of the contract, but before the plaintiff went into possession, the defendant wrongfully removed certain fixtures; and the plaintiff claimed damages. The defendant in his statement of defence, denied the allegations in the statement of claim, and set up certain other defences; and, further, he brought into court, with a denial of liability, the sum of £20 as sufficient to satisfy the plaintiff's claim. The plaintiff took the £20 out in satisfaction of his claim, and gave the defendant notice thereof, and carried in his bill of costs for taxation. The master held that the action was founded on contract within the meaning of section 116 of the County Courts Act, 1888, and taxed the costs upon the county court scale.

Jelf, J., at chambers, affirmed the master's decision. The plaintiff appealed.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

G. A. Scott, for the plaintiff.—This is an action founded on tort within section 116 of the County Courts Act, 1888. A vendor in possession after a contract for the sale of land is until completion in the position of a trustee for the purchaser: *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456, 40 W. R. Dig. 274. The defendant being in that position tortiously dealt with the property of which he was trustee for the plaintiff by removing the fixtures. That was a tort, and the action was therefore founded on tort. The rule laid down in *Turner* v. *Stallibrass*, 46 W. R. 81, [1898] 1 Q. B. 56, is that if the plaintiff, in order to make out a cause of action, must rely on a contract, the action is founded upon contract. That means that if the cause of action arises directly out of a contract, the action is founded on contract. But where it is necessary to prove a contract merely in order to bring about the relation between the parties, the case is different: per Collins, L.J., in *Turner* v. *Stallibrass*. It was necessary here to prove the contract for the lease of the house, merely for the purpose of proving the relation between the parties and the position in which they stood towards each other. That relation imposed a duty and the breach of duty arose out of that relation. The action therefore was "founded on tort" within section 116. [He also referred to *Pontifex* v. *Midland Railway Co*, 26 W. R. 209, 3 Q. B. D. 23; *Kelly* v. *Metropolitan Railway Co.*, 43 W. R. 497, [1895] 1 Q. B. 944. He also contended that section 116 of the County Courts Act, 1888, did not apply as the action was not one which could have been commenced in a county court, the value of the tenement exceeding £50 a year and the title thereto coming in question within section 60; but the arguments upon this point are omitted as the court gave no decision upon it.]

J. K. F. Cleave, for the defendant.—This was an action founded on contract within the rule laid down in *Kelly* v. *Metropolitan Railway Co.* and *Turner* v. *Stallibrass*. The defendant was the owner of this house and property and he could deal with them as he pleased, subject only to the contract with the plaintiff. Apart from the contract to grant the lease, and as incidental thereto to hand over these fixtures to the plaintiff upon the day of completion, there was no duty upon the defendant to hand them over. The plaintiff must therefore rely upon a breach of contract by the defendant, and the action is founded on contract within section 116.

COLLINS, M.R.—This appeal raises the question whether the action, in which the plaintiff has recovered £20, is an action "founded on tort" within the meaning of section 116 of the County Courts Act, 1888. If it is, the plaintiff is entitled to costs on the High Court scale. The master and the judge at chambers have both held that the action is founded on contract within the meaning of section 116, and that the plaintiff is not entitled to High Court costs. In my opinion, when the facts are looked at, the action is founded on tort. It has been repeatedly laid down that, in order to determine this question, the substance, and not merely the form of the matter, must be looked at. The question arises in this way: The defendant, in October, 1899, agreed to grant a lease of the house and premises to the plaintiff as from the 25th of March, 1900. After the lease had been executed and the plaintiff had taken possession he found that certain fixtures which were on the premises at the time when he agreed to take the lease had been removed by the defendant. In those circumstances it seems to me that the case is completely covered by the decision of this court in *Turner* v. *Stallibrass*. It was there pointed out that, when dealing with breaches of duty, it is not enough, in order to displace the contention that an action is founded on tort, to aver that the duty in the last resort arises out of some contract. In that case the duty arose out of a contract of bailment, but it was held that the action for breach of that duty was founded on tort. It is there pointed out that frequently where a duty arises and is not performed, there is a consensus of mind, antecedent to the breach of duty, which has established the relation between the parties out of which the duty arises. Nevertheless, when once the relationship is established, and the breach of duty arising out of that relationship follows, the action founded on that breach of duty may be an action founded on tort. I agree that the division between tort and contract is not a logical one, but still it is not often difficult to say when a thing is a wrong and when it is a contract. If the plaintiff had brought an action for a breach of a particular stipulation in the contract, clearly the action would have been founded on contract. But where the plaintiff is only bound to refer to the contract in order to show the relation between the parties, and then shows some act of misdoing in connection with what has to be done under the relation so established, that amounts to a tort. That is clear from the railway cases—*e.g.*, *Kelly* v. *Metropolitan Railway Co.*, where an action is brought by a passenger against a railway company to recover damages for personal injuries caused by their negligence. The relation between the passenger and the railway company is founded upon the contract of carriage, but when there is a breach of duty arising out of that relation, the action based upon that breach of duty is in substance an action founded on tort and not on contract. In the present case there was a duty on the defendant arising out of the relation between him and the plaintiff created by the agreement to grant a lease, not to take away from the subject-matter of agreement anything included therein. Any reasonable man would call a breach of that duty a wrong. The allegation is that the defendant took advantage of being in possession to subtract something from what he had agreed to let. That is clearly a tort. The appeal must therefore be allowed.

ROMER, L.J.—I am of the same opinion. These somewhat puzzling questions must be dealt with from the point of view of substance and not of form. The form of the pleadings is not the decisive test. The question is whether the action is or is not in substance an action for breach of contract or an action of tort. Applying that test, it seems to me that the present action is substantially founded on tort. The allegation is that the defendant, having agreed to grant a lease of certain premises, including the fixtures therein, took away some of the fixtures without telling the plaintiff of it, and the plaintiff executed the lease under the impression that the fixtures were still there. In my opinion that is a tort. The defendant by the agreement undertook an obligation towards the plaintiff to use reasonable care in the protection of the property, the subject of the agreement. If the defendant had been guilty of want of reasonable care, he would have been guilty of negligence—that is to say, a tort, and would have been liable to the plaintiff; yet it is said that because the defendant went further and was guilty of a wilful wrong by removing the fixtures, the action to recover damages for that wrong in not an action founded on tort. I do not agree. I think that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiff, *St. Barbe Sladen & Wing.*

Solicitors for the defendant, *Guscotte, Wadham, Bradbury, & Tickell.*

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Feb. 5.

HUSEY v. LONDON ELECTRIC SUPPLY CORPORATION (LIMITED). (a.)

Electric Lighting Acts—Arrears due to electric supply corporation—Receiver—Occupier—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *s.* 19—*Electric Lighting Orders Confirmation (No.* 2) *Act,* 1889 (52 & 53 *Vict. c.* 178), *Schedule, clause* 47.

A hotel company contracted with an electric lighting company for a supply of electricity to the hotel. A receiver and manager was appointed of the property of the hotel company by an order in a debenture-holders' action. The receiver entered into possession of the premises. At the time the receiver entered into possession the hotel company was indebted to the electric lighting company for electricity supplied, and the latter company threatened to discontinue the supply unless the arrears due to them were paid. The receiver brought an action for an injunction to restrain the company from cutting off the supply.

Held, that, assuming in the receiver's favour that he was a new occupier of the premises, still he had no right to a supply under the Electric Lighting Acts till he had entered into a new contract with the electric lighting company, and that the motive of the electric lighting company in demanding a contract could not affect their statutory rights. On the other hand, if he claimed under the contract with the hotel company he was bound to discharge the arrears.

The injunction was accordingly refused.

This was an appeal from an order of Kekewich, J., granting an injunction.

The facts were as follow:

A company called the St. Ermin's Hotel Co. entered into a contract with the defendants, the Electric Supply Corporation, for the supply of electricity to the hotel.

The company had issued debentures, and in a debenture-holders' action the debenture-holders obtained an order for the appointment of a receiver and a manager.

The receiver was Mr. Husey, the plaintiff. Mr. Husey, having gone into possession of the hotel, desired to have a continuance of the supply of electricity. At the moment when he went into possession there was due from the hotel company to the London Electric Supply Corporation a sum of £437 for electric energy supplied. Mr. Husey was not prepared to enter into any fresh contract himself; on the contrary, at this time he never said anything upon the hypothesis that the contract with the St. Ermin's Hotel Co. had come to an end. All he did was to intimate his desire for the electric light to be continued to be supplied after he had been appointed receiver.

The defendants were not willing to supply the electricity under the old contract unless some provision was made for the discharge of the debt which was due for the previous supply, and their secretary submitted to the receiver a draft which they invited the receiver to sign if he wished the supply of electric light to be continued. It ran thus: "I, the receiver appointed by the Court of Chancery in the above matter, hereby personally undertake and promise that your account for electric energy supplied to the above which is at present outstanding and amounts to £437 2s. shall be paid within twenty-eight days from the date hereof and that accounts for supply of electric energy subsequent to the 18th inst. shall be paid weekly during the tenure of my receivership." This draft was dated "this 9th day of January, 1902." The receiver was not willing to sign, and the company proposed under those circumstances to cut off the supply of electricity.

The receiver thereupon issued the writ in this action in which he claimed to have the Electric Supply Corporation restrained from cutting off the electricity.

Kekewich, J., granted an injunction subject to certain undertakings which were to be given by the plaintiff in the following terms: "And the plaintiff, Ernest Innis Husey, by his counsel undertaking to make such necessary application and enter into a new contract as required by section 47 of the provisional order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act, 1889 (52 & 53 Vict. c. 178). And the plaintiff by his counsel undertaking to abide by any order this court may hereafter think fit to make as to damages in case the court shall be of opinion that the defendants shall have sustained any by reason of this order which the plaintiff ought to pay, this court doth order that the defendants, the London Electric Supply Corporation (Limited), be restrained, until such undertaking to make such application aforesaid be complied with, from cutting off or discontinuing the supply of electric current from their mains to the premises known as St. Ermin's Hotel, Victoria-street, in the city of Westminster."

The defendants appealed.

By the Electric Lighting Act, 1882, s. 19: "When a supply of electricity is provided in any part of an area for private purposes, then, except in so far as is otherwise provided by the terms of the licence, order, or special Act authorizing such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply."

By section 21: "If any local authority, company, or person neglect to pay any charge for electricity or any other sum due from them to the undertakers in respect of the supply of electricity to such local authority, company, or person, the undertakers may cut off such supply, and for that purpose may cut or disconnect any electric line or other work through which electricity may be supplied, and may, until such charge or other sum, together with any expenses incurred by the undertakers in cutting off such supply of electricity as aforesaid, are fully paid, but no longer, discontinue the supply of electricity to such local authority, company, or person."

By the Electric Lighting Order Confirmation (No. 2) Act, 1889, a provisional order granted by the Board of Trade to the defendants in that year was confirmed. Clause 47 of that order provided that the undertakers (the defendants) should "upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers . . . give and continue to give a supply of energy for such premises in accordance with the provisions of this order . . . subject to the conditions following" (*inter alia*): "Every owner or occupier of premises requiring a supply of energy shall 'serve a notice upon the undertakers specifying the premises in respect of which such supply is required,' the maximum power required, and the day on which the supply is required to commence, and 'enter into a written contract with the undertakers (if required by them so to do) to continue and receive and pay for a supply of energy for a period of at least two years of such an amount that the payment to be made for the same, at the

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

rate of charge for the time being charged by the undertakers for a supply of energy to ordinary consumers within the area of supply, shall not be less than 20 per cent. per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of such supply,' and give to the undertakers, if required by them, security for payment. If, after notice by the undertakers, security is not given by the owner or occupier within seven days, or if the security given becomes invalid or insufficient, the undertakers may, if they think fit, discontinue to supply energy for such premises so long as such failure continues."

P. O. Lawrence, K.C., and *Austen Cartmell*, for the defendants.—The plaintiff gets his right to a supply of electricity either under the old contract, in which case he must pay the arrears due to the defendants, or he must make a fresh application to the defendants as a new occupier of the premises, in which case the defendants can cut off the supply till he does so.

They referred to *Paterson* v. *Gas Light and Coke Co.*, 45 W. R. 39, [1896] 2 Ch. 476; *In re Marriage, Neave, & Co.*, 45 W. R. 42, [1896] 2 Ch. 663.

Warrington, K.C., and *Mitchell*, for the plaintiff.—Under section 19 of the Electric Lighting Act, 1882, the plaintiff is entitled to a supply of electricity on the same terms as any other person within the area. On the true construction of section 21 the defendants are not entitled to cut off the supply on default in payment except when the defaulter continues to be the person to whom the supply is given. This provision in the Electric Lighting Act differs from the similar provision in the Gas Acts, under which a gas company can cut off the supply from the premises. Under the Electric Lighting Acts a company has no right to refuse to supply an occupier of premises because a previous occupier has made default. Payment of arrears is nowhere made a condition of continuing the supply. The contract required by clause 47 of the Electric Lighting Confirmation Act is only required in cases where no supply is being given at all. In the present case the receiver is, having regard to the terms of the order appointing him, an occupier of these premises. The case of *Paterson* v. *Gas Light and Coke Co.* does not therefore apply. The defendants here have never offered to supply the plaintiff on his entering into a contract with them, but on the contrary have refused to do so unless the arrears due from the St. Ermin's Hotel Co. are paid. Their conduct relieves the plaintiff from the necessity of making any further application.

The following cases were referred to: *In re Smith*, 41 W. R. 159, [1893] 1 Q. B. 323; *In re Flack*, 48 W. R. 446, [1900] 2 Q. B. 32; *Richards* v. *Overseers of Kidderminster*, 44 W. R. 505, [1896] 2 Ch. 212.

Austen Carmell replied.

VAUGHAN WILLIAMS, L J., stated the facts and continued: From the indorsement on the writ issued by the receiver it is obvious that the claim was made upon the basis that the contract between the Electric Supply Corporation and the St. Ermin's Mansions Proprietary (Limited) was still a subsisting contract. But when the case came before Kekewich, J., the receiver took up an alternative sort of position—namely, that the occupation by the limited company had come to an end and that there was a new occupation by him. Now I shall assume that this latter contention was right, and I think that this is the contention which puts the receiver in the best position. I assume that there was a new occupation by him; that the occupation by the Mansions Proprietary (Limited) had come to an end, and he was a new occupier. If that is so, in my judgment the receiver was not entitled to any supply of electric lighting unless and until he made a new contract with the Electric Supply Corporation. On the other hand, if one is to suppose that the old contract with the Mansions Proprietary (Limited) continued, and that the supply was to continue under that old contract, there can be no doubt that the Electric Supply Corporation were entitled to cut off the electricity because of the default that had been made and not discharged under the contract between the corporation and the Mansions Proprietary (Limited), for the past supply of electric energy.

Under these circumstances it seems to me whichever way you put it, it was not right to grant this injunction restraining the Electric Supply Corporation from cutting off the supply. I think that, whether one looks at it on the assumption that the old contract continued, or whether one looks at it on the assumption that there was a change of occupation, in neither case ought the Electric Supply Corporation to have been restrained. We have had a long argument to-day as to whether or not the 47th section of the Confirmation Act applies to anything else than the first contract for the supply of electric energy. It is said that certain clauses, especially the clauses contained in the first and second conditions for the contract, do not apply to any case but a case where there is for the first time a supply of electric energy. And it is said that those clauses have no application to a case in which there is an existing supply of electric energy and the connections have been made by the company under a previous contract. I do not propose to decide how that may be. I think there are a great many cogent reasons which might be urged to show that the 47th section is a section of general application. I cannot, however, shut my eyes to the fact that there are some arguments which were most forcibly urged by Mr. Warrington to the contrary. But I do not think that one need decide that question at all. According to my view, whether the 47th section applies to other than the first supply of electricity or not, it is plain that under the Act of 1882 no one is entitled to demand a supply of electric energy unless and until he has made a contract with the undertakers, who have the authority to supply the electric energy. The basis of the general Act of 1882 is that persons requiring a supply shall be entitled to contract for the same providing that the undertakers shall not charge a price exceeding the limits imposed by the licence, order, or special Act authorizing the undertakers to supply electricity, and provided also that the undertakers show no preference, and that really is effectively provided for in the 19th section, the effect of which is that every person shall be entitled to a supply of electric energy on the same terms upon which any other person under similar circumstances is entitled to a corresponding supply. But that is only a provision which assumes that there is already a contract fixing the terms of supply as between the corporation and some other persons who are supplied. Then the Act of Parliament says in effect that any other person who wishes for a supply under similar circumstances is to have a right to insist upon having a similar contract. But all that assumes that there will be a contract, and section 20, which is the section which provides for the limit in prices, also is a section drawn upon the basis that there is to be a contract. Section 20 is "The undertakers shall not in making any agreements for a supply of electricity show any undue preference to any local authority, company, or person, but save as aforesaid they may make such charges and supply the electricity that may be agreed upon, not exceeding

the limits of price imposed by or in pursuance of the licence, order, or special Act licensing the supply of electricity." The outcome of all this, in my judgment, is shortly this, that the receiver here is not entitled to any supply of electricity unless and until he has made a contract for that supply. He has not made that contract, and as long as he has not made that contract he is not entitled to have the Electric Supply Corporation restrained from cutting off the electricity. As I have already said, if the receiver is not the occupier—if there has been no change of occupation—and the Proprietary Mansions (Limited) are still in occupation, then *a fortiori* the Electric Supply Corporation ought not to be restrained.

I only wish to add one word upon a point that has been urged upon us in respect of the purpose which it is said the Electric Supply Corporation have here in insisting in cutting off unless and until a contract is made. It is said that their real object is not to get a contract, but to compel the receiver for the debenture-holders to pay this £400—the whole account for electricity supplied—which the debenture-holders are not really liable to pay. I do not know whether that is the object or not, but I will assume that it is part of the object. But even so the Electric Supply Corporation have a right to say, "We will cut off the supply of electric energy until a new contract is made." If the debenture-holders would sooner pay the old account than keep the the hotel or mansions in darkness for a few days, so much the better for the Electric Supply Corporation; they have a perfect right to exercise any rights that they have, and not the less a right to enforce their rights because by so doing they will be likely to get collateral advantage. I cannot say at this present moment whether the Proprietary Mansions (Limited) would prefer to remain in darkness for a week or with only candles or something of that sort, but it seems to me that the question of what the ultimate purpose of the Electric Supply Corporation may be has really nothing to do with the abstract question of law that we have to decide here. It has been said that one can have no sympathy with the Electric Supply Corporation who are putting the screw on in this way. I do not say that that is not so, but it is not necessary to have sympathy for a corporation because a corporation never has sympathy for anyone else.

STIRLING, L.J.—I am of the same opinion. I shall only say a very few words. This action is based on the infringement of a legal right. The injunction which has been granted is not sought on any equitable ground, but simply because it is contended by the plaintiff that the defendants threaten and intend to violate a legal right of the plaintiff—viz., the continuous supply of electric light to the St. Ermin's Mansions. In order therefore to obtain an injunction he must show a legal right to that supply. [His lordship stated the facts, and continued:] Now, the limited company, who were the owners of the hotel, have made a serious default, and a large sum is due in respect of the electric supply from them. The stipulation in this contract, if the receiver adopts it, would be binding as against him, but he objects to pay the arrears and therefore naturally he will have nothing to do with this contract. It is not for me to say, and I do not express an opinion one way or the other, whether he can be compelled to adopt that contract or can only get a supply by entering into another and fresh agreement. But if he does not choose to avail himself of that contract the only other way in which he can get a supply is by virtue of his being occupier of the hotel. Now, his title to that arises either under the Electric Lighting Order Confirmation Act of 1889 or under the general provisions of the Electric Lighting Act of 1882, and the learned counsel for the plaintiff rather relied, I think, upon the provisions of the Electric Lighting Order Confirmation Act of 1889, s. 47. That begins by imposing an obligation on the electric lighting company which I shall read very shortly: "The undertakers shall, upon being required to do so by the owner or occupier of any premises (within certain limits which I need not mention), give and continue to give a supply of energy for such premises in accordance with the provisions of this order." Therefore that imposes the duty of giving and continuing to give a supply of energy when required so to do by the owner or occupier of any premises, but such supply is to be given and continued in accordance with the provisions of the order. Now that extends, I suppose, to every owner and occupier within the defined limits. The subsequent portion of the section imposes obligations upon the owner and occupier. The second part of it begins: "Every owner or occupier of premises requiring a supply of energy shall do certain things." The language as far as I have read it is as extensive as that which is used with reference to owners and occupiers in the preceding portion of the order, and it seems to me that *primâ facie* the meaning must be taken to be that every owner or occupier who desires to avail himself of the provisions in the earlier part of the order and to seek a supply from the undertakers is on his part to comply with the directions which are given in the subsequent portions of the order. These require him to serve a notice upon the undertakers specifying the premises in respect of which such supply is required, and the maximum power required and so forth, and to enter into a written contract.

Now I quite agree that notwithstanding the wide language which was used it may be that the terms of the section and the nature of the obligations imposed show that it is to receive a narrower interpretation, and it is said that in part at least the language as to some of the obligations which are there imposed does show that it did not apply to owners or occupiers who were not requiring supply for the first time, or at all events to occupiers who became such at the time when there was an existing supply to the premises. I do not think it is necessary for me on this occasion to do more than to say that I am not satisfied that that limitation exists. And notwithstanding the points which were very forcibly put both by Mr. Warrington and Mr. Mitchell, I remain as at present advised of the opinion that every owner or occupier must fulfil the conditions imposed by section 47 of this order, but if I am wrong in that then I agree entirely with what Vaughan Williams, L.J., has said as to the effect of section 19 of the Act of 1882; and *quacunque via*, I am of opinion that the occupier is not entitled as of right to a supply of electric light until he enters into a contract with the corporation. The plaintiff does not profess to have entered into any such contract, and therefore it seems to me that there is no ground for the injunction. I will only add this, that if, as I think, the defendants had the right which they insist upon, of cutting off the electric light, the court has no jurisdiction to interfere with them simply because they may do it for the motive which is suggested. It has been held by the House of Lords in a well-known case that even the existence of malice does not prevent a person exercising his legal right or found a right for an injunction against such person. Here the facts fall very short of that, and it seems to me therefore that there is no foundation for the granting of the injunction which has been granted by Kekewich, J.

COZENS-HARDY, L.J.—I am of the same opinion. The injunction which has been granted can only be justified on the ground of a breach or a threatened breach of some contract between the plaintiff and the defendants or on the ground of a breach of some statutory duty imposed upon the defendants in favour of the plaintiff. Now, there is one contract in existence which has been called the old contract—that is, the contract between the Electric Supply Corporation and the hotel company. That is a contract upon which the plaintiff here does not rely for the best possible reason, that under the express terms of that contract the Electric Supply Corporation has the right to cut off the supply by reason of the non-payment of the arrears due. No new contract is even alleged by the plaintiff, but it is suggested—at least this is how I understand it to be put—that there is a breach of some statutory duty which entitles the plaintiff to relief by way of injunction. I assume, without in any way deciding, that the plaintiff in this case—the receiver in the debenture-holders' action—is by virtue of the form of the order appointing him to be deemed an occupier of these premises. If he is not an occupier, then it seems to me to be plain that there is no statutory duty towards him. But if he is an occupier, and treating him on that footing I cannot find anything in the statutes which entitles a person from the mere fact of being in occupation of premises which have been supplied with the electric light to say "You must continue this supply between you and me, and in fact you are bound to continue it for at least seven days without any security—without any right whatever on my part." Now I prefer to base my view rather, as Vaughan Williams, L.J., has done, upon the Act of 1882, s. 19. I think section 19 contemplates an arrangement or a contract between the occupier and the company, and then the words "entitled to a supply" mean entitled to a supply under and by virtue of a contract made between the occupier and the company. The terms of supply may vary. There is a maximum, and there is a clause in the Act which prevents undue preference. But within those limits it is left to the electric light company to make such bargains as it may think fit with individual customers who apply to them for a supply of electric light. This seems to me really to have been the view taken by Buckley, J., in *Metropolitan Electric Supply Co. (Limited)* v. *Ginder*, 49 W. R. 508, [1901] 2 Ch. 799, which has been referred to from which I will only read one passage at p. 810. He says: "Under section 19 every person within such area as this is entitled to a supply upon the same terms on which any other person in the area is entitled under similar circumstances to a corresponding supply." Now that expression "person entitled" means, I think, entitled by arrangement made between him and the company. No such arrangements have been made here, no such contract is alleged now to exist between the plaintiff and the company. I think that for these reasons the injunction granted by Kekewich, J., ought to be discharged.

Appeal allowed.

Solicitors, *Deacon, Gibson, Metcalf, & Marriott; G. J. R. Stammers.*

High Court of Justice.

Chan. Div. } Buckley, J. } March 11.

FLETCHER v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (a.)

Vendor and purchaser—Railway company—Mine owner—Possession of mines—Interest upon purchase-money—Construction of private Act of Parliament—"Losses."

A railway company, owners of a canal, were empowered by a private Act of Parliament to give notice to adjacent mine owners not to work their mines within a prescribed distance of the canal. Upon such a notice being given the company were to purchase the mines affected by the notice, the amount of purchase-money and compensation was to be settled by arbitration, and the compensation was to include "all such additional expenses and losses" as should be incurred by the mine owner by the minerals being left for the support of the canal. In 1892 the company gave a notice under the Act to a mine owner. The amount of the purchase-money and compensation was settled by arbitration in 1901, and was subsequently paid by the company without prejudice to the question of the right of the mine owner to interest.

Held, that the mine owner was not entitled to interest under the Act as an "additional loss."

But, held, that the company were in possession or enjoyment of the mines in question from the date of their notice, and that upon the general principles of equity as between vendor and purchaser the mine owner was entitled to interest at 4 per cent. upon the purchase-money as from that date.

Action.

This was an action to recover interest upon the purchase-money or compensation payable by the defendant company, under a private Act of Parliament, for certain mines and minerals which they had given notice to the plaintiffs not to work.

The plaintiffs were the administators of the estate of one Herbert Fletcher, in whom, at the date of the Act, were vested certain mines and minerals lying under or adjacent to the Manchester, Bolton, and Bury Canal, and who was then engaged in working them. The defendants were the owners of the canal.

By the Lancashire and Yorkshire Railway (Various Powers) Act, 1892 (55 & 56 Vict. c. clxxvi.), it was provided by section 53, with regard to these mines and minerals, that when the mine owner should get within a prescribed distance of the canal he should give two months' written notice to the defendant company of his intention to proceed with the working of the mines, and that within such period of two months he should not continue to work within the prescribed distance.

Section 55, after giving the company, upon receipt of this notice, power to inspect the mines, proceeded: "If the company be willing to purchase and make compensation for such bed, vein, or seam within the prescribed distance or any part thereof to the mine owner, and shall give notice in writing to that effect to such mine owner, then the said bed, vein, or seam within the prescribed distance, or such part thereof as the company may desire to be left, shall not be wrought or gotten, but shall be purchased and paid for by the company; and if the company and mine owner do not agree as to the amount of such purchase-money and compensation, the same shall

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

be settled by arbitration in the manner provided for by the Arbitration Act, 1889, or any subsisting statutory modification thereof. Such compensation shall include in addition to the value of the bed, seam, or vein so purchased, all such additional expenses and losses as shall be incurred by the mine owner by reason of the leaving of minerals for the support, security, or preservation of the canal . . . or for the continuous working of the said mines being interrupted."

By section 62 the mines and minerals paid or compensated for were to vest in and belong to the defendant company, and to remain for ever unworked.

The Act was passed in June, 1892, and Mr. Fletcher, who was at the time working within the prescribed distance, in July, 1892, gave notice to the company of that fact, under section 53.

On the 19th of November, 1892, the defendant company gave Mr. Fletcher notice in writing under section 55 that they were willing to purchase and make compensation to him for so much of the mines therein specified as remained unworked, and such further compensation as he might be entitled to under the Act, and that that part of the mines must not be wrought or gotten.

Mr. Fletcher died in December, 1895. His administrators and the company not being able to agree upon the amount of the purchase-money and compensation, the matter was referred to an arbitrator, who in April, 1901, awarded the sum of £16,565 as the amount payable by the defendant company, and that if as a matter of law interest was payable it should be paid as simple interest at 4 per cent. per annum from the 19th of November, 1892, until the actual payment.

On the 20th of December, 1901, the defendant company paid this sum to the plaintiffs without prejudice to the question as to whether interest also was payable. The plaintiffs now claimed a declaration that they were entitled to be paid interest upon the above sum from the 19th of November, 1892, to the 20th of December, 1901, at 4 per cent. per annum.

Astbury, K.C., and *O. L. Clare*, for the plaintiffs.—The railway company have been in possession of the mines since the 19th of November, 1892, and not having paid the purchase-money till 1901 must pay interest at 4 per cent. upon it: *In re Piggott and the Great Western Railway Co.*, 29 W. R. 727, 18 Ch. D. 146; *Rhys* v. *Dare Valley Railway Co.*, 23 W. R. 23, L. R. 19 Eq. 93; *In re Shaw and the Corporation of Birmingham*, 33 W. R. 74. 27 Ch. D. 614. The plaintiffs are also entitled to interest under section 55 as being an "additional loss" incurred by the mine owner.

Littler, K.C., H. Terrell, K.C., and *A. M. L. Langdon*, for the defendant company.—The amount of the purchase-money was not ascertained until the award, and at any rate no interest is payable till then: *Caledonian Railway Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 56. And interest cannot be given as "losses"; *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co*, [1893] A. C. 429.

BUCKLEY, J.—Directly the company gave the notice of the 19th of November, 1892, the mine owner ceased to enjoy the seam of coal in the only way in which it could be enjoyed, and the company became liable to pay compensation. It is argued for the plaintiffs that they can get interest on the purchase-money under section 55. In my opinion that contention is not well founded. Interest upon purchase-money is not a loss incurred by reason of the leaving of the minerals, or of the continuous working of the mines being interrupted. There might be a loss from those things, and it might be equal to, or greater than, or less than the interest, but it is a totally different thing. If coal was at a very high price, the owner might sustain a very serious loss from being precluded from working it. If the coal was at a ruinous price to the colliery owner, he might sustain no loss from being so precluded. These two things are not comparable. I do not think that there are any words in section 55 which include under compensation (which is compensation for the seam of coal) interest which measures the loss the man sustains by not being paid the purchase price for the seam of coal.

But the question remains, what are the rights of the plaintiff under the general law? The principle laid down in *Birch* v. *Joy*, 3 H. L. Cas. 565, is, I think, plain, and has been daily acted upon. When there arises such a state of things between vendor and purchaser as that the purchaser becomes entitled in equity to the thing purchased, and to the receipt of the rents if there be such, or to the enjoyment of the thing purchased, there arises in equity a correlative right on the vendor to have interest upon his purchase-money. That general principle has been frequently acted upon since. The case of *Rhys* v. *The Dare Valley Railway Co.* is a fair instance of its application in the case of a railway company. There the right to interest was from the date of the railway company taking possession of the land. You have always to see whether one party has acquired enjoyment of the property and the other party has not acquired the purchase-money. Now what is the possession of a subterranean seam of coal. The railway company did not want to dig it; they wanted it for the support of their canal. On the other hand, the mine owner wanted to dig it; that was his way of enjoying it. Now from the 19th of November, 1892, the railway company had the enjoyment of the coal by way of support. So far as you can have possession of such a thing, they had possession of it. The possession at that date was changed under sections 53 and 55 of the Act. The mine owner could not go there. That is to say, from the 19th of November, 1892, the railway company, who were the purchasers, have enjoyed those mines, and the mine owner, who was the vendor, has not enjoyed them, and consequently the railway company have been in the possession, the occupation, or the enjoyment, or whatever you like to call it, of both the land and the purchase-money. I think, therefore, they ought to pay interest at 4 per cent. upon the purchase-money during that period. The case of the *Caledonian Railway Co.* v. *Carmichael* seems to me a different case. Sir Thomas Carmichael did not take steps to ascertain the sum to be paid, or ask for payment of it, and in that case the ordinary rule applied that a debt does not carry interest except under contract or after notice given under the statute.

Judgment for the plaintiff.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Peace & Ellis*, Wigan; *Woodcock, Ryland, & Parker*, for *C. Moorhouse*, Manchester.

Chan. Div.
Swinfen Eady, J. } March 6, 7, 19.

In re HIGHETT AND BIRD'S CONTRACT. (a.)

Vendor and purchaser—Open contract—Leasehold—Covenant to repair broken—Dangerous structure—London Building Acts, 1894 *and* 1898 (57 *&* 58 *Vict.*

(a.) Reported by J. F. CARR, Esq., Barrister-at-Law.

c. 213; 61 & 62 *Vict.* c. 137)—*Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 3, *sub-section* 4.

A leasehold house was sold in July, 1901, *under an open contract, the lease containing a covenant to keep the building in good and substantial repair and condition. On the* 1*st of November*, 1901, *a police-court order was made under the London Building Acts*, 1894 *and* 1898, *requiring the vendor to underpin a portion of the house within fourteen days. On the* 6*th of November*, 1901, *the vendor established a good title to the premises.*

Held, that the expense of complying with the police-court order for the repair of the premises in respect of which the vendor was liable under the covenant in the lease, must be borne by the vendor, and could not be thrown by him upon the purchaser.

Tubbs *v.* Wynne, [1897] 1 *Q. B.* 74, 45 *W. R. Dig.* 168, *distinguished.*

Vendor summons under the Vendor and Purchaser Act, 1874.

The contract was by correspondence for the sale of a leasehold house held at a ground-rent of £7 per annum for £365.

The facts and arguments sufficiently appear from the considered judgment.

Eve, K.C., and *Edward Ford*, for the vendor.

W. M. Spence, for the purchaser.

SWINFEN EADY, J.—On the 22nd of June, 1901, Alfred J. Bird wrote to William Highett offering £350 for the leasehold house, 142, Friern-road, East Dulwich, held for an unexpired term of about eighty years, at a ground-rent of £7 per annum, and stating that the present tenants informed him that their tenancy agreement expired the 25th of March, 1902. On the 24th of June, 1901, William Highett wrote that the lowest possible price he could take was £365. On the 25th of June Alfred J. Bird increased his offer to £360, adding, "I shall be glad to hear that you will accept this, as no doubt you are aware that the house requires sundry repairs." This offer was declined, but on the 1st of July, 1901, Bird agreed to purchase for £365. No date was then fixed for completion of the purchase. On the 28th of August, 1901, the parties agreed that the purchase should be completed on the 27th of September, 1901, the purchaser stipulating, however, that he was to be at liberty to complete at any earlier date.

On the evening of the same day, the 27th of September, 1901, the tenant of the house brought to his landlord, the vendor, a notice in writing, dated the previous day, which had been left on the premises and signed on behalf of the London County Council, requiring the owner and occupier of the structure known as 142, Friern-road forthwith to take down, underpin, or otherwise render secure the front bay; also to shore up the structure immediately. The notice was not complied with, and on the 1st of November, 1901, an order was made by the Lambeth police-court, under the London Building Acts, requiring the owner of the structure to take down or underpin or otherwise render secure the front bay, to the satisfaction of the district surveyor, within fourteen days from the service of the order. A copy of that order was served on the vendor's solicitor, Mr. Bartlett, on or about the 8th of November, 1901, and on the vendor on or about the 9th of November, 1901.

The question raised by this summons issued by the vendor under the Vendor and Purchaser Act, 1874, was (paragraph 3)—by whom are the costs of complying with this order to be borne, by the vendor or the purchaser?

It was not disputed that in the absence of any stipulation on the subject, the vendor must bear all expenses and outgoings of property sold, down to the time when a good title was first shown, so that the purchaser could prudently take possession, and as from that time that all such expenses and outgoings must be borne by the purchaser. This is settled law: *Barsht* v. *Tagg*, 48 W. R. 220, [1900] 1 Ch. 231, at p. 234.

On the 6th of November, 1901, the last outstanding requisition was cleared up. Mr. Bartlett, the vendor's solicitor, wrote to the purchaser's solicitor on that day. that the tenant of 142, Friern-road would leave at Lady-day, 1902, and this answer was accepted as sufficient notwithstanding the previous answer on the 14th of September, 1901, that the tenant had taken the premises for three years from the 24th of June, 1899. The governing date showing the dividing line by which the rights and liabilities of the parties are to be determined is the 6th of November, 1901.

It has been contended before me by the vendor that the cost of complying with the order of the Lambeth police-court must be borne by the purchaser, and that the purchaser is bound to indemnify the vendor against the expense. This contention was based upon the fact that the fourteen days within which the work was ordered to be done did not begin to run until after the 6th of November, 1901, and therefore that the vendor was not in default. Reliance was placed upon *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168. In that case an order had been made to pull down dangerous buildings, and the twenty-eight days allowed for doing the work were on the point of expiring on the 8th of May, 1893, the date down to which the vendor agreed by the contract to discharge the outgoings. At the trial before Collins, J., it was held that the liability, having been incurred before the 8th of May, was an "outgoing" within the meaning of the condition, that the purchaser, having paid the amount, was entitled to recover from the vendor the sum so paid. The vendor relied upon that case in his favour, and contended that as the order to execute the work had not in the present case been served on the 6th of November, 1901, the cost of the necessary work was not an outgoing to be borne by him, but that the expenses incurred arose after the 6th of November, 1901, and therefore must be borne by the purchaser. He insisted, moreover, that the expenses of the works did not become a charge upon the property until the completion of the work.

This argument does not touch the principle upon which, in my judgment, the present case falls to be decided. The sale is of a leasehold house, the lease containing a covenant to keep the buildings in good and substantial repair and condition. The sale is under an open contract so that the purchaser is entitled to proof that the covenants and conditions in the lease have been performed and observed up to the 6th of November, 1901. Under the Conveyancing Act, 1881, s. 3, sub-section 4, upon production of the receipt for the last payment due for rent, the purchaser is to assume unless the contrary appears that all the covenants of the lease have been duly performed up to actual completion. But in the present case the contrary does clearly appear. There is no dispute that on the 6th of November, 1901, the covenant before mentioned had been broken and that a portion of the buildings was so much out of repair as to be dangerous and to justify the action taken by the London County Council.

The vendor contended that although the premises were out of repair the purchaser had notice of their state and condition before entering into the contract. The result of the evidence is that the purchaser did inspect the premises before agreeing to purchase, and saw some cracks there, but that they afterwards

increased to such an extent that the premises became in a dangerous condition by the 21st of September, 1901, and remained so until after the 6th of November, 1901. The knowledge of the purchaser of the state of the property at the date of the contract does not, however, appear to me to be material, as it has been held that the obligation to make a good title to leaseholds is not removed by the knowledge of the purchaser at the time of the sale that the title was bad by reason of the breach of a covenant to repair: *Barnett* v. *Wheeler*, 7 M. & W. 364. The vendor then insisted that the purchaser could not object to the breaches of covenant as the receipt for the ground-rent had been produced, and he relied upon the cases of *Bull* v. *Hutchens*, 11 W. R. 366, 32 Beav. 615, and *Lawrie* v. *Lees*, 30 W. R. 185, 7 App. Cas. 19, at p. 32, but in both those cases the purchaser was bound by the condition of the contract to accept the last receipt for rent as conclusive evidence that the covenants had been performed, whereas under the Conveyancing Act the receipt is only *primâ facie* evidence, and when the contrary appears the receipt cannot be relied upon. The result is that as between vendor and purchaser of this leasehold house I decide that the expense referred to in paragraph 3 of the summons in respect of which the vendor is clearly liable under the covenant in the lease must be borne by the vendor and cannot be thrown by him upon the purchaser.

With regard to the cost of the summons, I am satisfied that they have been much increased by the purchaser's denying any knowledge of cracks at the date of the purchase or of the state of the bay window. I think it clear that some cracks had then arisen, and that the state of the bay window was to some extent defective. Indeed, in the November previous, Alfred Bate, the builder, had cased the windows by reason of the settlement of the bay, and I arrive at the conclusion that Filmer, the tenant, did point out the condition of the premises to the purchaser, as Filmer states. It would not be right to throw these costs upon the vendor. Justice will be done if I order the taxation of the purchaser's costs of the summons, and order the vendor to pay one-half of the amount.

Solicitors, *J. Bartlett; J. T. Anthony.*

Chan. Div.
Swinfen Eady, J. } Feb. 21, 22, 25; March 6.

In re CROMPTON'S TRADE-MARK. (*a.*)

Trade-mark—Registration—Rectification—Combination mark—Sufficiency of description—Double registration—"User"—Registration too wide—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.

Where a trade-mark consists of a number of labels, and the labels themselves appear on the register, the description of the essential particular as a "combination of devices" is sufficient.

Where a mark essentially the same as a prior registered mark belonging to the same person has been put on the register, it will not be expunged at the instance of a rival trader.

In re Player & Sons' Trade-Mark, [1901] 1 *Ch.* 382, 49 *W. R. Dig.* 176, *distinguished.*

A trade-mark may consist of several pieces, all of which need not be simultaneously visible.

The fact that a mark is registered for the whole of a class, and is only used for part of the class, is not a ground for expunging it from the register.

Motion.

This was a motion by Messrs. Grandage & Co. to rectify the register of trade-marks by removing therefrom the trade-mark of Messrs. A. & A. Crompton & Co. (Limited), No. 107,354, in class 23, cotton yarn and sewing cotton.

An action was pending in which Messrs. Crompton, who are cotton spinners, were seeking to restrain Messrs. Grandage from infringing the plaintiffs' registered trade-mark, and from passing off yarn sold or exported by the defendants as and for the plaintiffs' yarn.

The mark in question was registered on the 10th of January, 1894. The essential particular was described as "a combination of devices," and the applicants disclaimed any right to the exclusive use of the added matters, except so far as the same consisted of their own name and address.

There appear upon the register in respect of this mark three labels of different sizes; their description as stated by the judge, is as follows: "The largest size label consists of an oblong border with a statement in nine different languages descriptive of the quantity and weight of yarn; the medium size label consists of an oblong border in which are two shields, charged with devices, surmounted by crests, with leaves, flowers, and a scroll, and the name of the respondents (Messrs. Crompton) impressed by perforation. The smallest size label is the same as the medium size, but without the perforated name."

D. M. Kerly (*O. L. Clare* with him), for Messrs. Grandage.—The trade-mark application is bad because it contains no sufficient description of the essential particulars within section 64; it does not say what the devices are, or how they are combined. There are also none of the essential particulars required by the section. The large label is merely descriptive matter, and therefore the only device is that contained in the two smaller labels; that is protected by a previous registration and cannot be again registered: *In re Player's Trade-Mark*, [1901] 1 Ch. 382, 49 W. R. Dig. 176. A trade-mark cannot be registered in three pieces, between which there is no physical connection and one of which is not seen until the goods are opened. Intention to use as a trade-mark is essential: *Batt* v. *Dunnett*, [1899] A. C. 428. The part of this mark which is placed inside the package is not used as a trade-mark: *In re Kinahan's Trade-Mark*, 10 Rep. Pat. Cas. 393. The registration is for the whole of class 23; it is not applicable to sewing cotton, and is, therefore, too wide.

He also referred to *Baker* v. *Rawson*, 45 Ch. D. 519.

Sebastian, for Messrs. Crompton.—The form of claim is sufficient; it is in common use and was that suggested by the comptroller. The mark as a whole is to be protected. The combination of devices consists of the double sets of arms, the scrolls and floral matter, the perforation, and the rectangular shape of the three labels. I do not claim to protect the large label separately, but it is part of the trade-mark, though not part of the essential particulars; it is equivalent to the disclaimed matter in *Hubbuck* v. *Brown*, 17 Rep. Pat. Cas. 638, where Lord Alverstone said that the whole combination was to be protected. In the present case the combination of the three labels together with the perforation is quite different from the small mark previously registered. Registration in several pieces, even though one piece is concealed, is no objection. Anyone who has been accustomed to see the two outside marks would not be content until he had seen the third one inside. Old marks

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

must be registered as a whole; what is compulsory in respect of old marks must be at least admissible in respect of new marks: *In re Spencer's Trade-Marks*, 3 Rep. Pat. Cas. 73, 34 W. R. Dig. 200. Concealment of part of the mark is no objection. Marks on the inside of corks have been protected (*Moët* v. *Clybouw*, Sebast. Dig. 316; *Moët* v. *Pickering*, 26 W. R. 637, 8 Ch. D. 372); the reason must have been that they were trade-marks. Even supposing the mark to be bad if put inside, there is nothing in this registration to compel us to put it inside. In *In re Clement et Cie's Trade-Mark*, 48 W. R. 67, [1900] 1 Ch. 114, registration in two pieces was allowed. *In re Player's Trade-Mark* is distinguishable, because in that case the two marks were replicas of each other. If Messrs. Compton wanted to use the three labels together with the perforation the only course open to them was to register the whole: *Richards* v. *Butcher*, [1891] 2 Ch. 522, 39 W. R. Dig. 237.

He also referred to *In re Powell's Trade-Mark*, 41 W. R. 627, [1893] 2 Ch. 388, and *Moët* v. *Couston*, 33 Beav. 578, 12 W. R. Ch. Dig. 38.

O. L. Clare, in reply.—The application does not in form comply with section 64, because it does not state the essential particulars. The object of the application and disclaimer in the case of a trade-mark is the same as that of the specification in the case of a patent; it is to warn the public of what is claimed by the applicant. There is nothing in Messrs. Crompton's application and disclaimer to show that the essential feature of their trade-mark is the use in combination of the specified devices. If it is suggested that the essential particulars consist of the size, shape and manner of user of the labels, the answer is that they have not been specified. There is no distinctiveness about the shape of a rectangle. None of the cases cited as to concealed marks are registration cases. The registration is in point of fact too wide, and may therefore be restricted to the article for which the mark is in fact used: *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197. In such a case there is no distinction in principle between restriction and striking off.

He also referred to *In re Apollinaris Co.'s Trade-Mark*, [1891] 2 Ch. 186, 39 W. R. Dig. 237.

Cur. adv. vult.

SWINFEN EADY, J., after stating the facts, continued: The first ground upon which the applicants base their case is that the essential particulars are not sufficiently stated in the respondents' application to register. It appears that the application in writing, as at first carried into the comptroller, did contain some description in writing of the essential particulars, but this was altered (and, as I gather, at the request of the comptroller) to the form in which it now appears on the register, describing it as "a combination of devices," and leaving anyone to refer to the actual combination registered to see for themselves of what the trade-mark consists. I am told that this is now a common form at the office of the comptroller, and Mr. Sebastian referred to some current numbers of the Trade-Marks Journal as showing how general the practice is. However that may be, I am of opinion that the description is sufficient. Where the labels themselves appear upon the register, and in the manner in which they are used, the description is, in my opinion, sufficient. The eye frequently enables a better idea to be formed of trade-mark than any verbal description would have done. In *Eno* v. *Dunn*, 39 W. R. 161, 15 App. Cas. 252, the Lord Chancellor, at p. 255, after stating the results of comparing two trade-marks, which he placed side by side, added that no verbal description of the difference did entire justice to the dissimilarity of the two marks.

It was next urged that the trade-mark was not really a trade-mark at all, but, if anything, it was three trade-marks, which could not be registered as one mark, and it was contended that there could not be a valid trade-mark consisting only of the combination of two old labels, each separately registered as a trade-mark, together with something not distinctive at all. In support of this proposition reliance was placed upon *In re Player's Trade-Mark*, where Cozens-Hardy, J., refused to direct the comptroller to proceed with the registration of a mark which, in all its essentials, was the same as an earlier registered trade-mark of the same applicant, on the ground that it was superfluous. If the mark had been registered, however, by the comptroller in that case, it does not follow from the decision of Cozens-Hardy, J., that, upon an application by a rival trader, it would necessarily have been taken off the register. How is he aggrieved by its registration? If his contention is that registration of the mark is superfluous, as the registration adds nothing to existing rights, then he is not injured by such registration. If, however, registration prevents him from doing anything which, but for the registration, he could lawfully do, then it follows that registration was not superfluous, but has secured to the party registering some additional right. Nor has the argument that the mark is in reality three trade-marks any validity. Provided that the mark complies with the requisites of section 64 of the Act of 1883, the whole mark need not appear on any one ticket, label, stamp, or impression. A combination of several different marks, like that which was the subject of dispute in *Robinson* v. *Finlay*, 27 W. R. 294, 9 Ch. D. 487, and which is very common among dealers in cotton goods, may be treated as equivalent to a single mark. In *In re Spencer's Trade-Marks*, where the words "diamond cast steel" were on one side of files, and the corporate mark of the maker on the other side, the court held that the words "diamond cast steel" had not been used alone as a trade-mark; they treated the marks on both sides of the file as together constituting one mark. In that case Lord Esher, M.R., said: "What was used before 1875 by Mr. Walter Spencer was one distinguishing mark, which one mark was a combination of a mark which had been granted to his father by the Cutlers Company, and a mark which he invented himself. The two together being put on his goods in order to distinguish his goods, they made it one trade-mark, and I do say this distinctly, that whether the things which are put on to make a distinction (for that is all that is wanted) are put close together, or are put at two ends of the same goods, or are put one on one side of the goods and one on the other, if they are on the goods for the purpose of making a distinction they are one mark, and the mere fact that on the files they have been put on the two sides does not make them separate marks—certainly not the separation which is relied on here, even though the name of the person is not a part of the mark." In the present case Messrs. A. Crompton & Co. (Limited) use a combination of the three labels to distinguish their goods. To apply what the Master of the Rolls said in the case just cited, the moment a trader puts on his goods three labels it is clear, it is an inevitable business result, that he puts them all three on in order that all three being there may distinguish his goods.

It was next urged that the respondents had never used and never intended to use the combination mark in question as a trade-mark. It was not disputed that the respondents had used the three labels in combination upon their goods to a large

extent, but it was said that two labels were placed outside the wrapper and the third label inside the wrapper, and that it was necessary that all the labels should be visible at once to constitute a user as one trade-mark. In my judgment there is no foundation for this contention. It must very frequently happen that if labels or tickets are put at different ends, or different sides of packages, or if a portion of a mark is stamped or impressed on one side of any article and the other portion on the other side, the whole mark cannot be seen at the same time; the goods may have to be turned over, or turned round, yet it cannot be doubted that marks so used are being properly used as trade-marks.

A further point was made that the respondents have only used their registered mark for cotton yarn, and only intend so to use it, whereas they have registered it in class 23, for cotton yarn and sewing cotton not on spools or reels. It does not appear that the applicants deal in sewing cotton, or are in any way affected, by the registration, except so far as yarn is concerned, and in any case their remedy would be to rectify the register by limiting the mark to those articles in the class in connection with which it was being actually used, as was done in *Edwards* v. *Dennis*, and not to strike the mark off the register altogether. No application has been made to me on the present motion to limit the respondents' mark to yarn. The result is that the motion fails and must be refused.

Solicitors, *W. J. & E. H. Tremellen*, for *Blair & Seddon*, Manchester; *Woodcock, Ryland, & Parker*, for *Tweedale, Son, & Lees*, Oldham.

K. B. Div. (Kennedy, J.) Feb. 19; March 7.

JACOB v. GAVILLER. (a.)

Insurance—Marine—Policy on dog—All risks including mortality—Cattle clause—Walking to be deemed safe arrival.

A policy of insurance on a dog during transit from Liverpool to Lahore contained the following clause: "This insurance is against all risks, including mortality from any cause, jettison and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." The dog was injured during the transit, and on arrival at Lahore could only walk on three legs.

Held, first, that the policy covered all risks, and not merely mortality; secondly, that the dog did not walk at Lahore within the meaning of the policy.

Action tried in the Commercial Court without a jury.

The plaintiff was the owner of a valuable fox terrier dog called Hardwood. The defendant was an underwriter at Lloyd's.

The plaintiff's claim was for £25, the defendant's share of liability under a policy of insurance on the dog for £150.

The plaintiff had bought the dog for £55 with a view of sending it out to India for show and stud purposes and possibly for sale, and in the meantime had left it at Messrs. Spratt's depôt at Liverpool for the purpose of being taken care of. When it was sent to the depôt the dog was healthy and sound.

The insurance covered by the policy, which was dated the 23rd of October, 1900, was expressed to be as follows: "From the Mersey to Bombay whilst there and thence by rail to Lahore, Punjab, including seventy-two hours at Spratt's depôt, Liverpool. Including all risks in craft to and from the vessel and of steam navigation . . . in the good ship or vessel called *The Clan Chisholm* . . . £150—one fox terrier dog (Hardwood) so valued."

The policy then proceeded to enumerate the ordinary perils of a marine risk, and continued as follows: "This insurance is against all risks including mortality from any cause, jettison and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival."

On the 27th of October *The Clan Chisholm* sailed from Liverpool with the dog on board, and duly arrived at Bombay on the 24th of November.

At Bombay the dog was found to have been injured, and on its arrival at Lahore it could only walk on three legs, the fourth leg being useless and somewhat withered.

On examination it appeared that the dog was suffering from periostitis, and it was greatly depreciated in value.

Scrutton, K.C., and *Schiller*, for the plaintiffs.—The policy, being against "all risks," covers any injury which may have happened to the dog while it was at Spratt's depot, or while it was in transit from Liverpool to Lahore. The words "including mortality from any cause, jettison and washing overboard" are superfluous. The word "risks" is equivalent to "perils": *Nigel Gold Mining Co.* v. *Hoade*, *ante*, p. 108. Secondly, "walking at Lahore" is only an answer to a claim for a total loss, and not to a claim for a partial loss. Thirdly, the dog did not walk at Lahore; "walking" means efficient walking in the ordinary sense of the term.

Hamilton, K.C., and *F. D. Mackinnon*, for the defendant.—The words "all risks" are qualified by the following words, which show that the policy was only intended to cover a total loss. Secondly, the clause "walking at port of discharge to be deemed a safe arrival" is generally inserted in insurances on cattle for the purpose of precluding any inquiry as to injuries received in transit. Such walking is an answer to any claim under the policy. Thirdly, the dog did walk at Lahore; he was able get along by pedestrian locomotion.

Cur. adv. vult.

March 7.—KENNEDY, J.—On the evidence I have come to the conclusion that the injury was caused during the early part of the voyage. Now, assuming that the dog could not walk at Lahore, the first question is whether on the terms of the policy the defendant is liable. In my opinion the words "all risks" in the clause of the policy cannot be cut down or qualified as the defendant contends. To restrict the risk to mortality would, I think, be to give the words an unnatural construction. I am of opinion that the policy covers all risks, and not mortality only. I cannot accept the plaintiff's contention that the words "walking at Lahore, Punjab, shall be deemed a safe arrival" merely qualify the mortality clause, and do not refer to other risks. If the dog walks at Lahore within the meaning of the policy then no claim can be made. It is true that this might lead to the absurdity that if the dog had been blinded but could walk at Lahore the plaintiff could not recover. Next, did the dog walk at Lahore? I think that walking, applied to a dog, means locomotion in the usual way, on four legs; and therefore I am of opinion that this dog did not walk at Lahore. The case would have been different if he had been limping from some temporary cause, as, for instance, a thorn in the paw. This was not a case of im-

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

perfect user, but of incapability of user. I think that the value of the dog has been depreciated to the extent of two-thirds its value, and therefore the defendant is liable to the extent of £16 13s. 4d.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Coode, Kingdon, & Cotton.*

Solicitors for the defendant, *Thomas Cooper & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Channell and Darling, JJ.) Dec. 16.

WESTMINSTER CITY, COUNCIL OF *v.* LONDON COUNTY COUNCIL. (*a.*)

Local government—Jurisdiction—Temporary structures—London Building Act, 1894—*London Government Act,* 1899.

The powers over temporary wooden structures conferred by section 84 *of the London Building Act,* 1894, *on the London County Council are transferred by the London Government Act,* 1899, *to the borough councils created by that Act.*

This was a case stated under section 29 of the London Government Act of 1899, which provides that if any question arises or is about to arise as to whether any power or liability is or is not transferred by or under this Act to the council of any metropolitan borough, or any property is or is not vested in any such council, that question may be submitted for decision to the High Court in such summary manner as subject to any rules of the court may be directed by the court, and the court after hearing such parties and taking such evidence (if any) as it thinks just shall decide the question.

Questions arose between the London County Council and the city of Westminster as to whether or not the powers, duties, and liabilities of the county council with respect to the approval or licensing the setting up and control, of certain structures within the city of Westminster were or were not transferred under the London Government Act, 1899, to the council of the borough.

The city of Westminster was created in pursuance of section 1 of the London Government Act, 1899, which gives the Crown power to create certain areas and to make such rearrangements for boundaries as may be found necessary, and the 1st schedule to such section defines those boundaries. By section 5, sub-section 1, of the same Act the powers and duties of the London County Council under the enactments mentioned in Part I. of the 2nd schedule to that Act, subject to the conditions mentioned in that schedule, were transferred to the borough council.

That schedule is as follows:

"PART I.

"Minor powers and duties to be transferred from county council.

"Powers and duties transferred. Conditions of transfer. Power under section 84 of the London Building Act, 1894, to licence the setting-up of wooden structures, and power to take proceedings for default in obtaining or observing the conditions of a licence under that section."

Section 84 is one of a series of five sections, 82-86, in Part VII. of the London Building Act giving to the London County Council power to licence temporary structures and providing for the deposit of plans and also providing for the recovery of penalties.

Section 82 provides that "where a builder is desirous of erecting an iron building or other structure . . . he shall make an application to the council accompanied by plans of the proposed building." Section 83 provides that where an application is made to erect any iron or other building or structure of a temporary nature, the council may, if they approve of the plan, limit the period under which it shall be allowed to remain. Section 84, sub-section 1, provides that "no person shall set up in any place any wooden structure . . . without having first obtained a licence from the council and the licence may contain such conditions with regard to the structure as the council may think proper."

Certain temporary wooden stands were erected at the funeral of her late Majesty Queen Victoria and questions arose as to which was the proper licensing authority. It was contended by the London County Council that notwithstanding the provisions of section 5 and the transfer in the first part of the 2nd schedule they had still jurisdiction over the stands in question under sections 82 and 83 of the Act of 1894. They also contended that by section 238 of the Act jurisdiction was still preserved to the district surveyors. Section 238 is as follows: "Every building or structure and every work done to or in or upon any building . . . shall be subject to the supervision of the district surveyor appointed by the district in which the building is situate."

For the borough of Westminster it was contended that the structures fell within the provisions of section 5 (1) of the London Government Act, 1899, and that by the effect of that section all the powers and duties of the London County Council were transferred to the city of Westminster, and that the county council had no authority to licence such structures, and that the duty of supervising such structures by the district surveyor was now transferred to the council of the city of Westminster and its officers.

Manisty, K.C., and *Davis,* for the city of Westminster.—The section (84) in question is copied from section 13 of the Metropolis Management Act, 1882, but with the difference that the words movable or temporary do not occur in section 84, which would have made the matter plain. It is difficult to say what structures do fall within section 84 if these do not.

Avory, K.C., and *Daldy,* for the county council.—The control is still preserved to the county council, as many of the structures are partly composed of iron. The case of *Venner* v. *M'Donell,* 45 W. R. 267. [1897] 1 Q. B. 421. In any case the control of the district surveyor is still preserved, and fees will have to be paid to him.

Manisty, K.C., in reply.

Lord ALVERSTONE, L.C.J.—The broad question raised in the case is whether the London County Council or the city of Westminster is the proper authority to lay down the conditions of construction of wooden structures which it may be proposed to erect at any public functions taking place in the borough of Westminster. Now it is impossible to deal with every case that may arise or to decide upon every particular state of facts which may be involved in the construction of some special structure. This question arises with regard to a number of constructions wholly made of wood except for the nails used, and I wish to guard against being supposed to say that we do lay down any general rule which

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

must govern some special case which may involve other considerations. In my opinion the main question must be determined in favour of the city of Westminster. The history of the matter has been very clearly stated by the learned counsel engaged in the case. Before the passing of the London Government Act of 1899 there had been a series of enactments which put buildings and structures under certain supervision, and section 56 of the Metropolitan Building Act of 1855 was a section similar to section 82 of London Building Act, 1894. Section 13 of the Metropolis Management Act of 1882 was a section which superseded sections 56 and 128 of the Act of 1855, which dealt with or were intended to deal with temporary wooden structures, and no doubt some question similar to the one we have now got to decide might have arisen under the three sections taken from those two Acts of Parliament. When the London Building Act of 1894 was passed section 56 of the Act of 1855 was replaced by section 82; section 12 of the Act of 1882 was replaced by section 83. Section 84, which replaced section 13 of the Act of 1882, modified that section to a certain extent by the removal of the words which related to movable or temporary wooden structures, and making section 84 apply to all wooden structures except hoardings.

The first question therefore that we have to determine is, what is the class of structures that fall within sections 82 and 83 as distinguished from section 84, because by the subsequent Act the powers of section 84 have been transferred to the borough council. I think as far as I can express an opinion sufficiently for the purposes of this case, without attempting, as I said, to deal with any particular state of circumstances that may arise, that sections 82 and 83 are intended to apply to buildings or structures which would ordinarily have been supposed to come under the provisions of Part VI. of the Act, but as to which, from either their construction or their intended use, it was thought by the London County Council that the provisions of Part VI. of the Act were inapplicable. Section 84 seems to me, as it now stands, a section giving control over wooden structures to which no general provisions or substituted provisions of a general character would be applicable. Then we come to the Act of 1899, the London Government Act. As I have already said, by the combined operation of section 5 and the schedule the powers of section 84 of the London Building Act to licence the setting up of wooden structures and the power to take proceedings for default in obtaining or observing the conditions for licensing under that section are transferred to the borough councils. I was very anxious to learn whether Mr. Avory would assist us to find out what would be transferred to the borough of Westminster if his argument was right. The only case that he was able to suggest to us was, if I may use a somewhat abnormal phrase, permanent temporary structures, or in other words some wooden structures intended to remain but joined on to some other structure. It does not seem to me that that is a satisfactory explanation. I think that the Legislature thought that matters that ought to be dealt with by a central body and could be the subject of substituted regulations in place of the general provisions of Part VI. should be dealt with by the central body, the London County Council, but that local matters—as, for instance, the erection of wooden structures for a limited time, to which no general or substituted regulations could be intended to apply, should be transferred to the borough councils. Therefore on this point, as to which of the two authorities are to fix the conditions and impose the limit of time for temporary wooden structures which are to be erected for the purpose of enabling persons to see public ceremonies, in my opinion the contention of the borough of Westminster is right.

Now there remains only the question of the possible supervision or duty of supervision by the district surveyors. Speaking for myself, I do not think we ought to decide that question for two reasons. In the first place it seems to me that it may to a certain extent depend on the very conditions the Westminster Council may think fit to impose. Secondly, we could not deal with that question without deciding what are the rights, duties, and obligations of district surveyors under the Act. They are not represented before us, and their case has not been argued. I think it would be unwise on our part to express an opinion on such a point without knowing the particular circumstances under which this duty arises. We propose therefore not to answer the third question which has been put to us. On the broad question which has been submitted to us I think that the contention of the City of Westminster Council is the right one.

DARLING and CHANNELL, JJ., concurred.

Solicitors for the city of Westminster, *Cameron, Hitchins, & Co.*

Solicitor for the London County Council, *W. Blaxland.*

IN BANKRUPTCY.

K. B. Div. (Wright, J.) March 1

In re WALLIS.

Ex parte THE TRUSTEE *v.* CHARLOTTE WALLIS.

Bankruptcy — Property of bankrupt — Assignment of chose in action—Notice of assignment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

Prior to the bankruptcy the bankrupt had borrowed money from his wife and deposited a life policy with her as security for the loan.

The trustee gave notice of the bankruptcy to the insurance company before the wife gave notice of her claim.

Held, that the fact of the trustee having been the first to give notice to the insurance company did not affect his title as an incumbrancer for value prior to the bankruptcy.

Motion by the trustee in the bankruptcy of A. Wallis for a declaratian that he was entitled to a policy of insurance for £500 on the life of the bankrupt.

Some time prior to the bankruptcy Wallis had obtained a loan from his wife out of her separate estate, and had handed to her as security the life policy in question.

She deposited the policy at her bank, but gave no notice of her charge thereon to the insurance company until after the bankruptcy.

On the 11th of October, 1901, a receiving order was made against Walus, and on the same day he gave the official receiver information of the existence of the policy and of the fact that it was charged in favour of his wife, and deposited with her.

On the 16th of October the official receiver gave the insurance company notice of the receiving order.

Mrs. Wallis did not give the company notice of her claim until the 3rd of January, 1902.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

In the meanwhile the creditors had elected a trustee, who launched the present motion.

Eve, K.C., and *Richard Neville*, for the trustee.—Mrs. Wallis obtained no title to the policy by delivery: *Howes* v. *Prudential Assurance Co.*, 49 L. T. Rep. 133, 31 W. R. Dig. 229; *United Kingdom Life Assurance Co.* v. *Dixon & Hay*, 16 Ct. of Sess. Cas., 1st ser., 1277. The trustee having been the first to give notice of assignment is entitled to the policy.

Reed, K.C., and *Frank Mellor*, for Mrs. Wallis.—A policy of insurance is a *chose in action*, and notice of assignment is not required to take it out of the reputed ownership of the bankrupt: *Ex parte Ibbetson, In re Moore*, 26 W. R. 843, 8 Ch. D. 519. Mrs. Wallis had a better equity to the policy, for she was an incumbrancer for value, and the trustee was not. Further, the trustee had notice of her incumbrance when he gave notice to the company of his title, and therefore he did not obtain any priority to Mrs. Wallis by giving notice before she did: *Newman* v. *Newman*, 33 W. R. 505, 28 Ch. D. 674.

Eve, K.C., replied.

WRIGHT, J.—It is singular that there is no express authority upon this point, but it seems to me plain enough that at the date of the bankruptcy Mrs. Wallis had a good equitable charge for value upon the policy in question. Now the property of the bankrupt only vests in the trustee subject to such incumbrances for value as may have become attached to it prior to the bankruptcy. The trustee therefore cannot affect the rights of an incumbrancer for value by giving such a notice as he has given in this case. I also agree that as an incumbrancer for value Mrs. Wallis had a better equity to the policy than the trustee, and I think she is entitled to succeed in this motion.

Application dismissed.

Solicitors for the trustee, *Piesse & Son.*

Solicitors for the respondent, *Wood & Wootton.*

Privy Council.

(*From the Court of King's Bench, Canada.*)

Nov. 22.

ATTORNEY-GENERAL FOR MANITOBA v. MANITOBA LICENCE-HOLDERS' ASSOCIATION. (a.)

Canada, Law of—Local legislature—Province—Licensing law—Conflict of laws.

A provincial legislature in Canada has jurisdiction to restrict the sale of intoxicating liquors within the province so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada and in force within the province.

Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] *A. C.* 348, 44 *W. R. Dig.* 24, *followed.*

Appeal from the King's Bench, Canada.

The facts appear in the judgment.

Colin Campbell, K.C. (*Attorney-General for Manitoba*), *Haldane, K.C.*, and *R. O. B. Lane, jun.*, for appellant.

Blake, K.C., and *Phippen* (both of Canadian bar), for respondents.

Newcombe, K.C. (of Canadian bar), for Attorney-General for Canada.

The judgment of their lordships (Lords HOBHOUSE, MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY) was delivered by

Lord MACNAGHTEN.—In July, 1900, an Act was passed by the Legislature of Manitoba for the suppression of the liquor traffic in that province. The Act, which is known by its short title of "The Liquor Act," was to have come into operation on the 1st of June, 1901. Before that date on a reference under Chapter 28 of the Revised Statutes of Manitoba the Court of King's Bench pronounced the whole Act to be unconstitutional. From this decision the present appeal has been brought.

Although the questions submitted to the Court of King's Bench by the Lieutenant-Governor in Council were eleven in number, the only one considered in the court below, and the only one argued before this Board was the first: "Had the Legislative Assembly of Manitoba jurisdiction to enact the Liquor Act, and if not, in what particular or respect has it exceeded its power?" To this the answer given was: "It exceeded its power in enacting the Liquor Act as a whole." The other questions are either of an academical character or such as are material only in the event of the Act being declared partially and not wholly unconstitutional. No answer that could be given to any of those questions would be of any practical value. Their lordships therefore will confine their attention to the subject to which the judgment of the Court of King's Bench and the arguments at the bar were addressed.

The question at issue depends on the meaning and effect of those sections in the British North America Act, 1867, which provide for the distribution of legislative powers between the Dominion and the provinces. The subject has been discussed before this Board very frequently and very fully: see *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 98, at p. 109, 30 W. R. Dig. 31. Mindful of advice often quoted but not perhaps always followed, their lordships do not propose to travel beyond the particular case before them.

The drink question, to use a common expression which is convenient if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in section 91 and assigned to the Legislature of the Dominion or in those enumerated in section 92 and thereby appropriated to provincial legislatures. The omission was probably not accidental. The result has been somewhat remarkable. On the one hand according to *Russell* v. *Reg*, 7 A. C. 829, it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the dominion, and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada. On the other hand, according to the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348, 44 W. R. Dig. 24, it is not incompetent for a provincial legislature to pass a measure for the repression or even for the total abolition of the liquor traffic within the province provided the subject is dealt with as a matter "of a merely local nature" in the province and the Act itself is not repugnant to any Act of the Parliament of Canada. In delivering the judgment of this Board in the

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(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, Lord Watson expressed a decided opinion that provincial legislation for the suppression of the liquor traffic could not be supported under either No. 8 or No. 9 of section 92. His lordship observed that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13 and 16, which assigned to the exclusive jurisdiction of provincial legislatures (1) "property and civil rights in the province" and (2) "generally all matters of a merely local or private nature in the province." He added that it was not necessary for the purpose of that appeal to determine whether such legislation was authorized by the one or by the other of these heads. Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that in the opinion of the Board the case fell under No. 16 rather than under No. 13. And that seems to their lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil rather than the regulation of property and civil rights—though of course no such legislation can be carried into effect without interfering more or less with "property and civil rights in the province." Indeed, if the case is to be regarded as dealing with matters within the class of subject enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

The controversy therefore seems to be narrowed to this one point: Is the subject of "the Liquor Act" a matter "of a merely local nature in the province" of Manitoba and does the Liquor Act deal with it as such? The judgment of this Board in the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion* has relieved the case from some if not all of the difficulties which appear to have presented themselves to the learned judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada and which may be in force within the province or any district thereof. It held further that there might be circumstances in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. That judgment, therefore, as it stands and the report to her late Majesty consequent thereon show that in the opinion of this tribunal matters which are "substantially of local or of private interest" in a province—matters which are of a local or private nature "from a provincial point of view"—to use expressions to be found in the judgment, are not excluded from the category of "matters of a merely local or private nature" because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province and may or must interfere with the sources of dominion revenue and the industrial pursuits of persons licensed under dominion statutes to carry on particular trades.

The Liquor Act proceeds upon a recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section: "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the province of Manitoba except under a licence or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the province of Manitoba, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly." Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all *bonâ fide* transactions in liquor which come within its terms. It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act become a dead letter it must interfere with the revenue of the dominion with respect to licensed trades in the province of Manitoba, and indirectly, at least, with business operations beyond the limits of the province. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their lordships' opinion removed by the judgment of this Board in the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*. Having attentively considered the very able and elaborate judgments of Killam, C.J., and Bain, J., in which Richards, J., concurred, and the arguments of counsel in support of their view, their lordships are not satisfied that the Legislature of Manitoba has transgressed the limits of its jurisdiction in passing the Liquor Act.

Their lordships will therefore humbly advise his Majesty that the judgment of the Court of King's Bench of the Province of Manitoba dated the 23rd of February, 1901, ought to be discharged, and that in lieu thereof there ought to be substituted the following answers to the eleven questions submitted to it:

1. In answer to the first question: That the Legislative Assembly of Manitoba had jurisdiction to enact the Liquor Act.

2. In answer to the questions numbered 2 to 11 both inclusive: That no useful answer can be given to these questions.

There will be no costs of this appeal.

Solicitors for the appellant, *Harrison & Powell.*

Solicitors for the respondent, *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

House of Lords.

From C. A. (England). Feb. 25.

MIDLAND RAILWAY CO. v. ATTORNEY-GENERAL. (a.)

Inland revenue — Stamp duty — Railway company — "Increase of the amount of nominal share capital" — Conversion of stock—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

The Midland Railway Co., in pursuance of a special Act, converted various classes of stock, preferential and ordinary, into other stocks of higher nominal value, but bearing a corresponding lower rate of interest;

Held, that, although nothing was added to the working capital of the company, yet there was an "increase of the amount of the nominal share capital" within the meaning of the Stamp Act, 1891, *s.* 113.

Decision of the Court of Appeal (49 *W. R.* 243, [1901] 1 *Q. B.* 220) *affirmed.*

Appeal from an order of the Court of Appeal (A. L. Smith, M.R., and Collins and Stirling, L.JJ.), 49 W. R. 243, [1901] 1 Q. B. 220 (affirming a judgment of a Divisional Court (Ridley and Darling, JJ.), 49 W. R. 138, [1900] 2 Q. B. 353.

An information had been filed by the Attorney-General for duty and penalties under section 113 of the Stamp Act, 1891—and a special case was stated by consent.

The case is given very fully in the court of first instance.

The Midland Railway Co., in pursuance of the Midland Railway Act, 1897, re-arranged and consolidated the several classes of their stocks.

As the result of the re-arrangement and consolidation was a very large increase in the nominal amount of share capital, the Commissioners of Inland Revenue claimed that duty was payable under section 113 of the Stamp Act, 1891 upon £59,230,581 3s. 6d., being the aggregate increase of the amount.

The Divisional Court gave judgment for the Crown, which was affirmed by the Court of Appeal.

Sir R. T. Reid, K.C., and *Asquith, K.C.* (*Loehnis* with them), for the appellants.

Sir E. Carson, S.G., Danckwerts, K.C., and *Rowlatt*, for the respondent, were not heard.

Lord MACNAGHTEN.—The only question in this case is whether an increase of the amount of the nominal share capital of the Midland Railway Co. was authorized by the Midland Railway Act, 1897.

It seems that the company were desirous of effecting, as it is called in their Act, a "rearrangement and consolidation of the several classes and denominations of their shares and stocks." This was carried into effect by the Act of 1897. It may be convenient to give two instances of what was done under that Act. The company had a perpetual preference stock, carrying a dividend of 4 per cent. They were desirous of reducing that dividend to a uniform dividend of 2½ per cent.; and that was carried out by the Act of Parliament in this way. It was declared that "the existing and authorized 4 per cent. perpetual preference stock of the company shall be by virtue of this Act cancelled and extinguished," and "there shall be created in lieu thereof 2½ per cent. perpetual preference stock of the company to an amount exceeding by 60 per cent. the nominal amount of the stock so cancelled and extinguished." Was not that an increase in the amount of the nominal share capital? Then there was a large amount of consolidated ordinary stock, and the company were minded to give their shareholders such advantages as would result from splitting their stock; but instead of splitting it in the proper sense of the word, and giving to every holder of £100 stock £50 of preferred ordinary stock and £50 of deferred ordinary stock, they really duplicated their stock and gave each holder of £100 stock £100 of preferred and £100 of deferred. Again, was not that increasing the amount of their nominal share capital? It seems to me that this company has done the very thing which brings them within the words of the Act of Parliament, the Stamp Act, and within the grasp of the Commissioners of Inland Revenue.

I cannot see any loophole of escape. It seems to me that if you were asked to describe what has been done with regard to the ordinary consolidated stock of the company, you would say that the actual working capital has not been increased by a penny, but the amount of the nominal share capital has been doubled. I therefore move your lordships that this appeal be dismissed with costs.

Lord SHAND.—I am entirely of the same opinion, and I will only add a few words to what has been said because of the general importance of the question, for I understand that there are a number of cases which will be regulated by the decision.

I cannot express my view of the case better than it is expressed in the judgment of Ridley, J., in which he said, in reference to the interpretation of the statute: "The words are 'in the case of any increase of the amount of nominal share capital.' Now, the 'nominal share capital' means the capital in shares and the figure value attached to it. The increase of such nominal share capital seems to me to be simply this. If instead of being £100 it becomes £200, not necessarily that it means more but that if the company extends the capital and gives it a greater nominal value, that is an increase which requires an additional statement of the amount of such increase to be delivered by the company." Of course that statement being given to the Commissioners of Inland Revenue infers an increase in the stamp duty which has to be paid.

It seems to me that that is clearly the effect of sections 61 and 66 of this company's private Act. An increase is created in the amount of the nominal share capital, and indeed, it is so called in the Act itself. By section 61 the previous nominal capital is abolished, and the amount is nearly doubled under that same section. And in section 66 those who are obtaining this Act of Parliament, very correctly I think, characterize it in this way: "Any increase in the nominal amount of the preference or ordinary capital of the company by virtue of this Act shall not increase" their borrowing powers, which are there mentioned.

The case seems to me clearly to fall within section 113 of the Stamp Act, 1891, as all the learned judges who have applied their minds to this question think it does. Therefore I am of opinion that the appeal must be dismissed.

Lord DAVEY.—I am of the same opinion, and I can really add nothing to what has been said. The section of the Act appears to me to be free from any possible ambiguity, and I cannot bring my mind to entertain any doubt as to the right construction of it; indeed, but for the very learned and able arguments we have heard from counsel for the appellant I should have said that the case was unarguable.

Lord BRAMPTON.—I concur.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lord ROBERTSON.—I am of the same opinion. The appellants' success depends on their contention that an "increase of the amount of nominal share capital" in the sense of the Act of 1891 only takes place when there is an increase in the resources of the company. It seems to me that this test is purposely disregarded by the Legislature in favour of a standard entirely different and more arbitrary. The standard selected is the amount of nominal share capital; and in the present case that is now, as the result of operations authorized by statute, let us say £70,000,000. It is perfectly plain that if this had been the original amount, this would be the taxable sum. The enactment about change does not let in any new criterion of amount, but adheres to the same criterion as is set up for a new company by the same section. The question therefore comes, as Stirling, L.J., said, to be merely one of arithmetic.

Lord LINDLEY.—I am of the same opinion, and I will express my view by asking and trying to answer two questions: First of all, what is now the amount the nominal share capital of the company, taking the ordinary stock? The only answer to that question is £70,000,000. The next question is, what was it before the Act of Parliament was passed? The only answer to that is £35,000,000. Can it be said there has been no increase? It has been urged for the appellants, supposing there was an increase, the increase was not authorized because it was not done by the company under the powers of the Act, but was done by the Act itself. That is too subtle for me and I cannot follow it. If the Act had been imposed by *vis major* I could have followed it, but when the company have themselves obtained the power I cannot follow it.

Appeal dismissed.

Solicitors for the appellants, *Beale & Co.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) March 19, 20, 26.

In re HILL.
HILL *v.* HILL. (*a.*)

Will—Construction—Chattels settled to go with dignity—So far as the rules of law and equity permit—Absolute vesting.

A testatrix by her will bequeathed certain jewels to her son, the third Viscount H., for life, and after his death "to each and every of the persons who shall in turn succeed to the title and dignity of Viscount H. . . . severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said jewels shall descend as heirlooms as far as the rules of law and equity will permit."

Held, that the jewels vested absolutely in the first person who succeeded to the title on the death of the third viscount.

Tollemache *v.* Coventry, 2 *Cl. & Fin.* 611, *followed.*

This was an appeal against the judgment of Swinfen Eady, J.

The material facts were as follow:

The case came before the court on an originating summons in the matter of the trusts of the will of Ann, Dowager Viscountess Hill, dated the 28th of May, 1891, and of the Settled Land Acts, 1882 to 1890, for the determination of the question whether the plaintiff, Viscount Hill, is entitled absolutely, or for life only, or otherwise, to certain diamonds, consisting of a tiara, necklace, pendant, and earrings, and to other chattels bequeathed by the will to her son, the third viscount, "until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, or any other title or dignity which may be granted to or assumed by any person for the time being entitled to the said title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit."

The testatrix died on the 31st of October, 1891, and her will was duly proved.

Her son, the third Viscount Hill, survived his mother, and entered into possession of the said chattels.

He died on the 30th of March, 1895, and was succeeded in the title by his son, the plaintiff Rowland Richard Clegg, fourth Viscount Hill, who was born in 1863.

The plaintiff is married, but has not any issue.

The heir-presumptive to the title is the plaintiff's brother, the defendant Francis William Clegg Clegg Hill, who was born in the year 1866 and is unmarried.

The plaintiff, shortly after the death of his father, took proceedings to recover a portion of the said chattels from his stepmother, Isabella Elizabeth, Dowager Viscountess Hill, who claimed the same on the ground of their having been subject in the hands of the testatrix to an alleged precatory trust. The decision of the Court of Appeal established that the chattels were not subject to any precatory trust, and that the testatrix had power to dispose of them by her will: *Hill* v. *Hill*, 45 W. R. 371, [1897] 1 Q. B. 483. The nature and extent of the interest taken by the plaintiff under the will of the testatrix did not arise in those proceedings, and had to be determined on this summons.

It was not disputed that under the will, the son of the testatrix—namely, the third Viscount Hill—was entitled to possession of the chattels during his life. The plaintiff contended that upon his decease the chattels vested absolutely and indefeasibly in himself.

The defendant, F. W. C. Clegg Hill contended that the chattels did not so vest absolutely in the plaintiff, but that upon his death within twenty-one years after the death of the testatrix they would pass and belong to the next Viscount Hill, subject in turn to be similarly divested in favour of the next succeeding viscount if he should succeed to the title within the period of twenty-one years, and that the person who should be Viscount Hill at the expiration of the period of twenty-one years would become indefeasibly entitled to the chattels.

Swinfen Eady, J.—The plaintiff contends that upon the death of the third Viscount Hill the chattels vested absolutely and indefeasibly in himself. The defendant F. W. C. C. Hill contends that the chattels do not vest absolutely in the plaintiff, but that upon his death within twenty-one years after the death of the testatrix they will pass and belong to the next Viscount Hill, subject in turn to be similarly divested in favour of the next succeeding viscount if he succeeds to the title within the said period of twenty-one

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

years, and that the person who is Viscount Hill at the expiration of the said period of twenty-one years will become indefeasibly entitled to the said chattels. The defendant founds this contention on the clause in the will of the testatrix, bequeathing the chattels to each and every of the persons who should in turn succeed to the title and dignity of Viscount Hill severally and successively as they should in turn succeed to the title, her intention being that the chattels should descend as heirlooms so far as the rules of law and equity will permit. It is clear that subject to the rule against perpetuities chattels may be settled to follow the devolution of a dignity: *In re Johnston, Cockerell* v. *Earl of Essex; Hill* v. *Hill.* I have, however, to consider whether in the present case the articles have been effectually settled in the manner contended for by the defendant F. W. C. C. Hill and whether the words which I have read are sufficient to create an executory trust and cut down the interest taken by the plaintiff to a defeasible interest in the event of his dying within the period of twenty-one years from the death of the testatrix. That the mere addition of the words "so far as the rules of law and equity will permit" will not make the trust executory or amount to a direction to settle appears from *Lord Scarsdale* v. *Curzon*, 1 Joh. & Hem. 46, at p. 50. In *Shelley* v. *Shelley* the testatrix gave certain jewelry "to my nephew John Shelley to go and be held as heirlooms by him and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son and so on to the eldest son of his descendants as far as the rules of law and equity will permit." I stop there, omitting the subsequent direction in that will, because there is nothing equivalent to it in the present case. Wood, V.C., held in substance that the words which I have read, if they had stood alone and unqualified by the subsequent direction, would have created an absolute interest in his nephew John. Again, in *In re Viscount Exmouth, Viscount Exmouth* v. *Praed*, the facts were that the second Viscount Exmouth bequeathed to trustees certain plate, jewels, and other chattels "upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will permit, by the person who for the time being shall be actually possessed of the said title in the nature of heirlooms." There followed in that case other words to which there is nothing equivalent in the present case. In dealing with the portion of the gift which I have read, Fry, L.J., said at p. 162: "There can, in my judgment, be no doubt that the effect of that clause standing alone would be to give an absolute interest in the chattels to the first person who succeeded to the honours, and that therefore if it had stood alone the third viscount would have become absolutely possessed of these chattels. That I think follows from the case of *Tollemache* v. *Coventry*. In the case of *Countess of Harrington* v. *Earl of Harrington*, Lord Westbury pointed out that in the case of a direct gift of chattels upon trusts corresponding with the ownership of real estates, up to the limit of time allowed by the law against perpetuities, it is settled that, so soon as the real estates (to which the personal chattels are thus made accessory) vest in a tenant in tail in possession, the transmissibility of the personal estate ceases, although the time allowed by the rule against perpetuities, has not expired, and the personal chattels become the absolute property of the tenant in tail in possession although he may be an infant and may afterwards die without having attained majority. To meet the difficulty of the chattels becoming severed from the real estate by reason of the death of an infant tenant in tail it is usual to impose a condition that the heirlooms shall not vest absolutely in any tenant in tail unless he shall attain it. In the same case Lord Cairns pointed out that none of the authorities (except Lord Hardwicke, whose views had not been followed) had doubted, but that indeed all had assumed that a general trust of chattels to go with settled estates, or to be held by persons for the time being entitled to the possession of settled estates as long as the rules of law and equity would permit, would be effectual and effectual by means of those particular words to carry the chattels to the first person with an estate of inheritance, but that that the doctrine of the same authorities was that the Court of Equity could not further protect the chattels if that person died under twenty-one and if the instrument of settlement did not contain any valid clause of defeasance in that event. In my judgment a similar rule applies where chattels are settled to follow the devolution of a dignity and to descend as heirlooms so far as the rules of law and equity will permit, and in the absence of any clause of defeasance in the instrument of settlement they will vest absolutely in the first person upon whom the dignity devolves, upon the decease of any person or persons to whom limited interests in the chattels are expressly given. In the present case, upon the decease of the third Viscount Hill, to whom the chattels were given for his life or until his death, the chattels passed absolutely to the fourth viscount, and I make a declaration accordingly.

The defendant appealed.

Brinton, for the appellant.—The effect of the words "as far as the rules of law and equity will permit" is to prevent this gift being void as offending against the law against perpetuities. The testatrix intended that these chattels should not vest absolutely in any person so long as the law allows the vesting to be postponed. The decision in *Harrington* v. *Harrington*, L. R. 5 H. L. 87, 20 W. R. H. L. Dig. 25, shows that the court will give effect to that intention by holding that the chattels do not vest absolutely in any Viscount Hill so long as there are persons living at the date of the death of the testatrix who can succeed to the title. Alternatively it is submitted that the whole gift is void as offending against the law against perpetuities and that the jewels pass under the residuary gift.

He also cited Sugden's Law of Property, p. 337; *Montagu* v. *Lord Inchiquin*, 23 W. R. 592; *In re Johnston, Cockerell* v. *Earl of Essex*, 32 W. R. 634, 26 Ch. D. 538; *Dungannon* v. *Smith*, 12 Cl. & Fin. 546.

Micklem, K.C., and *Errington*, for the respondent.—If this jewellery had been settled to go according to the limitations of real estate the third viscount would have taken for life and the present respondent as tenant in tail would then have taken them absolutely. There is no distinction in principle between the case of chattels settled to go with real estate and chattels settled to go with a dignity. The decision of the House of Lords in *Tollemache* v. *Coventry*, 2 Cl. & Fin. 611, governs the present case.

They also cited *Mackworth* v. *Hinxman*, 2 Keene 658; *Viscount Exmouth* v. *Praed*, 31 W. R. 545, 23 Ch. D. 158; *Shelley* v. *Shelley*, 16 W. R. 1036, L. R. 6 Eq. 540.

Brinton replied.

Cur. adv. vult.

March 26.—VAUGHAN WILLIAMS, L.J.—In this case Ann, Dowager Viscountess Hill, bequeathed certain jewelry to her son Rowland Clegg, Viscount Hill, "until he should die, and after his death to each and every of the persons who shall in turn succeed to the

title and dignity of Viscount Hill, or any other title or dignity which may be grantd to or assumed by any person for the time being entitled to the said title or dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said jewelry shall descend as heirlooms as far as the rules of law and equity will permit." The testatrix died on the 31st of October, 1891. Her son Rowland Clegg Hill survived his mother, and entered into possession of the said jewelry. He died on the 30th of March, 1895, and was succeeded in the title by his son Rowland Richard Clegg, Viscount Hill, the present plaintiff. The plaintiff has several brothers and half-brothers who were alive at the date of the will of the testatrix, and also at the death of her son Rowland Clegg Hill, the third viscount. The question is whether the plaintiff is entitled absolutely, or for life only, or otherwise to the said jewelry bequeathed by the said will to descend as heirlooms with the Hill title.

In my judgment the plaintiff is entitled absolutely to the said jewelry. It seems to me that the case is really concluded by the case of *Tollemache* v. *Coventry*. The words in that case were almost identical with the words in the present case. In that case a life estate was given first to the widow and the named only son of the testator. In the present case a life estate is given to the named son of the testatrix, and in each case there is what I will call the heirloom clause disposing of the heirlooms after the termination of the life estate. In the *Tollemache case* there were alive at the date of the will and of the death of the testator a son who took a life estate and living grandsons who might succeed to the title; and in the present case there were likewise a son, Rowland Clegg Hill, the third viscount, who took a life estate, and living grandsons who might succeed to the title; and in my judgment the House of Lords did in *Tollemache* v. *Coventry* decide that the third Lord Vere—that is to say, the first taker under the description, "such person as shall from time to time be Lord Vere"—took the heirlooms in that case absolutely. I know that this has been doubted by some of the judges who wrote opinions in *Dungannon* v. *Smith*, but, for reasons which I will give presently, I am of opinion that the House of Lords did so decide, and did not, as has been suggested, merely negative the title of the fourth Lord Vere. If this view is right, it seems difficult to see why the plaintiff must not, on the basis of that judgment, take the heirlooms absolutely. The contrary contention can only be maintained on the assumption either that the third Viscount Hill only takes a life interest in the jewelry, or that he takes no interest at all in the heirlooms as being in his turn the person bearing the title of Lord Hill. The suggestion that he only takes a life estate, or only the use of the heirlooms, seems to be based upon the argument that, as the plaintiff and his brothers were all "lives in being" at the date of the will of their grandmother, they are all persons to whom the user of, as distinguished from the property in, the heirlooms might be given; and that, therefore, in pursuance of the obvious intention of the testatrix to preserve the jewelry as heirlooms as long as possible, one ought, if possible, so to construe her will as to limit the interest of all these grandsons living at the death of the testratrix to use and enjoyment only, and to treat the will as giving the absolute property to Lord Hill, who first takes the heirlooms on the determination of the "life or lives in being," and who, therefore, must take within a period which does not offend against the rule against perpetuities. So to do would be really to give effect to the view of Sir John Leach, Vice-Chancellor of England, in the *Tollemache case*, when before him under the name of *Deerhurst* v. *St. Albans*, 5 Madd. 232. This view he thus expresses: "By the rules of law and equity, any person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only. The son and the grandson of the testator were living at his death, and were both limited to the use and enjoyment only; but the child who succeeded the grandson as Lord Vere and Duke of St. Albans was not living at the death of the testator, and could not, therefore, by the rules of law and equity, be limited to use and enjoyment only. He took, therefore, an absolute interest." But whatever else may be doubtful in the decision of the House of Lords, there can be no doubt but that they negatived this view of Sir John Leach; for they held that the great-grandson did not take at all. It follows that in the present case it is impossible to treat all the persons living at the date of the will of the testatrix as taking (if they take at all as holders of the title) life estates—that is, mere use and enjoyment. Neither do I think it possible to hold that the present plaintiff takes no interest. The ground on which I understand it is suggested that this may be the case is that the bequest to the person for the time being holding the title (even when qualified with the words "as far as the rules of law and equity will permit") is void as including persons who possibly might come into existence at a time so remote as to offend against the rule against perpetuities; and that, if such bequest is void as regards one person who might fall within the category of those the testatrix meant to benefit in succession, it is void as to all. I cannot assent to this argument. The answer to it is admirably put by Sir C. Pepys (afterwards Lord Cottenham) and Mr. Preston in the argument in *Tollemache* v. *Coventry*, as reported 2 Cl. & Fin., p. 617, in which it is pointed out that the first member of the series, the Lords Vere, the first taker of the title of Lord Vere after the survivor of the holders of the life estate in the heirlooms, takes under a bequest which must of necessity vest, if it ever vests, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life, and was, therefore, good in law; whereas the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the dropping of any such life, and, therefore, was not valid. The first member of this series must take on the death of the tenant for life, and, therefore, at not too remote a period, although the second and all the later members might take beyond the limits fixed by the rule against perpetuities; and I do not quite understand why Cresswell, J., in *Dungannon* v. *Smith*, 12 Cl. & Fin. 546, at p. 566, says that the whole of the reasoning of Lord Brougham in *Tollemache* v. *Coventry* shows that the executory bequest after the death of the second Lord Vere was void because it possibly might not vest in due time, and that the decision, therefore, must be taken to have been, not that the bequest was good as to the third Lord Vere, but that it was bad as to the fourth. I see nothing in the reasoning of Lord Brougham inconsistent with his adoption of the argument of Sir C. Pepys and Mr. Preston; and Lord St. Leonards, who, in his Law of Property (1st ed.), p. 336, seems to have doubted this, himself in the case of *Ker* v. *Lord Dungannon*, 1 Dr. & War. 509, at p. 536, refers to the decision of the House in *Tollemache* v. *Coventry* as having been to that effect. The decision in this sense

seems to me to have been frequently recognized in later cases: see the decisions of Mr. Justice—afterwards Lord Justice—Fry in *Exmouth* v. *Praed* and *In re Johnston, Cockerell* v. *Earl of Essex*. I wish to make an observation on *Harrington* v. *Harrington*, which was much pressed upon us in argument. Mr. Brinton argued that that case showed that the words "as far as the rules of law and equity permit" would justify the court in holding that no Lord Hill could claim the jewelry absolutely, so long as there were persons living at the date of the death of the testatrix who could succeed to the title. But that case turned upon a proviso preventing the personalty from vesting absolutely in a tenant in tail unless he should attain twenty-one, and it was contended that the proviso had the effect of carrying on to those who came next in remainder after the taker on the determination of the life estate, so exposing itself to be rendered void as aiming at perpetuity; but the House held that the proviso was an essential part of the gift, and, therefore, controlled by the words in the dispositive clause "so far as the rules of law and equity permit." The effect of this was to limit the proviso so as that it should only apply to tenants in tail who took by purchase, and, consequently, it could not be said that the proviso was void as aiming at perpetuity. For the reasons I have given I think that the decision of Swinfen Eady, J., must be affirmed, and the appeal must, therefore, be dismissed.

STIRLING, L.J.—I agree with the judgment that has been just delivered. I think in particular we are bound by the decision of the House of Lords in *Tollemache* v. *Coventry*. I think that the *ratio decidendi* in that case cannot be more clearly, or more compendiously, stated than in the following passage: [His lordship read the passage from p. 617, "The gift was to a class of persons" to "was not valid," and continued:] It is true that these sentences are not found in the report of what was said by the Lord Chancellor in advising the House of Lords in that case, but occur at the commencement of the argument of Sir Christopher Pepys and Mr. Preston; nevertheless I think that they do form the ground-work of the decision of the House of Lords. The most difficult step, in my opinion, appears to be the first—namely, that the gift was to a class of persons in succession—viz., Lords Vere, and not to individuals. Now, a large portion of what was said by the Lord Chancellor is devoted to dealing with that proposition. He appears to me to sum it up and put it abundantly clear at p. 631. [His lordship read the passage from "It is a fallacy" to "came to be Lord Vere," and continued:] As regards the distinction which is drawn in the argument, between the difference in the position, with reference to the rule against perpetuities, of the first taker of the title of Lord Vere after the death of the survivor and the testator's widow and son and that of the person who would be Lord Vere next in succession, it is not explicitly stated in what was said by the Lord Chancellor, but I cannot but think that there is a distinction to which his lordship alluded when towards the end of his judgment he says this on p. 633: "I must run in the face of authority if I denied the third Lord Vere's right, but I have no decision nor any authority supporting the other."

For these reasons I think the appeal must be dismissed, the plaintiff being, in accordance with what was decided by the House of Lords, absolutely entitled.

COZENS-HARDY, L.J.—If it were now open for decision, I think it might be reasonable to hold that the words "as far as the rules of law and equity will permit" should be treated as a direction so to frame the limitations that the heirlooms should go with the title as long as possible, or in other words to regard the trust as an executory trust. But it has long been settled that such is not the effect of these words. It only remains to construe the words as they stand. I think it is not possible to avoid the conclusion that the present viscount takes the jewels and heirlooms, and that there is no shifting clause in favour of the successor in title. I entirely agree with the judgment of Vaughan Williams, L.J., and I do not desire to add anything.

Solicitors, *Chester & Co.*, for *Lucas & Salt*, Wem; *Upperton & Co.*

From P. D. & A. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Jan. 22; Feb. 12, 13; March 26.

BIRCH v. BIRCH. (*a*.)

Practice—New trial—Allegation of fraud—Res judicata *—Probate suit—Evidence.*

A judgment obtained in a probate action may be set aside if it has been procured by the fraud of a party to the action, notwithstanding the innocence of other parties to the action having the same interest. But a party seeking to set aside a judgment on the ground of fraud must, in order to succeed, adduce evidence to show that there is a reasonable probability of the alleged fraud being established. Accordingly, where an action was brought to set aside a judgment granting probate of a will on the ground that since the judgment a document, which, however, could not have been put into evidence, had come into the hands of the police confessing that the will was a forgery,

Held, that the action ought to be dismissed, on the ground that the matter was res judicata.

Decision of Barnes, J. (ante, *p.* 192), *reversed.*

This was an appeal against the decision of Barnes, J. (reported *ante*, p. 192), refusing an application by the defendants for the dismissal of the action on the grounds that the question raised had been already heard and adjudicated upon and that the action was frivolous and vexatious.

The facts were thus stated in the written judgment of Cozens-Hardy, L.J.:

"The facts, so far as admitted or proved beyond question, may be shortly stated. Arthur Birch died in April, 1899. No will being forthcoming, letters of administration were granted to Walter George Birch, Edwin Birch, and Jesse Joseph Birch. In the month of December, 1899, two actions were brought, one by Mrs. Guise as plaintiff against the three administrators, and Charles Birch and Henry Birch as defendants, and the other by Edwin Birch, Jesse Joseph Birch, and Amy Birch as plaintiffs against Walter George Birch as defendant. These actions were consolidated. Each action claimed revocation of the letters of administration, and probate was claimed of an alleged will of the 18th of December, 1897, or alternatively, of alleged instructions for a will dated the 8th of December, 1897. The document of the 18th of December was the first which was produced, it being forwarded from America by one Sanders, who, with one Ford, appeared to be the attesting witnesses. The instructions, which were subsequently forwarded from America, purported to be attested by

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the same two witnesses, and also by Mr. Barnes. Walter George Birch pleaded that both of these documents were not signed by the deceased, or by anyone at his direction, and that they were not executed according to the provisions of the statute. The consolidated action came on for trial before the President without a jury on the 22nd of June, 1900. Neither Sanders nor Ford was forthcoming. The existence of such a person as Ford was challenged. Expert evidence as to handwriting was given for and against the will. Barnes, however, was called as a witness, and severely cross-examined; and in the result the President pronounced for the force and validity of the will of the 18th of December, and ordered the letters of administration to be revoked. So far as appears, all the next-of-kin were parties to the consolidated action. The present action was commenced by W. G. Birch as plaintiff against Edwin Birch and Amy Birch, the executors of the will, and it asked that the probate of the pretended will of the 18th of December might be revoked. The writ has since been amended by adding the next-of-kin, and also Henry Guise, the husband of Ada Rose Guise, as defendants. The statement of claim contains the following allegations: "(3) The said judgment was obtained against the plaintiff by the fraud of Frederick Charles Barnes, Alfred Sanders, and a person passing by the name of W. G. Ford, and Henry Guise, the husband of Ada Rose Guise, one of the plaintiffs in the aforesaid consolidated action. (4) In July, 1899, the said Alfred Sanders, at the instigation of and in conjunction with the said Henry Guise, drew up and forged the pretended will dated the 18th of December, 1897. The said Alfred Sanders, in pursuance of the said fraud and at the expense of the said Henry Guise, went to Baltimore, United States of America, and from there wrote a letter, dated the 28th of August, 1899, falsely describing the circumstances under which the said pretended will was executed. (5) In September, 1899, in further pursuance of the said fraud, the said Alfred Sanders drew up and forged a document purporting to be a will executed by the said deceased on the 8th of December, 1897. The said Alfred Sanders was instigated to draw up and forge the said document, dated the 8th of December, 1897, by the said W. G. Ford, acting on behalf of and as the agent of the said Henry Guise. The said Alfred Sanders, W. G. Ford, and Frederick Charles Barnes fraudulently signed the said document as attesting witnesses to the due execution thereof by the said deceased. (6) In pursuance of the said fraud the said Henry Guise and Frederick Charles Barnes falsely represented upon oath to the court that they were strangers to and unacquainted with each other prior to on or about the 29th of July, 1899. (7) In further pursuance of the said fraud the said Henry Guise and Frederick Charles Barnes concealed from the court the fact that the said W. G. Ford had been in personal communication with the said Alfred Sanders between the 13th of July, 1899, and the 15th of November, 1899." The defendants moved before Barnes, J., to stay proceedings in this action. No evidence was filed in support of the motion, but the plaintiff filed an affidavit by himself stating that the will of the 18th of December was entirely in the handwriting of Sanders, and verifying a letter, dated the 10th of September, 1900, from a Mrs. Smith, of San Francisco, addressed to the authorities at Scotland-yard, enclosing what purported to be a confession by Sanders that he had forged the will at the suggestion and with the help of the defendant Henry Guise, then Henry Bagley. In this state of things Barnes, J., held that the court had jurisdiction to set aside the judgment obtained by fraud, and that the action must be allowed to proceed. On the appeal an opportunity was afforded to the parties to adduce further evidence, the nature of which I may shortly state. There was expert evidence, to which I do not attach any great importance, as to the letter enclosing the confession and the confession itself being in the handwriting of Sanders, who also wrote the will. There was evidence intended to prove, or at least to suggest, that Barnes was well known to Henry Guise (formerly Bagley) before the so-called accidental meeting, and, indeed, that there had been previous monetary transactions between them. On the other hand, Barnes and Henry Guise made affidavits entirely denying this, reasserting the truth of the evidence which they gave at the trial before the President, and suggesting that a mistake had been made between Henry Bagley and his brother, James Bagley. The latter, who appears to be a respectable witness, has made an affidavit stating his own connection with Barnes, and thus confirming to some extent the evidence of Barnes and Henry Guise. Barnes, J., held, upon a consideration of the authorities, that the suit could be maintained. In a probate suit a number of persons might be interested who were not parties, and it followed that, if someone interested was guilty of fraud, it affected the whole litigation. To take a hypothetical case, if a will was put forward and executors named in it, and witnesses were procured, the executors might propound the will in all innocency, although it had been obtained by fraud. It would be absurd to allow such a document to stand. It was clear that Mr. Guise had an interest in the suit, and was acting in his wife's interest. If fraud were established, they would not be entitled under the will. His lordship carefully abstained from expressing any opinion one way or the other upon the merits of the case. But, the plaintiff having sworn to the facts which he alleged, the suit must be allowed to proceed, and the motion must be refused. Henry Guise must be added as a defendant. This was accordingly done."

Some of the defendants appealed.

C. A. Russell, K.C., for the appellants. [He was stopped by the court.]

Inderwick, K.C., for the respondent.

The case stood over to enable further evidence to be put in on both sides. When it came on again for hearing.

Inderwick, K.C., and *Willock*, for the respondent.—There is sufficient evidence of fraud on the part of Henry Guise to justify the court in granting a new trial.

C. A. Russell, K.C., and *W. L. Richards*, for the appellants.—The plaintiff must establish a *primâ facie* case of fraud. Here he has no evidence at all which the court can accept.

They referred to *Boswell* v. *Coaks* (*No.* 2), 6 The Reports 167; *In re J. L. Young Manufacturing Co.* (*Limited*), 49 W. R. 115, [1900] 2 Ch. 753; *Hungate* v. *Gascoyne*, 2 Ph. 25; *Thomas* v. *Rawlings*, 13 W. R. 248; *Anderson* v. *Titmas*, 36 L. T. Rep. 711, 25 W. R. Dig. 199; *Young* v. *Kershaw*, 81 L. T. Rep. 531, 48 W. R. Dig. 154; *Baker* v. *Wadsworth*, 67 L. J. Q. B. 301, 46 W. R. Dig. 133; *Priestman* v. *Thomas*, 32 W. R. 842, 9 P. D. 70, 210; *Flower* v. *Lloyd*, 25 W. R. 793, 6 Ch. D. 297, 27 W. R. 496, 10 Ch. D. 327; *Appleby* v. *Franklin*, 34 W. R. 231, 17 Q. B. D. 93.

Cur. adv. vult.

March 26.—VAUGHAN WILLIAMS, L.J.—We think that the judgment must be reversed, but it is right to state that the evidence before us is very different from

that before Barnes, J. The question, which in form has to be decided in the present case, is whether or not the action ought to be stayed as being frivolous and vexatious, and whether the statement of claim ought to be struck out as disclosing no cause of action. Now, as to the former part of the question—that is, whether the action is frivolous and vexatious—one is bound to include as an element to be considered the fact that there has already been a judgment binding the plaintiff, affirming the signature of the will of the 18th of December, 1897, to be the signature of the testator Arthur Birch, and by necessary implication the attestation by the witnesses of the will, and by the terms of the judgment as delivered the attestation of the instructions for the 8th of December for the will. And I think that the court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the judgment which raise a reasonable probability of the action succeeding. But I do not think that it can be laid down as a hard and fast rule that the evidence thus produced must be of such a character that it would be evidence in the action itself. I can quite conceive of a case in which there was evidence of a fact which would not be evidence in the action itself, which evidence would nevertheless make it impossible to say that there was not a reasonable prospect of the action to set aside the judgment being successful. Suppose a case of the judgment based on the validity of a document vouched by one witness alone; suppose that that witness had sent to the police authorities a confession that the document was forged by him, and that that witness had written to say that he desired to return from abroad to give himself up for trial for the offence of forgery; suppose that the witness had actually taken ship for the purpose of coming to England and surrendering for his trial; and suppose that he was accompanied by an English police officer sent to meet him; suppose then that the ship is reported as lost; none of the matters included in this hypothetical case could be had as evidence on the trial of the action. But I do not think that it would be possible to describe the action as frivolous and vexatious, nor do I think that in such a case the weight to be given to the principle *interest reipublicæ ut sit finis litium* is such as to compel the court to stay as frivolous and vexatious an action brought to set aside a judgment. I should think that in such a case the action ought to go on, so as to give the plaintiff the opportunity of discovery in the action. Nor do I think that in such a case the discovery could properly be described as fishing. But in each case it is a question of degree. Is the fact alleged to have been discovered so evidenced and so material as to make it reasonably probable that the action will succeed? If it is, I think the action ought not to be stayed. In the present case my brethren do not think that the evidence of the handwriting of Sanders and the contents of the letter forwarded to the police are sufficient, even in a case in which the evidence which led to the judgment raised in the mind of the judge who tried the case, considerable doubt, if not suspicion, and I do not think I ought to differ from them on such a question.

STIRLING, L.J.—I have had an opportunity of reading the judgment of Cozens-Hardy, L.J., and I entirely agree with it.

COZENS-HARDY, L.J., after stating the facts as above, continued: Now it is plain that in the action tried before the President the distinct issue was raised whether the alleged will was signed by Birch. The judgment in that action is binding upon the plaintiff unless and until set aside. This is not an appeal by the plaintiff from that judgment, or an application for a new trial. The present action is an independent proceeding to set aside that judgment on the ground that it was obtained by fraud. I do not doubt that such an action may be maintained, at least when the judgment has been procured by the fraud of a party to the action. Here Henry Guise, against whom fraud is alleged, was acting for and as the agent of his wife, who was a party, and she must be affected by his fraud. In *Boswell* v. *Coaks* (*No.* 2), A. L. Smith, L.J., who delivered the judgment of the Court of Appeal, after dealing with the case against the defendant Coaks, who was alone charged with the fraud, proceeded as follows: "As regards the point taken by the Solicitor-General for the other defendants—viz., that the judgment can only be set aside, if at all, against those who procured it by fraud, and it is not suggested that the other defendants had anything to do with the fraud alleged, this point appears to us to be fatal as regards all the defendants except Coaks, and we think it would be fatal to any further action to set aside the sale of the whole." But I do not think this limitation can apply to a probate action. The will is either good or bad against all the world. The defendants other than Mrs. Guise cannot, therefore, rely upon their not having had anything to do with the fraud of Mrs. Guise's agent. The judgments of the Court of Appeal and the House of Lords in *Boswell* v. *Coaks* (*No.* 2), 6 The Reports, 175, contain some important observations as to the mode in which a motion such as that which is now before us ought to be dealt with. Lord Selborne points out that it is not sufficient for the plaintiff to allege fraud. It is the duty of the court to receive such evidence, *pro* and *con*, as is material to the question whether there really has been, since the former judgment, a new discovery of something material to disturb the former judgment; and A. L. Smith, L.J., states that the plaintiff must show a reasonable possibility of the alleged fraud being established. It is plain that paragraph 3 of the claim is of no importance. A mere general allegation of fraud, without particulars, cannot avail. As to paragraphs 4 and 5, they are based solely on the alleged "confession." But, assuming that document to be written by Sanders, there is no possible mode of making it evidence in the present action. It is not known whether Sanders is alive, and there is no reasonable possibility of the alleged forgery being established. As to paragraph 6, this allegation does not seem to me to be directly material to the judgment. It only goes to the credit of two of the witnesses who were examined and cross-examined on this very point. It would be highly dangerous to allow a solemn judgment to be set aside on the ground of alleged perjury by witnesses dealing with a collateral point, more especially when the alleged perjury is absolutely, and with considerable appearance of probability, denied. Upon the whole I have come to the conclusion that upon the materials before us, which are different from those before Barnes, J., this motion ought to succeed. It is not for us to say whether the President arrived at a right decision upon the evidence before him. That must be assumed in the absence of an appeal. If the present plaintiff were appealing, and all questions of time were got rid of, he might apply for leave to adduce further evidence on the appeal. But I think such an application must have failed. Such a document as the alleged confession, which cannot be adduced in evidence, must be wholly disregarded. No documentary evidence recently discovered is suggested. A mere suspicion is not sufficient. The supposition which I have made of an appeal, coupled with an application to adduce fresh evidence, is probably too favourable to the present

plaintiff. Certainly the plaintiff cannot be in a better position when he seeks to set aside a solemn judgment. The importance of finality in litigation is very great; and I think it would be wrong to allow the issue to be again tried between these parties as to the validity of the will, which has been admitted to probate. In my opinion the order of Barnes, J., should be discharged, and an order made in the terms of the notice of motion, and the plaintiff must pay the costs here and below.

THE COURT directed that the plaintiff should pay the costs of the executors in the court below.

Solicitors, *J. W. Reid; E. W. Reeves.*

From K. B. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) March 13, 14, 25.

MONTGOMERY & Co. *v.* THE INDEMNITY MUTUAL MARINE INSURANCE Co. (LIMITED). (*a.*)

Insurance, Marine—General average sacrifice — Joint ownership of ship and cargo—Liability of underwriters.

A sacrifice made to avert perils of the sea is a general average act, quite independently of unity or diversity of ownership. Although the assured is the owner both of ship and of cargo, the underwriters of a policy on cargo are liable to pay his loss by reason of the deduction made by the underwriters of the policy on the ship in respect of his contribution as the owner of cargo.

Decision of Mathew, J., 49 *W. R.* 221, [1901] 1 *K. B.* 147, *affirmed.*

Judgment of Barnes, J., *in* The Brigella ([1893] *P.* 189, 41 *W. R. Dig.* 92, *disapproved.*

This was an appeal from a decision of Mathew, J., sitting in the Commercial Court, without a jury (reported 49 W. R. 221, [1901] 1 K. B. 147).

The facts were as follows: The plaintiffs were the owners of a ship name *The Airlie*, and also of a cargo of nitrate on board it, on which cargo the defendants had subscribed a policy of marine insurance at and from any ports or places on the west coast of South America to any port of call and/or discharge in the United Kingdom.

The policy was one of insurance against the perils of the sea and other losses of the same character, and contained the usual sue labour and travel clause.

During a voyage with a cargo of nitrate from Tocopilla, a port on the west coast of South America, to Shields, *The Airlie* encountered, on the 17th of May, 1900, very bad weather with a heavy cross sea in the latitude of the River Plate, and began to roll and lurch violently. About 9 a.m. it was noticed that the mainmast, which was of iron, and hollow, had settled down; and the rigging was accordingly tightened by a process called "swiftening up." The ship, however, continued to roll, and the master, fearing that the mast would break and fall on deck and cause the loss of the vessel, decided to get rid of it. The ship was brought into position, the windward rigging was cut, and the mast fell on the side, carrying away portions of the other mast and rigging. The wreckage was promptly cut adrift, and the vessel was brought safely home under jury rig.

The plaintiffs brought this action under the policy to recover a general average loss incurred by the cutting away of the mainmast and rigging.

Mathew, J. (after deciding on the facts that the cutting away was a general average sacrifice), held, not following the judgment of Barnes, J., in *The Brigella*, [1893] P. 189, 41 W. R. Dig. 92, that the plaintiffs were entitled to recover, notwithstanding that they were the owners both of ship and of cargo, so that as between those interests there was in fact no contribution to general average.

The defendant appealed.

Scrutton, K.C., and *Lochnis*, for the appellant.—Mathew, J., was wrong in holding that the cargo owner is liable to pay any sum which he can recover from the underwriter. The true theory of the subject is contained in Holt's Laws of Navigation (1846), p. 482, where general average is defined as "the common law and justice of partnership." Whether the subject be regarded as Rhodian law or as matter of contract, there must be more than one interest in the adventure or there can be no general average. General average must be treated altogether apart from insurance. The shipowner as such can never sue the underwriter on goods, but must sue the owner of the goods. The underwriter is only liable when the dispute between the ship and cargo owners has been determined at law, since he is only liable to make good what his assured is liable to pay. But a man cannot sue himself, and no law is necessary to enable a man to deal with his own as he likes.

They cited or referred to *Walthew* v. *Mavrojani*, L. R. 5 Ex. 116, 18 W. R. Dig. 93; *Moran* v. *Jones*, 5 W. R 503, 7 E. & B. 523; *Oppenheim* v. *Fry*, 11 W. R. 725, 3 B. & S. 873; *Simpson* v. *Thompson*, 3 App. Cas. 279, 26 W. R. Dig. 219; *Wright* v. *Marwood*, 29 W. R. 673, 7 Q. B. D. 62; *Price* v. *A1 Ships, &c., Association*, 37 W. R. 566, 22 Q. B. D. 580; *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755; *Kidston* v. *Empire Marine Insurance Co.*, 15 W. R. 63, 769, L R. 1 C. P. 535, L. R. 2 C. P. 357; *Dickinson* v. *Jardine*, 16 W. R. 1169, L. R. 3 C. P. 639; *Anderson* v. *Ocean Steamship Co.*, 33 W. R. 433, 10 App Cas. 107; *Svensden* v. *Wallace*, 13 Q. B. D. 69, 32 W. R. Dig. 191; *Xenos v Fox*, 16 W. R. 1053, L. R. 3 C. P. 630, 17 W. R. 893, L. R. 4 C. P. 665; Benecke on Indemnity and Marine Insurance, p. 260; Parsons on Marine Insurance (ed. 1868), vol. 1, p. 208; and two American cases, *Potter* v. *Ocean Insurance Co.*, 3 Sumner 27, and *Greely* v. *Tremont Insurance Co.*, 9 Cushing, 415.

Carver, K.C., and *J. A. Hamilton, K.C.*, for the respondent. — The question is not one of general average pure and simple as between the parties to the adventure, but one of insurance and what are the losses and risks which underwriters undertake. Contribution is a consequence of general average where the interests differ, it is not a characteristic of general average. The unity of property does not alter the nature of the loss. There is no authority for the appellant here and for the view taken by Barnes, J. in *The Brigella*, except Parsons. Though the liability to pay general average is admitted, it is never expressly mentioned in policies. The cutting of the mast was a general average loss which has to be distributed, and the underwriters must pay any general average loss which falls on their assured. Barnes, J., and the appellants here take the view that the underwriter is only liable to make good a contribution when contribution has been made, but this is contrary to *Aitchison* v. *Lohre*. The theory running through all the authorities is that a loss such as this is a loss by perils of the sea within the policy, and is distributed by law over the two portions of the adventure. It is a voluntary sacrifice for the benefit of the whole adventure: Emerigon, c. 12, s. 39. The mast was cut away to save lives, saving of property is only incidental.

They cited *Mouse's case*, 12 Rep. 63, and Phillips on

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

Insurances (3rd ed.), 1273, Benecke, p. 473, and many of the cases and other authorities referred to by counsel for the appellant.

Scrutton, K.C., in reply, referred to *Steamship Balmoral Co.* v. *Marten*, *ante* p. 35, [1901] 2 K. B. 896.

Cur. adv. vult.

March 25.—VAUGHAN WILLIAMS, L.J., delivered the following judgment of the court: This case raises a question of great importance. It is admitted that the case would give rise to a general average claim if the ship and cargo belonged to different owners, but it is said that there can be no general average claim because both ship and cargo belonged to the plaintiffs, and as there was no contribution there can be no general average loss. We have to determine whether the holding of Mathew, J., that a general average act is not affected by the consideration whether there will be contribution or not, or the contrary opinion of Barnes, J., in *The Brigella*, is the right view. We agree so entirely with the view of Mathew, J., and his reasons for it that we should not think it necessary to add a word to those reasons did we not feel bound to deal with the reasons given by Barnes, J., and to state our view of the principles on which the law of general average should be based. Barnes, J., seems to think, firstly, that there can be no general average act or loss without separate interests in the adventure, contribution being of the essence of general average, and diversity of interests essential to contribution; and, further, that even if there can be a general average act where ship, cargo, and freight belong to the same owner, yet the law of contribution cannot apply, since the right of contribution belongs only to the adventurer who has an interest at risk against one whose goods have been saved by the general average act, and an adventurer cannot possibly sue himself in respect of the salvage of one part of his property by the sacrifice of another. It is said, further, that the fact of the insurance of ship, freight, and cargo with different underwriters makes no difference, since the underwriters have only a subrogated right which they would have to enforce in the name of the assured, as the owner of the property sacrificed, against the same person as the owner of the property saved. It is also said that the obligation to contribute exists between the parties irrespective of whether they are insured or not.

We think that the question whether contribution is of the essence of a general average loss or only an incident of it must depend on the occasion of the general average act, and that it is not only danger to ship, freight, and cargo which necessitates and justifies a sacrifice. It may be made in fear of death, and if it be made on a proper occasion all must bear the loss, the several owners, if more than one, contributing according to the value of their interest, while if therebe but one owner he must bear it all. The object of the maritime law of general average is, we think, to give the master of the ship, absolute freedom to make any sacrifice he deems best to avert the perils of the sea, and such a sacrifice is a general average act quite independently of unity or diversity of ownership.

But there remains the question whether the underwriters of a policy on cargo can be held liable to pay to an owner of ship and cargo the contribution which the cargo owner, if he had been a different person to the shipowner, would have had to pay the latter in respect of the general average loss incurred by the cutting away of the mast. It is urged that the shipowner could not have recovered this contribution against himself as cargo owner, and that the underwriter on cargo is therefore not liable to recoup him for a contribution which he could not be compelled to pay, since the underwriter is only bound to indemnify the cargo owner for a contribution which he could be made to pay, for a loss which he has suffered. If this be so, the converse must also be true—that the underwriter on the ship must pay the whole loss incurred by the sacrifice without getting any contribution from cargo belonging to the shipowner and benefited by the sacrifice; but we do not think this view is the true one. Take first the case of the shipowner who has insured his ship, and suffers a general average sacrifice by the cutting away of the mast, and suppose that there is cargo on board belonging to the shipowner. In this case we think the underwriter on ship is liable to pay the loss incurred by the sacrifice less the contribution by the shipowner on account of the cargo; and there is nothing in *Dickenson* v. *Jardine* to prevent this, since the shipowner has his contribution as cargo owner in his pocket, and his loss can be ascertained as the cost of replacing the mast less this contribution. In *Dickenson* v. *Jardine* jettison was expressly covered by the policy, and as the assured had not received the contributions of the other owners, the underwiter could recover them in his name on indemnifying him; here there is no contribution to be recovered, and the assured's loss is *pro tanto* reduced before he makes his claim on the underwriter, since he has his own contribution in his pocket. But if the policy is on cargo, what is the liability of the underwriter on cargo? Surely, to pay the shipowner's loss by reason of the deduction made by the underwriter on the ship in respect of his contribution as the owner of the cargo, and *mutatis mutandis* the result is the same if the sacrifice is a jettison of cargo, and ship and cargo have a common owner. As to the underwriter's right, where this is the case, to deduct the contribution due from ship or cargo, as the case may be, I will quote the words of Shaw, C.J., in *Greeley* v. *Tremont Insurance Co.*, where, after stating that the underwriter is liable directly to the assured for a general average loss without waiting to collect the contributions from other owners, he says: "But this rule does not apply where the assured is owner of vessel and cargo. Then, as owner of the cargo, being bound to contribute, he is deemed to have the contribution in his own hands, and is therefore clearly *pro tanto* indemnified, and cannot collect of the underwriter a sum of money to be recovered back by the underwriter himself." We think this passage is quite right, and a correct working out of the principle on which the law of general average is based; and it seems to obviate any difficulty arising from the fact that a man cannot sue himself, and from the legal proposition that the underwriter's only right in respect of collection of contributions is to sue in the assured's name. There is nothing in it contrary to English authority, though no English case expressly decides the point; but there are a *dictum* of Lord Campbell in *Moran* v. *Jones*, and an opinion of Blackburn, J., in *Oppenheim* v. *Fry*. Lord Campbell said, "Where there are separate insurances on ship and freight the calculation must be made as to the amount of the contribution by each, although the whole freight which was in peril is to be received by the owner of the ship, and without insurance the whole loss would fall on him." And Blackburn, J., said, "I think it is not necessary for the decision of this case to say whether the extraordinary expenditure was general average or not, though I have a strong impression that where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship, cargo, and freight belong to one or to different adventures." Against this there is only the opinion

of Barnes, J., in *The Brigella*. American authority is strongly in favour of Mathew, J.'s, view, and the whole question is well discussed by Storey, C J., in *Potter* v. *Ocean Insurance Co.*; "But it is urged that here there can be no contribution of freight or cargo, and that therefore it is a particular average on the ship and not general average, on the ground that what is and is not general average does not depend on the nature and objects of the sacrifice made, but only only on the question whether there are different subjects to contribute. I think the rule as to what constitutes general average is founded on the consideration whether it is for the benefit of all interested in the voyage or only for that of a particular interest. Suppose an owner of ship and cargo, and ultimately of the freight also, who insures the three interests with different underwriters. If any sacrifice is made for the common benefit, this is clearly general average, and all the underwriters must contribute; and it can make no difference that the three interests were insured with the same underwriters, or that there was no insurance or only one interest insured. The loss is still a general average, or in the nature of one. General average means a voluntary sacrifice as distinguished from an involuntary loss, and the question is whether the act is intended for the benefit of all concerned, not who are to contribute. If there is an insurance the underwriters are *pro tanto* benefited, and are bound to contribute."

Generally we think they have throughout the adventure such inchoate property and liability to loss as makes it right to take their right to contribution and their loss into consideration in the final account. Moreover, our view of the law is in accordance with the practice of average staters and underwriters both before and since *The Brigella*, and this practice is really essential in applying the law of general average to present-day conditions of navigation. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the respondents, *W. A. Crump & Sons.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — March 22.

WHITBREAD & CO. v. WATT. (*a.*)

Vendor and purchaser — Deposit — Vendor's lien — Rescission of contract by purchaser under clause in contract—No default by vendor.

The lien that a purchaser of land has on the land for so much of the purchase-money as is paid by way of deposit exists so long as, and in every case in which, the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. It continues to be operative therefore in a case in which the purchaser himself rescinds the contract under a clause thereof which enables him so to do.

Decision of Farwell, J., 49 *W. R.* 534, [1901] 1 *Ch.* 911, *affirmed.*

This was an appeal from a decision of Farwell, J. (reported 49 W. R. 534, [1901] 1 Ch. 911).

By a contract dated the 25th of January, 1897, the plaintiffs agreed to purchase from F. Saunders a freehold plot on the Woodhouse estate, a building estate of Saunders, for the sum of £500, to be paid as to £200 by way of deposit on the signing of the contract and as to the balance of £300 on the completion of the purchase with interest.

The contract provided:

Clause 3. "The purchase is to be completed as soon as 300 houses shall have been erected on the said estate (but without prejudice to clause 10 hereof) at the office of the vendor's solicitors, and the purchasers are to have possession as from the day of completion, when the balance of purchase-money, with interest as aforesaid, is to be paid. All outgoings up to that time will be cleared by the vendor, his heirs or assigns."

Clause 9 enabled the vendor to cancel the contract if the purchasers made any requisition which the vendor should be unable or unwilling to comply with.

Clause 10. "If 300 houses shall not be erected on the said Woodhouse estate within two years from the date of this agreement, the purchasers shall have the right, by giving seven days' notice in writing to the vendor, to rescind and cancel this agreement, and at the expiration of such seven days the agreement shall absolutely cease and determine."

Clause 11. "In the event of either the vendor or the purchasers, cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit without interest shall be paid by the vendor to the purchasers."

The plaintiffs paid Saunders the deposit of £200 on signing this contract. Saunders afterwards sold and conveyed the Woodhouse estate to Saxelby, who mortgaged it. In November, 1900, the mortgagees sold and conveyed the estate to the defendant Watt with notice of the contract of the 25th of January, 1897. The 300 houses were not built, and Saunders did not pay or account for the deposit to any of his successors in title.

On the 3rd of December, 1900, the plaintiffs wrote to the defendant rescinding the contract of the 25th of January, 1897, and claiming repayment of the deposit-money. The defendant refused payment.

At the date of the rescission Saunders was a bankrupt.

The plaintiffs thereupon took out an originating summons claiming (1) a declaration that under the contract of the 25th of January, 1897, the plaintiffs were entitled to a charge or lien on the hereditaments therein described by way of security for the repayment of the deposit of £200 paid by them to Saunders on signing the contract; (2) enforcement of the said security by foreclosure or sale.

Farwell, J., gave judgment in favour of the plaintiffs.

The defendant appealed.

Brinton, for the defendant.—It is admitted that if a contract goes off otherwise than by the default of the purchaser he has a right to recover the money he has paid by way of deposit. It is also the fact that in some cases the purchaser may have a lien on the land for which he has paid the deposit. The one right does not, however, necessarily involve the other, and the court may refuse to declare that a purchaser has a lien on the land in a case where he has a perfect right to recover his deposit. [STIRLING L.J.—The theory of *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672, was that by paying money the purchaser acquired a lien on the land.] In *Rose* v. *Watson* the vendor was in default. That case leaves it still open as to what is to happen where neither the vendor nor the purchaser is in default. The right to a lien on the land which the purchaser is said in that case to

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

acquire is subject to him not rescinding. If he elects to rescind, as in the present case, he has no right to a lien, and *Rose* v. *Watson* does not apply.

He also cited *Howe* v. *Smith*, 32 W. R. 802, 27 Ch. D. 89; *Wythes* v. *Lee*, 4 W. R. 184, 316, 3 Drew. 396; *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53, at p. 88; *Rodger* v. *Harrison*, 41 W. R. 291, [1893] 1 Q. B. 161; *Levy* v. *Stogdon*, [1898] 1 Ch. 478, 46 W. R. Dig. 173; *Cornwall* v. *Henson*, 48 W. R. 42, 49 W. R. 42, [1900] 2 Ch. 298.

Hon. Frank Russell, for the plaintiffs.—Where a purchaser pays part of the purchase-money by way of deposit a lien arises and vests in him for repayment of the deposit The lien is not affected by the contract going off, so long as he is not the party in default. The appellant is really contending that the lien arises by the conduct of the parties. That is not so, it arises on the contract. The principle established by *Wythes* v. *Lee* and *Rose* v. *Watson* covers the present case.

Brinton replied.

VAUGHAN WILLIAMS, L.J.—I think this appeal fails. When one speaks of the lien that the purchaser gets one is speaking not of a thing which is the result of any express contract, but of some right in the purchaser which has been invented (and to that extent it is a fiction) for the purpose of doing that which is just and bringing about a just result. That is a fiction which has to be resorted to not only in equity, but at law. For instance when you bring your action for money had and received to the use of the plaintiff, it is not true, but it is the way in which the law puts it to do justice. When Lord Westbury speaks in *Rose* v. *Watson* of "a transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase-money paid," and Lord Cranworth of the purchaser being exactly in the position of a mortgagee of the estate to the extent of the money which has been paid, all those expressions are merely verbal vehicles to carry the right which justice demands that the purchaser should have. Having read the report of *Rose* v. *Watson*, I must say that I agree with Mr. Brinton to this extent, that that decision does not expressly carry the lien of the purchaser beyond a case where the contract has gone off through the default of the vendor. Mr. Brinton admits that the purchaser immediately upon paying the money gets either a lien or an inchoate right of lien—I do not think it makes much difference what you call it; he agrees, I understand, that is a vested right, but he says that that right or inchoate right of lien is defeasible not only in the case (as everybody admits) of the purchaser himself being in default, but also in the case where the purchaser elects without any default of the vendor to rescind the contract. He says that if the purchaser chooses to give up a contract, not being driven thereto by any default of the vendor, he not only gives up the contract, but he gives up the lien or the inchoate lien which is the creature of the contract. I agree *Rose* v. *Watson* does not absolutely negative that view, although I think that the illustration given by Lord Cranworth of the mortgage goes a very long way to do so. No one, I suppose, would suggest that, if you had a contract with a clause giving the purchaser a right to rescind, and the purchaser really had a mortgage on the land for the purchase-money that he paid, that he would lose his mortgage because he elected to rescind the contract. In this state of things, one would, on the assumption that *Rose* v. *Watson* has more or less left the point open, look to see what the other cases say, and Mr. Russell has, I think, most properly cited a statement of the law by Kindersley, V.C., in *Wythes* v. *Lee*. The learned judge said: "The point most discussed and most important was this abstract question. Suppose a person absolute beneficial owner in fee of an estate contracts to sell it and the purchaser pays a deposit in part payment of the purchase-money and by reason of the vendor being unable to make a title or from any other reason not being misconduct on either side the contract goes off and cannot be completed: has the purchaser a lien on the estate for his deposit? That is the most important question." And then he goes on to decide that in such a case the purchaser has a lien. That statement of the law by Kindersley, V.C., covers this case, and, it follows, in my judgment, that the decision of Farwell, J., is right and ought to be affirmed.

I do not mean by having thus attempted to give reasons of my own in any way to depart from or vary the reasons that Farwell, J., has given in his judgment. It seems to me an extremely clear and forcible judgment, and I am not very sanguine that I have added to it anything by what I have said in my judgment now, but I was very much struck as the judgment was being read with what Farwell, J., said as to the common condition. "If the purchaser makes or insists upon any requisition or objection to the title which the vendor is unable or unwilling to comply with, the vendor may rescind." The learned judge said: "There is no default there, but I venture to think it would not be arguable, and I do not think counsel for the defendant contended that the purchaser in such a case would have no right to a lien in the same way as if the purchase went off by reason of a want of title on the part of the vendor. It is not default, it is rather misfortune." I think to-day Mr. Brinton was so pressed with that passage that he ceased to say that he could not argue that the purchaser's lien would be lost in such a case, and he did assert that it would be lost.

For the reasons which I have given, and for the very cogent reasons which Farwell, J., has given, I think this appeal fails.

STIRLING, L.J.—I am of the same opinion, and after the judgment of Farwell, J., with which I entirely agree, and also that of Vaughan Williams, L.J., in which I also agree, I have very little to add. I think it is quite true, as Mr. Brinton has contended, that the question of the existence of the purchaser's lien for his deposit arises in this case in circumstances which differ from those of previous cases. The contract here has been brought to an end, not by any act or default of the vendor, but by reason of the purchaser exercising a power of rescinding which is reserved to him by the contract itself. That circumstance does not seem to have occurred in any previous case. Nevertheless in the judgment in the two leading cases on the subject, *Wythes* v. *Lee*, before Kindersley, V.C., and *Rose* v. *Watson*, in the House of Lords, the rule is stated in terms which cover the present case. And, if one looks at what after all is the foundation of the whole doctrine—namely, the desire to do justice as between vendor and purchaser, it appears to me that that reason applies not less forcibly to the present case than in the ordinary cases in which the rescission of the contract takes place by reason of some default on the part of the vendor. I think in a case where the vendor has rescinded under the common condition it would be absolute injustice if the purchaser were not allowed to have a lien for the purchase-money which he had paid, and which was the security on his part for the performance by him of his contract. And I think here also the justice of the case applies to give the purchaser his lien.

COZENS-HARDY, L.J.—I think the lien for the

deposit exists so long as, and in every case in which, the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. In other words, when the contract goes off either by reason of the default of the vendor or without any default on the part of the purchaser the lien becomes operative. It would be shocking injustice if the purchaser's lien were to be lost in the common case of a rescission by the vendor under the common form condition. Such a rescission is not unlawful, is not a breach of contract, and is not any default on the part of the vendor.

Solicitors, *H. T. Spottiswoode; Martineau & Reid.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 26; March 20.

In re HASLAM & HIER EVANS. (*a.*)

Solicitor—Client—Commission received by solicitor with knowledge of client—Bargain with client—Independent advice.

A solicitor may bargain with his client provided that the client is fully informed and duly and honestly advised, so that the solicitor and client are substantially at arm's length and on an equal footing, though he may not accept from his client, while the relation of solicitor and client exists, remuneration for his professional services beyond that to which he is legally entitled.

The vendor of a patent promised a firm of solicitors a commission on the purchase-money of the patent in the event of their finding a purchaser. The solicitors mentioned the matter to one of their clients, who eventually became the purchaser. The client knew that the solicitors were to receive a commission. The commission was paid to the solicitors by the vendor.

Held, that the client could not recover the commission from the solicitors.

This was an appeal from a decision of Kekewich, J.

The question was whether the respondents, Messrs. Haslam & Evans, solicitors, were entitled to retain a commission which they had received from the vendor of a patent to their client. The solicitors had sued the vendor for the commission and he had paid £210 into court, and the solicitors had accepted it.

Kekewich, J., gave judgment in favour of the solicitors.

The executors of the client (who had died) appealed.

The facts are stated in the judgment of Vaughan Williams, L.J.

Wilkinson, for the appellants.—The solicitors have received a benefit at the expense of their client. Even if he agreed with them that they should receive it, such an agreement will not be allowed to stand unless he had independent advice.

The following cases were referred to: *Tyrrell* v. *Bank of London*, 10 W. R. 359, 10 H. L. Cas. 26; *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. App. 252; *Liles* v. *Terry*, 44 W. R. 116, [1895] 2 Q. B. 679; *Barron* v. *Willis*, 48 W. R. 579, [1900] 2 Ch. 121.

J. B. Matthews, for the respondents.—Here the solicitors made full disclosure to their client that they were going to receive a commission from the vendor to him. If the client is allowed to get this commission he will in effect buy this patent at a less price than he contracted for.

He referred to *In re Olympia (Limited)*, [1898] 2 Ch. 153, 46 W. R. Dig. 32; *Copp* v. *Lynch*, 26 SOLICITORS' JOURNAL, 348; *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218.

Wilkinson replied.

Cur. adv. vult.

March 20.—VAUGHAN WILLIAMS, L.J.—In this case the short facts are that Mr. Haslam, a solicitor, on or about the 9th of January, 1899, received from Mr. B. Elliot, the owner of a patent, a commission note, under which Mr. Elliot promised, in the event of Mr. Haslam's introducing a purchaser whose terms Mr. Elliot might accept, to pay Mr. Haslam the sum of £250 out of a purchase price of £3,750, £300 out of £4,000, and so on. Mr. Haslam introduced the patent to Mr. Ohlsen, a gentleman for whom Mr. Haslam and his partner, Mr. Evans, had in several matters been acting as solicitors. This was on or about the 11th of January. Mr. Ohlsen instructed Mr. Haslam to make an appointment for him to see the patented article, and on the 17th of January Mr. Haslam and his partner accompanied Mr. Ohlsen to Harley-street for the inspection. On their return Mr. Haslam showed the commission note to his client, who thereupon stated that he should not pay the lowest price therein mentioned, and that, if he could not get the patent at a much lower price, he should not buy. Mr. Haslam says that he and his partner explained to Mr. Ohlsen that they were not quite satisfied with the commission note signed by Mr. Elliot, which was not as liberal as the note which they had submitted to Mr. Elliot, and thereupon, in consideration of a promise by Mr. Ohlsen to allow them a reasonable commission in case they were unable to obtain any commission under the original note, promised to accept the note for what it was worth, and not to insist on obtaining a more satisfactory note from Elliot. It appears from the bill of costs that Messrs. Haslam & Evans received the instructions of Mr. Ohlsen to try to negotiate with Mr. Elliot for a reduction of price, and they did so, and eventually effected a purchase. It seems plain that they were attempting to serve two masters, and that one master, Mr. Ohlsen, knew this, and the other, Mr. Elliot, did not. I think that, if the truth had been known, Mr. Elliot would never have paid the £210 into court. I think that the claim on Mr. Elliot ought never to have been made. I do not see how we can order money to be paid by Messrs. Haslam & Evans to Mr. Ohlsen's executors which Messrs. Haslam & Evans wrongfully obtained, to the knowledge of Mr. Ohlsen, from Mr. Elliot. But even putting aside the consideration that the money was wrongfully obtained, and that *in pari delicto potior est conditio possidentis*, I further think that the executors of Mr. Ohlsen are not entitled to treat the £210 paid by Mr. Elliot to Messrs. Haslam & Evans as money received to Mr. Ohlsen's use, or in any way to surcharge them. There is no ground for saying that the £210 was a secret profit. The only other possible view which, in my judgment, could support the contention that Mr. Ohlsen's executors are entitled to have the benefit of this payment is that the £210 was something put on the price by the vendor, and that Mr. Ohlsen, in allowing Mr. Haslam to keep this sum, was making a gift to his solicitor, which he was not entitled to keep, having regard to his position as solicitor for the donor. I do not think on the evidence that it was a gift. It was a payment for a service. Mr. Ohlsen in effect said to his solicitor, "Keep the sum which the vendor puts on the price to pay your commission, but you must, in consideration of this, serve me and not him." The case, therefore, does not fall within *O'Brien* v. *Lewis*,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

11 W. R. 318. The appeal must be dismissed, but, I think, without costs.

STIRLING, L.J.—All transactions between solicitor and client, which result in the solicitor's obtaining a benefit for himself, are subjected by courts of law to strict scrutiny, when called in question by the client, and are treated as imposing obligations on the solicitor of greater or less stringency. In some cases the obligation goes so far as almost to bind the solicitor to abstain altogether from a transaction of the kind. Thus a solicitor may not accept from his client, while the relation of solicitor and client exists, remuneration for his professional services beyond that to which he is legally entitled. Of the application of this rule *O'Brien* v. *Lewis* is a striking example. In the great majority of cases, however, the law does not exact so much. A solicitor may, for example, purchase from his client, but there is imposed on him the burden of proving that his client was fully informed, and duly and honestly advised, and that the price was just: see the judgment of Turner, L.J., in *Holman* v. *Loynes*, 2 W. R. 205, 4 De G. M. & G. 270. In *Edwards* v. *Meyrick*, 2 Hare, 60 (a case of purchase by a solicitor), Wigram, V.C., says: "The rule of equity, which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand," and this view of the law is approved by Turner, L.J., in *Holman* v. *Loynes*, and is in accordance with subsequent decisions. Wigram, V.C., in *Edwards* v. *Meyrick* went on to point out how the appropriate duty which falls on the solicitor depends on the special circumstances of each individual case. His concluding remarks are these: "The nature of the proof, therefore, which the court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence, ascendency, or other advantage over his client, or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing." It thus appears that, in the class of cases of which *Edwards* v. *Meyrick* is a type, it is necessary that the solicitor should establish that he and his client were "substantially at arm's length and on an equal footing." In the present case the solicitors were retained by Mr. Ohlsen, now deceased, to act for him in negotiating and carrying into effect the purchase of certain patent rights. The solicitors had obtained from the vendor a commission note, under which they were entitled to a certain commission in the event of their introducing to him a purchaser. This commission note was handed to Mr. Ohlsen, and remained in his possession some days previously to the contract of sale being entered into. The purchase was carried into effect, and the solicitors, with Mr. Ohlsen's knowledge, recovered payment of the commission from the vendor. After this Mr. Ohlsen died, and subsequently to his death the solicitors delivered a bill of costs to his executors, who have procured an order for its taxation. In the course of the taxation the executors have sought to charge the solicitors with the amount of the commission received by them, and the question is whether they are entitled so to do. I do not think that the rule applied in *O'Brien* v. *Lewis* governs this case, for the commission was paid, not by the client, but by the vendor as remuneration for services rendered to him. On the other hand, I think that the less stringent rule discussed in *Edwards* v. *Meyrick* does apply. I am fortified in this opinion by what is laid down by Turner, L.J., in *Lyddon* v. *Moss*, 7 W. R. 433, 4 De G. & J. 104, with reference to an agreement by a client to allow his solicitor interest upon his bills of costs. The learned judge says: "Every such agreement is a bargain between the solicitor and the client, and can be supported only under the same circumstances as would support any other bargain between them. It is the bounden duty of a solicitor, before he enters into any such bargain with his client, to inform the client that the law allows of no such charge of interest, and that, although he may decline to conduct the client's business without such an allowance, others of equal ability may be found who will conduct it upon the scale of allowances which is sanctioned by the law." The learned judge holds that interest on costs, although in a sense an addition to remuneration allowed by law, may be bargained for, but only subject to the like obligations on the part of the solicitor as any other bargain. I think, therefore, that in the present case the solicitors were under an obligation to give the client full information, and to advise him, if and so far as necessary, with reference to the commission note. The solicitors have established that they did give him full information, but, if legal advice was necessary to be given by them, there is no evidence of their having given it. If the solicitors had not made full disclosure, it is quite clear that the client would have been entitled to recover the amount from them, but no case has been cited to show that a person can recover a profit received, with full knowledge on his part, by one standing in a fiduciary position towards him. It was unnecessary that the solicitors should inform the client that they would have been liable to him if they had not given him the information which they did, and, so far as I have as yet stated the facts, more was not required of them. It appears, however, that the solicitors not only received the commission which they received from the vendor with the knowledge of their client, but bargained with him that they should be allowed what is termed a reasonable commission (of which the suggested amount was £250) from himself in the event of their not being able to recover a commission from the vendor. To that state of things the more stringent rule to which I have referred does appear to me to apply. In *O'Brien* v. *Lewis* the promise of additional remuneration appears to have been volunteered by the client, and Lord Westbury says that the solicitors ought to have said that they could accept no such thing, and that it was the bounden duty of the solicitors not to accept such a promise. Still more was it the duty of the solicitors in the present case to abstain from making such a bargain as they did. Since the date of the decision in *O'Brien* v. *Lewis* the Attorney and Solicitors' Remuneration Act, 1870, has been passed, and solicitors may make bargains with their clients as to their remuneration, which were previously inadmissible, but such agreements are fenced by safeguards imposed by the Legislature, which have not been observed by the solicitors in the present case, nor were they brought to the notice of the client. It is quite true that the bargain has not been enforced, and, in the events which happened, came to nothing; but the fact of its existence affords some evidence that the solicitors and their client were not dealing at arm's length and on an equal footing. It appears to me, however, that in such circumstances the remedy of the client is not to recover the amount of the commission

paid to the solicitors by the vendor, but to set aside the transaction between himself and the solicitors. That relief cannot, however, be given in the present proceedings. I think, therefore, that the appeal ought to be dismissed. But I consider it my duty to express my great regret that solicitors should have made a bargain, which was not merely improper in the eye of the law, but which placed them in a position in which it was scarcely possible for them to fulfil the duties which they had undertaken to both vendor and purchaser of the patent. Although I have rested my judgment on the grounds which I have stated, it must not be understood that I disagree with what has been said by Vaughan Williams, L.J.

COZENS-HARDY, L.J.—I have had an opportunity of reading the judgment of Vaughan Williams, L.J., which so entirely expresses my own view of this case that I do not think it necessary to add anything.

Solicitors, *Greenop & Son; Haslam & Hier Evans.*

High Court of Justice.

Chan. Div.
Swinfen Eady, J. } March 14.

STAGG *v.* MEDWAY (UPPER) NAVIGATION CO. (*a.*)

Company—Borrowing powers—Surplus lands—Ultra vires.

It is not ultra vires *for a company incorporated by statute, with express powers of borrowing upon mortgage limited to mortgages on its undertaking, to offer its surplus lands as additional security in arranging for the transference of an existing debt where the creditor would be entitled to levy execution against such lands.*

This was an action to restrain the defendant company from mortgaging its surplus lands.

By the Medway (Upper) Navigation Acts, 1664 and 1739, the Company of Proprietors of the Navigation of the River Medway were incorporated for the purposes of improving the navigation of the River Medway. Those Acts did not in terms or impliedly permit the company to borrow upon mortgage, but the company did in fact in the year 1874 borrow £6,000 upon mortgage.

In the year 1892 the Medway (Upper) Navigation Act, 1892, was passed for the purpose of reincorporating the company and changing its name into the Medway (Upper) Navigation Co. The Act contained the following recital:

"Whereas the company have borrowed on mortgage of their lands, tolls, rates, and duties the sum of £6 000 pounds which is still due and owing, and it is expedient that the company should be empowered to pay off the moneys due thereon notwithstanding any question as to the legality thereof."

Section 13 provided as follows: "Notwithstanding any question as to the legality of the power of the company to borrow the moneys secured by the indenture dated the 8th day of March, 1878, and made between Ambrose Ward and others of the first part, the company of the second part, and William Crundwell and others of the third part, and which moneys have been expended upon the undertaking, the company shall be at liberty to repay the amounts so secured. And for the purpose of paying off such mortgage the company may borrow on mortgage of their undertaking any sum not exceeding six thousand pounds."

The Act gave the company no express powers of borrowing upon mortgage except on its undertaking.

On the 18th of February, 1893, the company in pursuance of the above section paid off the old mortgage and mortgaged the undertaking afresh to William Levett. William Levett called in £2,000 of the mortgage debt, and thereupon the company in 1901 gave notice that they would pay off the whole debt. In order to do so they were making arrangements to transfer the mortgage to two persons who stipulated that the surplus lands of the company should be included in the security. By section 18 of the Act of 1892 the company had certain powers of dealing with their surplus lands, but these did not include the power of mortgaging them.

The plaintiff, Rowland Stagg, a director and shareholder in the company, thereupon brought an action to restrain the company from carrying out this arrangement on the ground that to mortgage the surplus lands was *ultra vires.*

On the hearing of the motion it was agreed to treat it as the trial of the action.

Vernon Smith, K.C., and *Leeke*, for the plaintiff, in support of the contention that the company were confined to the express powers of borrowing given them by their Act, quoted *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 33 W. R. Dig. 28; *Gardner* v. *Chatham and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201; and *Putney Overseers* v. *London and South-Western Railway Co.*, 39 W. R. 291, [1891] 1 Q. B. 440.

Theobald, K.C., and *Dunham*, for the defendant company.—This is not a question of borrowing, but of adding security now liable for payment of debts: *Blackmore* v. *Yates*, 15 W. R. 750, L. R. 2 Ex. 225; *Pickering* v. *Ilfracombe Railway Co.*, 16 W. R. 458, L. R. 3 C. P. 235. The demand for an injunction is premature.

The case of *Attorney-General* v. *Great Eastern Railway Co.*, 28 W. R. 769, 5 App. Cas. 473, was also referred to.

SWINFEN EADY, J., in giving judgment, said: The plaintiff in this case is seeking to restrain by injunction the defendant company from executing any mortgage upon its lands and property other than its undertaking—that is, from charging them specifically; and in substance I am asked to restrain the company from charging their surplus lands—that is, the tenements and hereditaments which in the opinion of the company are not required for the purposes for which the company was incorporated. The plaintiff contends that such a charge is *ultra vires* of the company, and that on that ground the injunction should be allowed. Now what are the facts? In 1892 the company was re-incorporated. Before the Act of its re-incorporation the company had executed a mortgage for £6,000, of which mortgage there is a recital in the Act. Section 13 of the Act gives the company an express power to raise the sum necessary to pay off the existing charge by a mortgage of its undertaking. Accordingly on the 18th of February, 1893, the old mortgage was discharged and a fresh security for £6,000 given to William Levett. That debt is now due and payable. The company were in possession of surplus lands, some of which have been sold for £5,000, but that sum was not used towards

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

paying off this mortgage debt, which still remains owing. The company have found certain persons who are willing to take a transference of the mortgage, but they require further security and stipulate that they shall receive a charge on the surplus lands of the company. This is not a case of borrowing. The company have already exhausted their powers under section 13, and as matters stand they have no further powers. The debt is a valid debt payable now, and the company are making terms for the transference of that debt, one of the terms being that they shall charge their surplus lands.

This question is, will that charge be valid or not? I approach it from this point of view. There is a debt upon which a creditor could obtain payment and take the land of the company in execution. The case of *In re Bishop's Waltham Railway Co.*, 15 W. R. 96, L. R. 2 Ch. App. 382, shows what should be done on such occasions. There was a petition for sale of railway land and the court directed an inquiry as to what part of it was saleable. It would appear to be a singular result that a creditor could obtain judgment, levy execution, and procure the sale of the surplus lands of the company, and yet the company could not prevent this by charging those lands. A similar question arose in *Blackmore* v. *Yates*. The facts of that case were these: A railway company gave a Lloyd's bond to their contractors who handed it to the plaintiff to secure an advance. The plaintiff in the name of the obligee brought an action against the company on the bond, but before judgment it was compromised on the terms that the company should transfer to him the whole of their rolling stock as security. This was before the Act protecting rolling stock from an execution creditor was passed. There the objection was raised that the conveyance of the rolling stock was *ultra vires* of the company, but it was met by the company saying that the transfer was only made in anticipation of what might happen if a creditor obtained judgment against them, and the transaction was held good. Between that case and this I can draw no distinction. If the surplus lands of a company are liable to be taken by a creditor obtaining judgment against the the company, the company can anticipate that event by making them a security for the debt. On that ground I hold that the transaction proposed is valid. The company are making no fresh loan, but are arranging terms with regard to an antecedent debt. The motion therefore fails, and I refuse to grant the injunction asked for by the plaintiff.

Solicitors, *Routh, Stacey, & Co.*, for *Stenning, Knocker, & Son*, Tonbridge; *Tarry, Sherlock, & King*.

Chan. Div.
Swinfen Eady, J. } Feb. 26.

In re BOZZELLI'S SETTLEMENT.
HUSEY HUNT *v.* BOZZELLI. (*a.*)

Conflict of laws—Marriage—Deceased husband's brother—Italian subjects—Domicil—Lord Lyndhurst's Act (Marriage Act, 1835, 5 & 6 Will. 4, c. 54), s. 2.

A marriage was legally contracted in Italy between a woman and the brother of her deceased husband, the wife and both husbands being Italian subjects and domiciled in Italy.

Held, that the marriage was valid in England.

Originating summons.

Edith M. Jones, an Englishwoman domiciled in England, married Edward Bozzelli, an Italian domiciled in Italy, on the 16th of November, 1871.

The marriage was solemnized in Italy.

On the 15th of November, 1871, a marriage settlement was made between Edith M. Jones of the first part, Edward Bozzelli of the second part, and trustees resident in the United Kingdom of the third part.

By this settlement certain funds were settled on trust for the wife, husband, and the issue of the marriage, with a proviso that if the wife survived her husband she might by deed or will appoint one-third of the settled funds subject to her own life interest in favour of a subsequent husband and the children of a subsequent marriage.

There were three children of this marriage.

Edward Bozzelli died on the 29th of November, 1879.

Mrs. Bozzelli lived with her husband up to the date of his death, and afterwards took no steps to change her domicil.

On the 11th of December, 1880, she married Michael Bozzelli, a brother of her deceased husband, who was also an Italian subject domiciled in Italy, and there was issue of the marriage.

This second marriage was valid in Italy as the necessary dispensations from the civil and ecclesiastical authorities had been obtained.

The wife was now desirous of exercising her power of appointment under the settlement of the 15th of November, 1871, and it was necessary to determine whether the second marriage was valid according to English law.

Austen Cartmell, for the children of the first marriage.—Such a marriage was declared to be "prohibited and detested by the laws of God," under section 3 of the statute 25 Hen. 8, c. 22, and section 11 of 28 Hen 8, c. 7; and by the Marriage Act of 1835 (5 & 6 Will. 4, c. 54), s. 2, "All marriages between persons within the prohibited degrees of consanguinity or affirmity shall be absolutely null and void to all intents and purposes whatsoever." There was no question that the parties in the present case were within the degrees of affinity under 28 Hen. 8, c. 7: *Brook* v. *Brook*, 9 W. R. 461, 9 H. L. C. 193.

McMullan, for the trustees of the settlement.

Tomlin, for the wife.—On the reasonable construction of the settlement the power was a power to be exercised on her contracting a valid marriage under Italian law; but even if this be not so the marriage was valid according to the law of England.

SWINFEN EADY, J.—The general principle in these cases is that the law of domicil governs the contract of marriage. Here the domicil was Italian. The objection was raised that the second marriage was void under 5 & 6 Will. 4, c. 54, which enacted that all marriages between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void to all intents and purposes whatsoever. The leading authority on this question is the case of *Brook* v. *Brook*, 9 W. R. 461, 9 H. L. Cas. 193. There, British subjects domiciled in this country went abroad to Denmark, where by law the marriage of a man with his deceased wife's sister is valid, and were there duly married. Lord Campbell said: "A marriage between a man and the

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so even if they were native-born English subjects, who had abandoned their English domicil, and were domiciled in Denmark." Here, Lord Campbell treats the law of domicil as being the law governing the validity of marriage even in the case of a deceased wife's sister, and even though the parties were British subjects domiciled abroad. [His lordship then read extracts from Lord Cranworth's judgment in the same case.] The case of polygamous marriage came before the court in *Hyde* v. *Hyde*, 14 W. R. 517, L. R. 1 P. & D. 130. There both the man and the woman were single and competent to contract marriage, and the marriage was contracted in a country where polygamy was lawful. It was a valid marriage according to the *lex loci*, but was not valid in Christendom. In the present case I have to deal with a marriage valid by the law of domicil and also by the laws of many countries, and a marriage which certainly cannot be regarded as an incestuous union. In the case of *Sottomayor* v. *De Barros*, 26 W. R. 455, 3 P. D. 1, the marriage celebrated in England of Portuguese subjects domiciled in Portugal was declared null and void because by the law of Portugal a marriage between first cousins is illegal as being incestuous. There the law of domicil was applied to the question of the validity of the marriage. Now in the case before me the marriage was valid by the law of domicil, and was not incestuous according to the general opinion, and in my opinion the marriage was a valid marriage, and the lady has the power of appointing to her second husband.

Solicitors, *Attree, Johnson, & Ward*, for *Hunt, Currey, Nicholson, & Co*, Lewes.

IN BANKRUPTCY.

K. B. Div.
(Wright and Phillimore, JJ.) March 17.

In re DAY.
Ex parte HAMMOND. (*a.*)

Bankruptcy—Act of bankruptcy—Deed of assignment for the benefit of creditors—Notice—Delay in presentation of petition—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (a).

Where a creditor, who is aware that the debtor has executed a deed of assignment for the benefit of creditors, does not assent to the deed and expressly reserves his right to take bankruptcy proceedings, he is entitled to succeed on a petition founded on the deed, even though there be some delay in presenting the petition.

In re Carr, Ex parte Jacobs, *ante, p.* 336, 85 *L. T. Rep.* 552, *distinguished.*

Appeal from the dismissal of a petition by the registrar of the County Court of Norfolk, holden at Great Yarmouth.

On the 4th of November, 1901, a meeting of the debtor's creditors was held, and a resolution was carried approving a deed of assignment for the benefit of creditors executed on the 30th of October.

The petitioning creditor was represented at that meeting by a solicitor who neither assented nor dissented, but stated that he must consult his client, and that he reserved the right to take proceedings in bankruptcy.

On the 30th of November the solicitor wrote to the trustee under the deed informing him that the petitioning creditor was not satisfied with the debtor's position, and asking for a report of the debtor's affairs. It also stated that the right to take steps in bankruptcy was reserved. The trustee's letter in reply concluded as follows: "If, however, your client has a desire to make the man a bankrupt I should prefer his doing so now, and to save further time, trouble and expense on the part of myself and staff." No reply was written to that letter, and the next communication received by the trustee was a notice that the bankruptcy petition was filed.

The petitioning creditor lived at a great distance from the district of the court.

The petition was filed on the 27th of January, 1902, and was heard on the 14th of February, when the registrar held that the delay in presenting the petition was not satisfactorily explained, and on the authority of *In re Carr, Ex parte Jacobs, ante*, p. 336, 85 L. T. Rep. 522, dismissed the petition.

Muir Mackenzie, in support of the appeal, referred to *In re Martin, Ex parte The Board of Trade*, 36 W. R. 698, 21 Q. B. D. 35.

F. Low, for the debtor, submitted that the facts were the same as in *In re Carr, Ex parte Jacobs*, and that the petition was rightly dismissed.

WRIGHT, J.—In this case the registrar dismissed the petition on the ground that he was bound by the case of *In re Carr, Ex parte Jacobs*. That case, however, does not go to the length suggested. In *Carr's case* the facts were different and the delay was unexplained. Here the agent expressly stated that he reserved all his rights, including the right to take bankruptcy proceedings, and at no time did the petitioning creditor acquiesce in any way in the deed for the benefit of creditors. The petitioning creditor did not do in this case what we thought he had been doing in *Carr's case*—sit on the rail.

PHILLIMORE, J.—I agree.

Appeal allowed. Receiving order made.

Solicitors for the appellant, *Gribble, Oddie, & Co.*

Solicitor for the respondent, *J. W. C. Dayne*, Norwich.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) March 13.

HARBURG INDIA RUBBER COMB CO. *v.* MARTIN. (*a.*)

Guarantee—Indemnity—Promise to answer for debt or default of another—Verbal promise—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

Where there is a main contract, the object of which is not to answer for the debt or default of another, such a contract is not within section 4 of the Statute of Frauds, even though incidentally it may involve a liability to answer for the debt of another. But where the object of a contract is to answer for the debt of another, the contract is not taken out of the statute by the fact that the person making it incidentally gains a personal advantage, and that such personal advantage was his motive in making the contract. Accordingly, where a director of, and a large shareholder in, a company verbally promised a judgment creditor of the company to give bills for the amount of the debt due to him in consideration of his refraining from levying execution on the company's goods,

Held, that the promise was a promise to answer for the company's debt within the Statute of Frauds, and must therefore be in writing.

This was an appeal from a decision of Mathew, J.

The action was brought upon a verbal promise by the defendant that he would give bills for a debt due to the plaintiff company from another company called the Crowdus Accumulator Syndicate.

The plaintiff company is a foreign company, and the plaintiff Winter is its agent in England. The plaintiff company had recovered judgment against the syndicate. The syndicate failed to pay the amount due under the judgment, and the plaintiffs issued a writ of *fi. fa.*

The sheriff found that the works of the syndicate had been stopped, and the place locked up, and he did not actually enter into possession of the premises.

While things were in this state the defendant, who was a director of, and a large shareholder in, the syndicate, had an interview with the plaintiff Winter.

At the trial of the action, the jury found as a fact that at this interview the defendant promised to give bills for the amount of the debt due from the syndicate to the plaintiff company.

On the faith of this promise or guarantee by the defendant, the plaintiff Winter instructed his solicitors not to proceed with the execution.

The defence to the action was that the guarantee was a contract or promise "to answer for the debt of another" within the meaning of section 4 of the Statute of Frauds, and therefore the action could not be maintained because the promise was not in writing.

Mathew, J., gave judgment for the plaintiffs. He held that the object of the arrangement was to protect the goods, not to pay the debt, and, moreover, the promise was given for the purpose of obtaining a direct personal advantage for the defendant, who had invested £5,000 in the syndicate. Consequently section 4 of the Statute of Frauds did not apply.

The defendant appealed.

By section 4 of the Statute of Frauds: "No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

English Harrison, K.C., and *Colam*, for the defendant.—This is not a promise by the defendant in order to protect his own goods. The goods to be protected are the property of the Crowdus Syndicate, which is a distinct legal entity. The fact that the defendant is a shareholder in the syndidate does not make them his goods. The defendant may have obtained an indirect benefit by the transaction, but the main object of it was to benefit the syndicate and not to benefit the defendant.

C. A. Russell, K.C., and *Wills*, for the plaintiff.—It is necessary to look, not at the form of the transaction, but its substance. Here the defendant has entered into an arrangement in order to secure an interest belonging to him. He agreed to indemnify the plaintiffs against loss if they refrained from proceeding with the execution, and by so doing he procured a benefit for himself. The fact that he at the same time guaranteed the debt of the syndicate does not alter the real nature of the transaction.

No reply was called for.

The following cases were cited in the course of the argument: *Williams* v. *Leper*, 3 Burr. 1886, 2 Wils. 308; *Edwards* v. *Kelly*, 6 M. & Sel., 204; *Sutton* v. *Grey*, 42 W. R. 195, [1894] 1 Q. B. 285; *Bampton* v. *Paulin*, 4 Bing. 264; *Walker* v. *Taylor*, 6 C. & P. 752; *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374; *Guild & Co.* v. *Conrad*, 42 W. R. 642, [1894] 2 Q. B. 885; *Wilkinson* v. *Unwin*, 29 W. R. 458, 7 Q. B. D. 636; *Castling* v. *Aubert*, 2 East, 325; and *Couturier* v. *Hastie*, 8 Ex. Ch. 40, 5 H. L. Cas. 673, 5 W. R. H. L. Dig. 253.

VAUGHAN WILLIAMS, L.J.—In this case the material facts are very short indeed. The plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The company did not pay what was due, and the plaintiffs recovered judgment and placed in the hands of the sheriff a writ of *fi. fa.* to realize the amount of the judgment. The sheriff found the works stopped and the place closed and did not take possession. After this there was a meeting between Mr. Brown Martin, the defendant, and Mr. Winter, the plaintiff. A conversation took place at that meeting; and the jury have found that Mr. Winter's account of that transaction is an accurate one. To put the result of that conversation shortly, Mr. Brown Martin promised that he would give some bills. I am not going now to deal with the question of what the form of those bills was, but he was to give some bills for the amount of the judgment debt. It is said that that amounted to an oral promise to give a guarantee of this judgment debt owing by the syndicate to the plaintiffs. It is said on behalf of the appellant that this was a promise by Mr. Brown Martin by word of mouth to make himself answerable for this debt of the syndicate to the plaintiffs. It is said on behalf of the respondents that this was not a promise to make himself answerable for the debt of another—that is, this debt of the syndicate, but that it was a contract of indemnity. I suppose that means a new contract in the nature of an original obligation. Those are the facts of the case, and the question which has to be decided is whether or not this bargain spoken to in the evidence of Mr. Winter as having been come to between himself and Mr. Brown Martin is a contract to answer for the debt of another within the 4th section of the Statute of Frauds. Mathew, J., has found that it does not come within that section. I am sorry to say that I cannot bring myself to agree with that conclusion. I think that

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

this contract as plainly as possible was a contract by Mr. Brown Martin to make himself answerable for the debt of the syndicate. It is said that it is not, and attention has been called to a great number of cases showing when the court has treated a transaction as being outside this clause in the 4th section. The earlier cases were most of them what I call property cases. They were cases in which the party making the promise either had property which he wished to relieve from liability or which he wished to acquire. It is not necessary for me to mention them one after the other. I cannot agree that the present case does come within those cases which I have called property cases. It does not seem to me that the promisor was either making a new contract of purchase or a new contract for the release of any property which either was his or in which he had an interest. Then attention is next called to the exception to section 4, which is established by what I call for short *del credere* cases, beginning with *Couturier* v. *Hastie* and coming down to *Sutton* v. *Grey*. It is said, and I think truly said, that those cases are instances of a different species from the property cases. I deliberately say instances of a different species, I do not say instances of a different genus, because I agree there is a general rule. There is a wider genus which I think can be very plainly and simply defined within which both of these species fall. But as far as I can see the authorities at present have left us with a general rule which I will attempt to define presently, and each of these two classes of cases falls within this general rule. In neither class of these cases, I want to say at once, has the form of the promise given by the promisor ever been held to be conclusive of the matter. The promise may or may not be to answer the debt of another, but whether it is or not, it is the substance that is looked at and not the form. Now before going away from these instances I should like to mention one more class which I do not put as an exception, but I do put as not coming within the section at all, and those are the cases spoken of as indemnity cases. With regard to those I wish to say this, that in one sense all guarantees, whether they come within this clause of the 4th section of the Statute of Frauds or whether they do not, are contracts of indemnity. But the difference between indemnities which do and those which do not come within the clause, is a difference which is very shortly expressed in these words in the notes to *Forth* v. *Stanton* in Williams's Notes to Saunders' Reports, vol. 1, p. 234: "These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable." That, to my mind, is an accurate description of a guarantee—or indemnity if you like so to call it—which comes within the 4th section of the Statute of Frauds as distinguished from an original liability which is not within the statute and which has no reference to a debt of another, but has reference to a new liability which has to be taken on himself by the promisor, and which has been called to-day a contract of indemnity. I do not wish to go at length into the cases but I wish to say that it seems to me that the case of *Guild* v. *Conrad* entirely confirms or entirely coincides with this view which I have been suggesting as being the true view of the distinction between an indemnity and a guarantee which comes within the clause in the 4th section. The case of *Guild* v. *Conrad* was a case in which the first judgment delivered was a judgment by Lindley, L.J., and there are also judgments by Lopes and Davey, L.JJ. The facts there were that the defendant orally promised the plaintiff that if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner he would provide the plaintiff with funds to meet the bills. Held, affirming the judgment of Mathew, J., that this was a promise of indemnity and not of guarantee, and therefore not required by the 4th section of the Statute of Frauds to be in writing. When Lord Lindley comes to deliver his judgment he says "the authorities are *Thomas* v. *Cook*, 8 B. & C. 728, and *Wildes* v. *Dudlow*, 23 W. R. 435, L. R. 19 Eq. 198; *Thomas* v. *Cook* appears to me to be indistinguishable from this case," and then he cites a passage from the judgment of Lord Wensleydale then Park, J.: "This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties that the plaintiff should be indemnified against the bond. If the plaintiff at the request of the defendant had paid money to a third person a promise to repay it need not have been in writing, and this case is in substance the same." I will now read the passage from the judgment of Lord Davey: "In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered or is about to enter into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not." It seems to me that those judgments entirely confirm the view which is taken in the note to *Forth* v. *Stanton* that the statute applies only to promises made to the person to whom another is already or is to become responsible.

In my judgment in the present case the circumstances show plainly that there was a guarantee for the payment of a debt for which the syndicate was primarily liable and not an original promise by Mr. Brown Martin to keep the plaintiffs indemnified. I have tried to put this question, whether or not a contract of this sort comes within the section, separately and I have dealt with the cases and pointed out what sort of contract does not in my judgment come within the section, and that there is nothing to justify us holding that in the present case the contract is a contract of indemnity. I think it is a contract of guarantee, a contract to answer the debt of another. That being so, I now wish to go back to cases which are not so much cases which do not come within the section, but cases which so far as words are concerned may come within the section, but have been held not to come within it because of the object of the contract. It seems to me that, whether you look at the property cases or whether you look at the *del credere* cases, the conclusion come to is that the cases in question do not fall within the statute because of the object of the contract, and because really there was a main contract, and the obligation to pay the debt of another in each one of those cases was merely an incident of the larger contract. According to my understanding of the cases, this is not a question of motive, it is a question of object. This is a case in which you must find in fact what was the subject-matter of the contract. If the subject-matter of the contract was to purchase a property—to relieve a property from a liability, to get rid of incumbrances, or to secure greater indulgence in the performance of the duty of a factor, or to secure the introduction of business into a stockbroker's office, in all those cases there is a larger matter which is the object of the contract. If that is the object of the contract, the mere fact that as an incident to that, not as the immediate object, but indirectly, the debt of another to a third person will be paid off, does not bring the case within the section. That being so, I have to ask myself whether in the present case one does really find any larger contract. I cannot find it. It

seems plain to me upon the evidence here that the only matter which was present to the mind of Mr. Brown Martin, and was presented by Mr. Brown Martin to Mr. Winter, was this: "Will you forbear for a time, will you give this company, which I believe has a future before it, the opportunity of turning round. I believe that if this company has that opportunity it will do well and will pay you. To induce you to forbear, and to give them this opportunity, I say that I will give you bills which shall secure you payment at the end of a specified period of this debt, in case the company do not come forward and pay you themselves."

It seems to me that really that is the whole of this contract, and there is neither a purchase or *del credere* arrangement, nor anything else outside this bargain. It is impossible to say that the mere fact that the defendant had, as he seems to have done in this case, financed the syndicate to a large extent, and that that was his motive for coming forward and bargaining for forbearance, makes any difference as to the object of the contract. That might have been the motive that induced him to make himself answerable for the debt of another, but it was not the object of the contract. The object of the contract was simply to obtain forbearance from the creditor in respect of this debt. Mr. Wills wanted to substitute for the definition that I had suggested, that if the obligation to pay the debt of another is the incident of a large contract it does not come within the section, if the main object is to secure personal interest of his own by the promisor. But if you were so to define the cases which do not come within the section there would be nothing left to come within it, because in every case there must be a consideration which the promisor bargains for which is to come to him from the promisee. That is just as true of mere forbearance as it is of anything else. If that is true, suppose a contract between the promisor and the promisee: "I will be answerable for the debt of your debtor if you will forbear." Mr. Wills would have us say that if the main object is to obtain that forbearance, and the promisor wishes to obtain it, that is sufficient to take the case out of the statute. He says that such a consideration is sufficient to take the case out of the statute. To my mind that is not so and so to hold would be simply to repeal the statute.

My judgment has been longer already than I like, but I do wish to say one word about the case of *Fitzgerald* v. *Dressler*. There there is a judgment of Cockburn, C.J., delivered long after the judgment in *Couturier* v. *Hastie*. He quotes from the notes to *Forth* v. *Stanton*, and he expressly approves of that note, subject to one qualification. All that I wish to say about it is, that according to my view there is not a word that I have said in my attempted definition which is inconsistent with those words of Cockburn, C.J. After quoting that part of the note which says the fair result seems to be that the question whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise but on the fact of the original party remaining liable coupled with the absence of any liability on the part of the defendant or his property except such as arises from his express promise. He says: "I quite concur in that view of the doctrine provided the proposition is considered as embracing the qualification at the conclusion of the passage. For though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt on default of another, still it must be taken with the qualification stated in the note above cited—viz., an absence of prior liability on the part of the defendant or his property—it being as I think truly stated there, as the result of the authorities that if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or property in which he has some interest, the case is not within the provision of the statute which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another where the person making the promise has himself no interest in the property which is the subject of the undertaking." I wish to point out that Cockburn, C.J., there in terms is only dealing with the property cases as an instance, and to my mind clearly only meant to deal with them as an instance of a general rule. I have attempted to define that general rule, and I think that every one of the exceptions which is to be found in the cases comes within the rule as I have defined it. I think, therefore, that the judgment of Mathew, J., in this case should be reversed and this appeal allowed.

STIRLING, L.J.—I am of the same opinion. The case is one of difficulty, and we are differing from Mathew, J., and we have heard a most excellent and elaborate argument on the subject. In these circumstances I have on my own account very few words to add as I agree entirely with what has been said by Vaugham Williams, L.J. In the first place I think that the decision in *Guild* v. *Conrad* does not apply. I think it is impossible to arrive at the conclusion at which the learned judge has arrived at in this case, that the contract is one to pay whether the company of which the defendant was a director could pay or not. In the case *Guild* v. *Conrad* it was for the judge to say what the nature of the contract was, and he found that it was not a contract to pay if the foreign firm did not pay, because there was no expectation at the time that the foreign firm would be able to pay, and the contract was to lend funds to enable the plaintiffs to meet certain acceptances. Here it seems to me that the transaction which was in contemplation was to give time to the company in the expectation that in the interval the company would be placed in funds by which it would be enabled to pay all its debts. The important element that there was no expectation that the company would ever be able to pay appears to me to be wanting. Now, that being so, we have to consider whether the case is one of a contract to answer for the debt, default, or miscarriage of another person within the meaning of the 4th section of the Statute of Frauds. Undoubtedly the decisions run fine in these cases and the main stress of the argument has been to extend the doctrine which was laid down in *Couturier* v. *Hastie* and in *Sutton* v. *Grey* to the present case. I accept the passage which has been cited from the judgment of Cockburn, C.J., in *Fitzgerald* v. *Dressler* as stating the law with reference to a class of cases or two classes of cases of which *Williams* v. *Leper* and *Walker* v. *Taylor* are the types. He said there, "If there be something more than a mere undertaking to pay the debt of another, as where the property, in consideration of the giving up of which the party enters into the undertaking, is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."

I do not forget that in the case of *Williams* v. *Leper* the promise was given by an auctioneer who had possession of the property under instructions

from the real owner to sell it, but when the reasons assigned by the learned judges for the decisions which they arrived at are examined it appears to me that the auctioneer was there treated as the agent of the owner, and he had authority from the owner to enter into a contract, which he did upon the terms that the debt in question should be paid out of the proceeds of the sale. That must be taken to have been the promise of the real owner, and therefore is brought within the statement of the law which I have just referred to. Again, in the case of *Walker* v. *Taylor* it seems to me that the real transaction was a purchase by the defendant in the action of a right of the plaintiff which the defendant thought would be valuable to him. Having acquired the right, he refused to pay, and it was held to be a case which did not fall within the Statute of Frauds. We then come to the case of *Couturier* v. *Hastie*, which is a case of a *del credere* agent, and there it was held that a case of *del credere* was not within the Statute of Frauds. Looking at the judgment of Bowen, L.J., in the case of *Sutton* v. *Grey* it appears quite clear that he regarded that case of *Couturier* v. *Hastie* as going to the verge of the law, and he referred to the remarks which were made on it in *Wickham* v. *Wickham*, 2 K. & J. 478, 4 W. R. Ch. Dig. 76, by Wood, V.C. The case of *Sutton* v. *Grey* is one in which there was a contract between a firm of brokers and a person who empowered them. The terms were that the defendant should introduce clients to them and the plaintiff should transact business on the Stock Exchange for clients thus introduced upon the terms that as between the plaintiffs and the defendant the defendant should have half the commission earned by the plaintiffs in respect of any transaction by them for any clients introduced by the defendant, and he should pay to the plaintiffs half of any loss which might be incurred by them in respect of such transactions. An action was brought by the plaintiffs to recover from the defendant half the loss which they had incurred, and it was held that the defendant, having an interest in the transaction equally with the plaintiffs, the principle of *Couturier* v. *Hastie* applied. Lord Esher, in the Court of Appeal, cites the passage already referred to from *Fitzgerald* v. *Dressler* and comments on it thus: "The learned judge there used the words 'has himself no interest in the property which is the subject of the undertaking' because he was dealing with the case of property, but if his words be read as I think they should be, 'has no interest in the transaction,' he is adopting that interpretation of *Couturier* v. *Hastie*, which I think is the right one." It is really upon this passage that the argument for the plaintiffs in the present case has been founded. As it seems to me in the judgment of Cockburn, C.J., in *Fitzgerald* v. *Dressler*, and in the judgment of Lord Esher interest means some species of interest which the law recognizes as the subject of property. Here the defendant had no such interest in the property which was about to be seized by the sheriff. He was simply a director of the syndicate. He had taken, no doubt, a deep interest in the popular sense in its proceedings. He held a large number of shares in the syndicate; I think he was the largest shareholder. He had also financed the syndicate, but he had nothing whatever in the shape of a charge on this property. He was at the best a general creditor of the company. Now it is contended that we should read the words "interest in the transaction" in a wide sense, and as including that sort of business interest which a creditor and a shareholder of a company has in its prospects. It seems to me that so to do would be to go a long way to repeal this 4th section of the Statute of Frauds, and to give an extension to the doctrine of *Couturier* v. *Hastie* which I am not prepared to give. On these grounds I think that the appeal ought to be allowed.

COZENS-HARDY, L.J.—I agree. It seems to me that this was certainly not a contract of indemnity for the reasons which my lord has given, and which I will not repeat. The contract is one which falls *primâ facie* within section 4 of the Statute of Frauds unless it can be brought within some recognised exception or some logical exception. One great peculiarity here is that neither the plaintiff nor the defendant was in possession or had any interest whatever in the goods of the syndicate, but it has been forcibly and most ably argued that the case is brought within the recognized exceptions from the section because it is said that though the defendant had no right or interest in the goods yet he had in a business sense an interest in them. It is argued that what you have to look at is what was the object of the promise which the defendant entered into, and if you can come to the conclusion that the object of the the defendant in giving the promise which he did give was to secure a benefit for himself and not to secure forbearance for the syndicate, then the case ought to be held not to be within the Statute of Frauds at all. I cannot agree with that. It seems to me to be a confusion between object and motive. I cannot doubt that the object of the promise which was made by the defendant was to secure forbearance of the enforcement of the debt against the syndicate. It that be so, the authorities do not in any way, as it seems to me, support the plaintiff's contention. They have been divided conveniently into three classes. The first is the property cases. I do not think they can be dealt with more accurately, and certainly not more shortly, than they are by Vaughan Williams, J., in *Fitzgerald* v. *Dressler*, 7 C. B. N. S., at p. 394. [His lordship read the judgment from "At the time the promise was made," to "undertaking to pay the debt of another."] Then stress has been placed on what are called the document cases. Those cases seem to me to stand on an entirely different footing. If I go to a banker or another person who has certain documents which he holds as security for a debt, and I ask him to hand over the documents to me on payment of the debt, that is simply a purchase of the security, and although it may involve the being answerable for the debt of another, that is not the main object of the contract. The third class of cases are the cases which have been called the *del credere* cases. When they are looked at they seem to me to only amount to this—that a contract for the employment of an agent or a contract for a general vendor of almost any other kind need not be in writing although it incidentally involves an answering of a debt of another person. In other words, if the court can find that there is a main contract the object of which is not to answer for the debt of another, that contract is not within section 4 even though incidentally it may result in a liability to answer for the debt. For these reasons I agree with my lords and think that the appeal ought to be allowed.

Solicitors, *West, King, Adams, & Co; Sharpe, Parker, & Co.*

High Court of Justice.

Chan. Div. Byrne, J. — March 20.

FARMER v. PITT. (a.)

Mortgage—Agreement to execute a legal mortgage—Provisions of legal mortgage—Construction of agreement—Consolidation—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 17.

An agreement in a memorandum of equitable mortgage that the mortgagor will execute a legal mortgage of the property "with such powers and provisions and in such form as" the mortgagee "may require for further securing the said principal moneys and interest," does not enable the mortgagee to insist upon the insertion in the legal mortgage of a clause excluding section 17 *of the Conveyancing and Law of Property Act,* 1881; *and consequently the mortgagee cannot consolidate the equitable mortgage with another mortgage from the same mortgagor, upon the latter seeking to redeem that other mortgage alone.*

Originating summons.

This was a summons by a mortgagor to redeem certain property, and was resisted by the mortgagee, who claimed to consolidate it with other property also mortgaged to him by the mortgagor.

On the 15th of May, 1899, the plaintiff, Mary Ann Farmer, mortgaged certain houses in Walsall and in Wednesbury to the defendant, F. T. Pitt, to secure the sum of £900 with interest.

On the 14th of July, 1899, the plaintiff having deposited certain title deeds with the defendant, signed a memorandum stating that the deeds were deposited with the intent to create an equitable mortgage on all the property comprised therein by way of collateral security, for the repayment of £100 advanced by the defendant to the plaintiff with interest as therein mentioned, and also of such further sums as should be advanced by the defendant to the husband of the plaintiff, with interest thereon. The memorandum continued as follows: "And the said Mary Ann Farmer doth hereby agree at any time or times during the continuance of this security, upon the request of the said F. T. Pitt, but at the cost of the said Mary Ann Farmer, to execute to him a legal mortgage of the said property with such powers and provisions and in such form as the said F. T. Pitt may require for further securing the said principal moneys and interest."

Neither the previous mortgage of the 15th of May, 1899, nor this memorandum contained any clause expressly excluding section 17 of the Conveyancing and Law of Property Act, 1881.

The defendant having brought an action in the King's Bench Division against the present plaintiff upon the covenant in the mortgage of the 15th of May, the plaintiff paid him the £900 and interest and costs due under that mortgage, but the defendant refused to hand back the title deeds or to reconvey the property, claiming to consolidate the two mortgages of the 15th of May and the 14th of July, 1899. Thereupon the plaintiff took out this summons, asking for redemption and reconveyance of the houses mortgaged by the deed of the 15th of May, 1899, the principal, interest, and costs due under that mortgage having been received by the defendant.

Levett, K.C., and *Underhill*, for the plaintiffs.—The agreement to execute a legal mortgage with such provisions for further securing the principal money and interest as the mortgagee may require does not give him the right to have inserted in the legal mortgage a clause enabling him to consolidate. That would be enlarging his security, which was not intended: *Whitley* v. *Challis*, 40 W. R. 291, [1892] 1 Ch. 64. Even if the defendants were entitled to the clause excluding section 17, he would not be entitled to consolidate. The case is different from that of *Griffith* v. *Pound*, 45 Ch. D. 553, 38 W. R. Dig. 159; the mortgage sought to be redeemed here is the earlier one, and not, as in that case, the later one.

They also cited *Bird* v. *Wenn*, 34 W. R. 652, 33 Ch. D. 215.

Rowden, K.C., and *Martelli*, for the defendant.—It is not a question of what clauses are usually inserted in mortgages. The defendant may have inserted any which he desires; at any rate so long as they are not entirely unreasonable. It cannot be said that a clause negativing the operation of section 17 is unreasonable. It only leaves the powers of the mortgagee as they were before 1881. The clause is given by conveyancers as one proper to be inserted in mortgages in certain cases, see Key & Elphinstone Prec. Convey. (6th ed.), pp. 59 and 59 note. *Whitley* v. *Challis* does not apply, as the defendant is not seeking to bring more property into the legal mortgage, but only to exercise a passive right of refusing to have one mortgage redeemed without the other. If the mortgagee has a right to the insertion of the clause, then that must be considered as done, and then one of the mortgages expressing a contrary intention, the operation of section 17 is by subsection 2 excluded, and the mortgagee has his right to consolidate as before the Act.

BYRNE, J.—It is said that by virtue of the clause in the memorandum of the 14th of July, 1899, the mortgagee might have required the mortgagor to execute a legal mortgage of the property containing a provision excluding section 17 of the Conveyancing and Law of Property Act, 1881, and that I must treat the case as if a mortgage had actually been executed to that effect. It is said that the mortgagee is master of the situation, and that if he required the insertion of such a clause in the legal mortgage it could not have been considered unreasonable, and that the state of the law before the Act of 1881 shows this. Since 1881 the Legislature has said that the mortgagee shall have no right to consolidate apart from contract, but that the parties may contract that he shall have that right. Now what is the true meaning of the clause in the memorandum we are considering. It is much the same as that in the case of *Whitley* v. *Challis*, where the question arose as to what ought to be considered as included in the legal mortgage agreed to be executed. In his judgment [1892] 1 Ch., at p. 72, Fry, L.J., says: "Then it is attempted to enlarge the security by the words which provide for the execution of the formal mortgage, and for the insertion in that mortgage of such powers, covenants, and provisions as the solicitor or counsel for the mortgagee shall advise or require. That clause was only intended to give effect to the previous charge, and does not enlarge the subject-matter of the charge." The question in that case was not the same as here, but the same reasoning applies to both cases. The memorandum of the 14th of May, 1889, does not in terms mention any of the property comprised in the mortgage of the 15th of July, 1889, and incorporate it. The result of the insertion of a provision excluding section 17 in the second mortgage would be to give to the mortgagee in the case of the mortgagor seeking to redeem the first mortgage a right of control over property not included in his security. It would be enlarging his security, and I do not

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

think he has any right to do that. With reference to what has been said as to the practice of conveyancers, the evidence is not clear. The books referred to seem to me to tell as much against the practice of inserting a provision of this kind, as in its favour.

Judgment for the plaintiff.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *J. F. Addison*, Walsall; *R. H. Bentley*, for *S. Ward*, Dudley.

Chan. Div.
Farwell, J. } March 12.

In re THE ROYAL BAKING POWDER CO.'S TRADE-MARK. (*a.*)

Trade-mark — "Addition" — Label — Disclaimer — Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

On the registration under the Patents, Designs, and Trade-Marks Act, 1888, *a disclaimer of any right to the exclusive use of such portion of a label as constitutes "added matter" must be made.*

Appeal from a decision of the Comptroller-General of Trade-Marks.

The Royal Baking Powder Co. of New York made application for the registration of a trade-mark consisting of a label, one half of which contained, on a red ground, a representation of a tin with the words "Royal Baking Powder" upon it, and the name of the firm upon a scroll at the four corners, and the other half, on a yellow ground, the words "Royal Baking Powder" followed by a description of the article, directions for its use, and the name and address of the makers.

The Comptroller-General of Patents, Designs, and Trade-Marks refused to register on the ground, *inter alia*, that the applicants had made no disclaimer of any right to the exclusive use of the added matter on the label according to the requirements of the Patents, Designs, and Trade-Marks Act, 1883, s. 64, as altered by the amending Act of 1888.

That section, in so far as it is material, provides as follows: "(1) For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars . . . (*c*) a distinctive device, mark, brand, heading, label, or ticket . . . ; (2) there may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register; (3) provided as follows: (i.) a person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof . . ."

From this refusal of the comptroller the company appealed.

Warmington, K.C., and *S. Dickinson*, for the appellants.—The registrar cannot enforce disclaimer when the matter in dispute is a label. The disclaimer only affects "added matter." Here there is none. The whole label is the trade-mark: *Pinto* v. *Badman*, 8 Rep. Pat. Cas. 181; *In re Clément et Cie's Trade-Mark*, 48 W. R. 67, [1900] 1 Ch. 114; *In re Smokeless Powder Co.'s Trade-Mark*, 40 W. R. 507, [1892] 1 Ch. 590; *In re Colman's Trade-Mark Application*, 42 W. R. 555, [1894] 2 Ch. 115.

Sir R. Finlay, A.G., and *R. J. Parker*, for the comptroller, were not called upon.

FARWELL, J., said: I am clearly of opinion that the matter contained in the yellow part of the label is "added matter" such as is contemplated in the 2nd sub-section of section 64 of the Act. If authority is needed for that view I refer to the case of *Clément et Cie's Trade-Mark* and to the words of Romer, L.J.'s, judgment. The amending Act of 1888 did not apply to that case, but in the present instance it does, and the words in this yellow portion of the label being, in my opinion, "added matter," disclaimer of any right to their exclusive use should have been made. The motion is dismissed, with costs.

Solicitors, *Janson, Cobb, Pearson, & Co.; Solicitor to the Board of Trade.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Chan. Div.
Buckley, J. } March 14, 24.

In re SCOTT.
SCOTT *v.* SCOTT. (*a.*)

Infant—Life interest contingent upon attaining twenty-one years—Accumulations during minority—Person "ultimately entitled"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-section* 2.

Where property is held in trust for an infant for life, contingently upon his attaining the age of twenty-one years, the accumulations of the income during the minority of the infant belong to him upon his attaining that age under sub-section 2 *of section* 43 *of the Conveyancing and Law of Property Act*, 1881, *and such accumulations are not to be added to the* corpus. *In the above case the infant, on attaining twenty-one, is "the person who ultimately becomes entitled to the property" under that sub-section, the words "the property from which the same arise" meaning the income from which the accumulations arise.*

Originating summons.

The question raised by this summons was as to who was entitled to certain accumulations of income of a trust fund under section 43 of the Conveyancing and Law of Property Act, 1881.

By his will dated the 9th of July, 1888, the testator, David Cooper Scott, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and after payment of expenses, debts, and any legacies, to stand possessed of the residuary trust moneys in trust after payment of certain annuities to pay the income of one moiety to his wife during her widowhood, and if she should marry again to pay the income of a third to her for life; and subject thereto he directed his trustees to hold the residuary trust funds for his children, who being sons should attain twenty-five years, or being daughters should attain the age of twenty-one years or marry, in equal shares. And he declared that his trustees should pay his wife during the infancy of any of his children a sum not exceeding one-half of the income of the share of such child for board and maintenance. And that his

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

trustees should retain the share of each daughter upon trust to pay her the income thereof for life, and after her decease upon trust for her children as therein mentioned.

He further declared that his trustees had power to raise any part or parts, not exceeding one moiety of the vested or expected share of any child, for the advancement or benefit of such child.

The testator died in June, 1890, leaving five children, of whom the plaintiffs, Anita Mary Scott and Eleanor C. Scott, were the two youngest.

These two daughters attained their ages of twenty-one in February, 1899, and October, 1901, respectively.

Since the death of the testator, and during the infancy of the plaintiffs, the trustees had paid the widow out of the income of their shares various sums for their board and maintenance, and also under an order of the court in 1890 further sums for their education.

The accumulations of income after these payments arising from the shares of the plaintiffs up to the days of their respectively attaining twenty-one years were the respective sums of £666 and £1,163.

The plaintiffs took out this summons against the trustees of the will for an order that they should be directed to pay to the plaintiffs these respective accumulations.

S. O. Buckmaster, for the plaintiffs.—The plaintiffs are entitled to the accumulations of income made during their respective minorities. They are the persons "ultimately entitled" under section 43, sub-section 2, because they have become entitled to the fund, although only for life. It has been decided that this is the case where the life interest was vested: *In re Wells*, 38 W. R. 327, 43 Ch. D. 281, and *In re Humphreys*, 41 W. R. 519, [1893] 3 Ch. 1.

He also cited *In re Buckley's Trusts*, 31 W. R. 376, 22 Ch. D. 583.

Beddall, for the trustees.—The persons "ultimately entitled" are the persons entitled to the whole fund, and the accumulations should therefore be added to the *corpus* of the fund. Suppose A. were a life tenant of the fund and B. were life tenant after A., and A. died under age and B. attained twenty-one, could it be said that B. should take absolutely the accumulations made during A.'s minority?

Cur. adv. vult.

March 24.—BUCKLEY, J.—The determination of the question raised in this case involves the consideration of the true construction of section 43 of the Conveyancing and Law of Property Act, 1881. The gifts in favour of the daughters are gifts to them, as members of a contingent class, of shares of residue. The contingency is that of attaining the age of twenty-one years. Under such a gift the income is accessory to the capital and belongs contingently to the legatees in whose favour the contingent gift is made. The question is how the income which thus follows the capital is applicable in the case of a settled share, regard being had to the statutory provision contained in section 43. First, as matter of principle, the intention of the section was not to affect the construction of wills: *In re Dickson*, 33 W. R. 511, 29 Ch. D. 331, at p. 338. The object of the Act was to shorten and simplify conveyances and not to alter the devolution of property. *Primâ facie*, therefore, when the daughter attained twenty-one, she, as tenant for life, would become entitled to receive payment of the income of the settled share accrued up to that date in respect of the contingent gift. For the respondents, however, who represent the possible unborn children of the daughters or other remaindermen, it is contended that under sub-section 2 of section 43 the accumulations are to be held for the benefit, not of the tenant for life absolutely in the events which have happened, but as *corpus* settled for all the persons entitled in succession under the settlement of the daughters' share—in other words, that the word "property" in sub-section 2 means the *corpus* from which the accumulated income has arisen. Another argument, but too extravagant to admit of serious consideration, would be that the accumulations are held, not for the persons thus entitled in succession, but for the person "who ultimately becomes entitled to the property"—that is to say, entitled to the *corpus* after the determination of the tenancy for life. In my judgment neither of these contentions can be sustained. The fact is that if in section 43 the word "property" is read as equivalent exclusively to "corpus" or "capital" its use is far from exact. Thus the section opens with the words, "Where any property is held by trustees in trust for an infant . . . for life." If "property" is equivalent to "corpus" or "capital," as contrasted with and to the exclusion of income, this language is not apt. If it is read to mean "corpus or its income, as the nature of the gift may require," the language becomes appropriate. Further, that the word "property" in sub-section 2 cannot mean "corpus" in every instance may be shown by taking a particular case. Thus, suppose that £1,000 is held by trustees for A., an infant, for life, and after his death for B., and suppose that A. survives the testator for ten years and then dies an infant—this is a case within section 43, sub-section 1. The income in such case during the ten years unquestionably belongs to A.—but B. is entitled to the *corpus*. If "property" in sub-section 2 means *corpus*, B. is the person entitled to that, and would on such a construction take the income which accrued during A.'s lifetime. Rejecting, therefore, a construction which would read "property" in sub-section 2 as always meaning *corpus*, I go on to consider whether it ever means *corpus*. I think not. The property spoken of is that from which "the same"—that is, the accumulations—arise. Income arises, no doubt, from *corpus*, but the accumulations arise from setting aside and investing income as it is earned. The words of sub-section 2 are not "the property from which the income arises," but "the property from which the same (*i.e.*, the accumulations) arise." The property from which the accumulations arise is the income which is year by year set apart and forms the accumulated fund. The words of sub-section 2 are, I think, to be read thus—"entitled to the property (viz., the income) by the accumulation of which the accumulated fund or accumulations arise." If the words be thus read and for the word "ultimately" there be substituted "in the events which happen," all difficulty disappears. The words will then read thus, "and shall hold those accumulations for the benefit of the person who in the events which happen becomes entitled to the property (viz., the income) from the accumulation of which the accumulations arise." I think that is the meaning of the words. I do not find that any authority is inconsistent with this view. The decision of Fry, J., in *In re Buckley's Trusts*, decided upon section 26 of Lord Cranworth's Act, is only that that Act applied to gifts absolute or contingent and not to gifts vested but liable to be divested. The decision of North, J., in *In re Wells* is that a person entitled to a vested interest for life is on attaining twenty-one the person ultimately entitled to the property within sub-section. North, J., I think, thought as I do, that "property" means the income the accumulations of which are being dealt

with. The Court of Appeal in *In re Humphreys* was again dealing with an immediate vested life interest. That decision approved *In re Wells*, and, while I have felt some difficulty by reason of the fact that the decision was rested upon finding in the will an expression of a contrary intention within sub-section 3 of section 43, I do not think there is anything in it to preclude me from coming to the conclusion that "property" in sub-section 2 means that property the accumulation of which has produced the fund. The court in *In re Humphreys* left open the point which I have here to decide. I therefore hold that the plaintiffs, who in the events which have happened are entitled to income, are entitled to the accumulated sums.

Solicitors for all parties, *Stevens, Bawtree, & Stevens.*

Chan. Div. Buckley, J. — March 12.

In re SETON SMITH.
BURNAND *v.* WAITE. (*a.*)

Will—Construction—Bequest—"Furniture and other personal effects"—Tenant's fixtures—Trade or business articles—Hotel.

A testator bequeathed to A. "all the furniture and other personal effects belonging to me, and which at the date of my death are at the R. hotel." The testator resided at and carried on the hotel, of which he was yearly tenant.

Held, that all the effects at the hotel belonging to the testator, whether used in connection with the hotel business or not, passed under the bequest, but that tenant's fixtures did not pass.

Harold Seton Smith, the above-named testator, was the yearly tenant of the Roebuck Hotel, Tilehurst, in Berkshire, which he kept and managed as an hotel, and where he resided. He was assisted by Miss Gertrude A. Waite, who also resided in the hotel.

By his will dated the 10th of May, 1901, the testator appointed the plaintiff and another person his trustees and executors, and he bequeathed "all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel aforesaid, to Gertrude A. Waite, who is now residing at the said hotel."

He bequeathed the residue of his personal estate and his interest in certain real estate to his trustees upon trust for sale and conversion, and upon other trusts therein mentioned. The testator died on the 11th of May, 1901.

The furniture and personal effects belonging to the testator in the hotel at his death consisted of (*a*) trade or tenant's fixtures and trade implements, (*b*) furniture and such personal effects as belonged to him independently of the business of the hotel, (*c*) linen, plate, glass, china, and other effects used in connection with the hotel business.

The present summons was taken out by the executors against Miss Waite to have determined what effects of the testator passed under the above bequest to Miss Waite.

George Lawrence, for the executors.

W. M. Cann, for Miss Waite.—I claim all the effects, including fixtures, whether connected with the business or not: *Cole* v. *Fitzgerald*, 1 Sim. & St. 189, 3 Russ. 301; *Swinfen* v. *Swinfen*, 9 W. R. 175, 29 Beav. 207.

Christopher James, for the residuary legatee.—Fixtures do not pass under a bequest of household furniture: *Finney* v. *Grice*, 27 W. R. 147, 10 Ch. D. 13. I also claim all the furniture and effects connected with the business of the hotel. "Furniture" must be read *ejusdem generis* with "other personal effects" in the bequest, and only the furniture and effects used personally by the testator are included: *Northey* v. *Paxton*, 60 L. T. Rep. 30, 37 W R Dig. 202; *Pratt* v. *Jackson*, 2 P. Wms. 302, reversed on appeal, 1 Bro. Parl. Cas. 222; *Le Farrant* v. *Spencer*, 1 Ves. sen. 97; *Manning* v. *Purcell*, 3 W. R. 273, 7 De G. M. & G. 55.

BUCKLEY, J.—It is contended that under the bequest of "all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel" Miss Waite is entitled to the tenant's fixtures in the hotel. I do not think so. They, no doubt, belonged to the testator in a sense, but I do not think that he intended to give Miss Waite the right to take down the roller blinds and things of that description: see *Finney* v. *Grice*. Passing to the next question. There was at the death of the testator a considerable quantity of furniture in the hotel, some of which was used by the testator himself, some by Miss Waite, and some of which was used for the general purposes of the hotel by the visitors. There was also the ordinary apparatus of an hotel, such as china, plate, and the like. It is said on behalf of the residuary legatee that only such part of this furniture and of these articles passed to Miss Waite as belonged to the testator and was personally used by him; and that such articles as were required for the trade or business of the hotel did not pass to her. I think that view is wrong. I think all those articles, whether used for the hotel or not, passed to her. The cases cited to the contrary appear to me distinguishable. In *Pratt* v. *Jackson* there were two households, and the question was which household was referred to. In *Le Farrant* v. *Spencer* household furniture was held not to include trade goods. In *Manning* v. *Purcell* the testator had a private house and a tavern, and the decision turned on the word "my" household furniture, &c. I think therefore that all the furniture, linen, plate, glass, china, and other effects belonging to the testator which at his death were at the hotel passed to Miss Waite, whether they were used for his trade or business of the hotel or not, but not including tenant's fixtures.

Solicitors, *Morris & Bristow; Gribble & Co.*, for *C. E Hewett*, Reading.

Chan. Div. Swinfen Eady, J. — Feb. 18.

In re DEVELOPMENT CO. OF CENTRAL AND WEST AFRICA. (*a.*)

Company—Deferred shares—Scheme—Petition for reduction of capital—No actual reduction—Illegality.

A company entered into an agreement with the holders of its deferred shares of £1 each (to which special rights were attached) that in consideration of the cancellation of the deferred shares the holders thereof should receive ordinary shares in exchange for each deferred share. The company now petitioned the court for an order confirming the reduction of capital.

Held, that, having regard to all the circumstances of the case, the capital of the company was not being reduced,

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

but increased; that the scheme was illegal and ultra vires, *and the reduction could not be confirmed.*

The Development Co. of Central and West Africa was incorporated on the 7th of February, 1901, under the Companies Acts, 1862 to 1900, with a capital of £100,000, divided into 99,300 ordinary shares and 700 deferred shares of £1 each.

All the deferred shares and about 18,000 ordinary shares were issued, and were fully paid up.

Special rights and privileges were granted to the holders of deferred shares by clause 5 of the memorandum of association. The memorandum gave the company power to increase or reduce its capital and to issue any of the original shares or new shares with special rights attached thereto, provided there was no infringement of the rights attached to the deferred shares.

At extraordinary general meetings held on the 25th of November and the 12th of December, 1901, a special resolution was passed, and it was resolved that the capital be reduced to 99,300 ordinary shares of £1 each; and that this be effected by cancelling the whole of the 700 deferred shares upon the terms of a conditional agreement dated the 23rd of November, 1901. This agreement was made between the company of the one part, and the deferred shareholders of the other part, and it was agreed that the deferred shareholders should consent to the cancellation of the whole of the 700 deferred shares, and should do all acts and things necessary or expedient for that purpose, and that the company should take the necessary steps for reducing its capital in the manner mentioned in the special resolution, and should apply for an order confirming the reduction, and that, if and so soon as the reduction should have been so confirmed, the company should take the necessary steps to increase its capital to £250,000, divided into 250,000 ordinary shares of £1 each, and should allot and issue to the deferred shareholders as fully paid 70,000 of those shares in exchange for the 700 deferred shares to be cancelled as aforesaid, and should, within one month after the allotment, satisfy the requirements of section 7 of the Companies Act, 1900 (63 & 64 Vict. c. 48). The agreement was conditional on the company obtaining an order confirming the proposed reduction.

The company now by petition asked the court to confirm the proposed reduction.

Evidence was produced to show that the company had not borrowed any money and that its debts did not exceed £300, made up of sums due for costs, salaries, and office rent.

The petition stated that it was important in the interests of the company that the agreement should be carried into effect.

Eve, K.C., and *Wurtzburg*, for the company.—So long as the court sees that the interests of shareholders and others are safeguarded, it has power to sanction any scheme of reduction of capital: *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399.

W. Gordon Fellowes, for shareholders.

SWINFEN EADY, J., after stating the facts, proceeded: In *British and American Trustee and Finance Corporation* v. *Couper* Lord Macnaghten said that the court must look at the arrangement as a whole, and have regard to all the circumstances of the case and the consequences which the reduction involved. I therefore consider it my duty in the present case to look at the entire scheme as a whole, and see whether or not I ought to sanction it. It is really a scheme for an increase of capital. The extent of the increase would be £69,300 nominal capital, for which the company in its corporate capacity would receive no consideration. The assets would not be increased, but would remain the same, and the only result would be that the 700 deferred shares would be cancelled, and the rights of the shareholders *inter se* would be altered. In my judgment the scheme involves the issue of 69,300 shares, not only at a discount, but without any consideration at all moving from the shareholders to the company in its corporate capacity. It is not sufficient for the bargain to be beneficial or adequate as between the shareholders. They are the best judges of that, and they all support the arrangement which is made in good faith and may be to their advantage. The real question which I have to consider in the present case is whether the scheme is legal. In my judgment it is not. It involves the issue of nearly £70,000 nominal capital in exchange for a surrender of £700 nominal capital without any consideration to the company. In my judgment such a scheme as this is wholly *ultra vires*. It is in no way authorized by *British and American Trustee and Finance Corporation* v. *Couper*, the observations in which apply to the case of a genuine reduction and not to a case where there is no real reduction, but an increase of capital. I therefore dismiss the petition.

Solicitor, *Albert J. Schweder*.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) March 5.

MOORE v. KEYTE. (a.)

Vaccination—Neglect to cause child to be vaccinated—Guardians direct their officer not to prosecute—Proceedings nevertheless instituted by him—Visit of public vaccinator at parent's house not a condition precedent—Conviction—Vaccination Act. 1867 (30 & 31 *Vict. c.* 84), *ss* 16, 29, 31—*Vaccination Act*, 1871 (34 & 35 *Vict. c.* 98), *s.* 5—*Vaccination Act*, 1874 (37 & 38 *Vict. c.* 75), *s.* 1—*Vaccination Act*, 1898 (61 & 62 *Vict. c.* 49), *s.* 1.

A vaccination officer is the proper person to institute a prosecution under the Vaccination Acts.

Therefore, where a vaccination officer had prosecuted the appellant under section 29 *of the Vaccination Act,* 1867, *without the consent and contrary to the orders he had received from the guardians.*

Held, dismissing the appeal, that the prosecution had been rightly instituted.

Held, also, that it is not a condition precedent to such a prosecution for the prosecutor to duly prove that the public vaccinator had visited the home of the child, after notice, as prescribed by section 1, *sub-section* 3, *of the Vaccination Act,* 1898, *and had offered to vaccinate the child.*

Case stated by justices for the county borough of Leicester.

The appeal was instituted on behalf of Robert Moore, a club steward, against an order of the justices of Leicester, who had in October last convicted and fined the appellant 1s. and costs for neglecting to have his child vaccinated within six months after birth, as prescribed by the Vaccination Act, 1867, s. 29, amended by the Vaccination Act, 1898.

The following facts were stated in the case:

In December, 1899, the respondent H. E. Keyte was duly appointed vaccination officer to the Leicester Board of Guardians. The respondent had, on the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

8th of October, 1901, laid an information against the appellant under section 29 of the Vaccination Act, 1867, for unlawfully neglecting to cause his child Hilda Victoria, born on the 13th of January, 1901, to be vaccinated within six months after her birth, contrary to the Vaccination Acts, 1867 to 1878.

The information was heard on the 23rd of October, 1901, by the justices, who convicted the appellant.

The respondent had, in October, included the appellant in a list of ten defaulters under the Vaccination Acts, and in regard to those named in that list and in another, containing twelve names, which respondent had handed to the guardians in June, they passed resolutions in June and October as follows: "That the vaccination officer be instructed to take no further steps instituting proceedings against those persons whose names are included in the list submitted to the guardians to-day until he receives the instructions of the guardians to do so." These resolutions were sent to the respondent, but he took proceedings against the appellant notwithstanding them, and this, it was said, he had no power to do.

At the hearing the clerk to the guardians read to the justices from his minute book the following resolution passed by the guardians on the 30th of April, 1901: "That this board strongly condemns the action of the vaccination officer in prosecuting defaulters under the Vaccination Acts, and incurring law expenses without consulting the guardians, and instructs him in future to report defaulters to the board, so as to afford them an opportunity to offer a reasonable excuse, as provided by section 29 of the Vaccination Act of 1867. The guardians also point out to the vaccinating officer that he was appointed (*inter alia*) subject to section 5 of the Vaccination Act, 1871, to enforce the provisions of the Vaccination Acts, 1867 to 1898, and to prosecute such persons as are charged as defaulters under the said Acts, and the guardians will specially authorize him, in writing under their common seal, to prosecute such defaulters as they desired to be prosecuted."

This resolution was also forwarded to the respondent, who accordingly remitted the list above referred to of twelve persons on the 4th of June, 1901, and another list of ten (including the appellant) on the 1st of October, 1901. The guardians resolved on the 4th of June and on the 4th of October, 1901, that the vaccination officer be and hereby is instructed to take no further steps instituting proceedings against those persons whose names are included in the lists, until he receives the instructions of the guardians to do so.

Notwithstanding these resolutions the respondent took proceedings as vaccination officer, and contended that his appointment gave him implied power to enforce the Vaccination Acts and take proceedings for that purpose without the authority of the guardians.

For the appellant it was contended that the prosecution must prove as a condition precedent to the prosecution under section 29 of the Vaccination Act, 1867, (*a*) that the vaccination officer had the authority of the guardians, if he prosecuted as vaccination officer; and (*b*) that the public vaccinator had visited the appellant's house for the purpose of vaccinating the appellant's child in accordance with section 1 (3) of the Vaccination Act, 1898, and that he had previously served notice of his intention to do so.

For the respondent it was contended that the vaccination officer as such was not bound to have the guardians' authority; that the resolutions of the guardians were *ultra vires*; that the officer had full powers to take proceedings independently of the guardians, and that proof of notice and of the visit was not a condition precedent to the prosecution.

The questions for the court were (1) whether the vaccination officer by virtue of his appointment as such, without direction general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, can institute proceedings under the Vaccination Acts, 1867 to 1898, as vaccination officer of the guardians; and (2) whether it is a condition precedent to a prosecution by a vaccination officer under section 29 of the Vaccination Act, 1867, that due proof must be given of the public vaccinator having previously given a notice of a visit and having visited the house as therein prescribed.

Rawlinson, K.C., and *Schultess Young*, for the appellant.—We submit that this conviction cannot stand, because under the circumstances stated in the case the vaccination officer had no *status* to prosecute merely by virtue of his appointment to that office by the guardians. Moreover, no evidence was given of a visit after notice of the public vaccinator at the childs home as prescribed by statute having in this case taken place, which is a precedent condition to the right of the guardians to prosecute. This is clearly to be inferred from several sections of the various Acts, and section 29 of the Act of 1867 provides that every parent or person having charge of a child who neglects to cause it to be vaccinated, unless he renders a reasonable excuse, shall be guilty of an offence and liable to be proceeded against. That reasonable excuse, we submit, was to be made to the guardians, who are the persons to make inquiry as to that directed by another section. [DARLING, J.—We know that the guardians of Leicester refused to appoint a public vaccinator, and when the court ordered them to do so they affected to appoint someone who would not enforce the law. Then they were told they must appoint a proper person or go to gaol, and having done so they now attempt to hold his hand.] We are not here to defend the previous action of the guardians, but we contend that the Legislature has given them this discretion, and also the orders of the Local Government Board made under the provisions of the various Acts. A vaccination officer is a servant of the guardians, and their consent, express or implied, to his instituting a prosecution, must be first obtained: *Robinson* v. *Lowe*, 13 Times Law Rep. 19; *Bramble* v. *Lowe*, 45 W. R. 366, [1897] 1 Q. B. 283.

J. J. Parfitt, for the respondent, was not heard.

Sir R. B. Finlay, A.G., and *H. Sutton*, said they were present on behalf of the Local Government Board, who considered the question raised of such general public importance that they considered it necessary to appear before the court. It was of enormous importance to have it decided once for all whether the vaccination officer, as such, was entitled to take proceedings without the order of the guardians by whom he was appointed and paid, and the resolutions showed that there was no consideration of individual cases by the guardians before they stayed their officer's hand. The resolutions were passed on the same day as the lists of names were received. The question was whether the guardians were to be allowed to nullify the object of the Acts by passing resolutions that prevented that officer carrying out his duties. There were numerous provisions of the Acts and the orders of the Local Government Board which clearly showed that the vaccination officer had power to proceed without the authority of the board of guardians: see Article 27 of the Vaccination Order, 1898, and also *Knight* v.

Halliwell, 22 W. R. 689, L. R. 9 Q. B. 912. There was no substance in the second objection raised against the validity of the conviction, for it could not be seriously argued that proof of visit, &c., was a condition precedent to a prosecution being taken against a neglectful parent.

Lord ALVERSTONE, L.C.J., in giving judgment, said: The issues raised in this case are of public importance, and it is for that reason that the court has heard the Attorney-General, and would have heard Mr. Parfitt for the respondent had we had any doubt as to what our decision should be. The first point argued was that the prosecutor must prove the notice of the visit and the visit of the public vaccinator before the prosecution could be launched. The answer to that depended on the true construction of three sections. Section 16 of the Act of 1867 as amended by the Act of 1898 is as follows: "The parent of every child born in England shall . . . cause it to be vaccinated by some medical practitioner." By section 1 of the Act of 1898 provision was made, not that the child must be taken to the public vaccinator, but there was the most salutary provision that the medical man must visit the house of the child. It being the duty of the parent to cause the child to be vaccinated and of the vaccinator to go to the house, section 29 of the Act of 1867, under which this prosecution was brought, provides, as amended by the Act of 1898, as follows: "Every parent or person having the custody of a child neglecting to cause the child to be vaccinated, and who shall not render a reasonable excuse for his neglect, shall be guilty of an offence and liable to be proceeded against summarily." And, again, by section 31 of the earlier Act, "the justices may make an order for the vaccination of any child under fourteen." Reading these sections together, it seems absolutely plain that when the magistrates had a case before them they should consider the question whether there was a reasonable excuse, taking into consideration in deciding that question, whether there has been a visit or not. But assuming no such point was raised, it involved useless expense formally to prove in every prosecution all those conditions without which, of course, the magistrates could not reasonably imagine that any prosecution would be instituted. For this court, therefore, to hold that the prosecutor must prove them, though no question was going to be raised except in connection with a reasonable excuse, appears to me to be an argument in which there is no substance.

The important question, however, is whether the vaccination officer, by virtue of his appointment, without directions general or special from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in particular cases, could himself properly institute proceedings. That, no doubt, is a question of greater public importance, but happily it does not present to my mind any greater difficulty than the first point we had to consider. Speaking for myself, I answer it at some length because we have been requested to do so, although it appears perfectly plain from the sections referred to in argument that when the magistrates have a case before them it is for them to say whether the excuse is reasonable or not. It is not for the board of guardians to decide; and to hold that there is to be an investigation by them, would involve everybody in absolutely useless and unnecessary expense and trouble. There is no ground for saying that the assent of the board of guardians must be a condition precedent to the prosecution, and in my judgment, having regard to the provisions of the Act and the duty which the vaccination officer has to perform, the duty of taking proceedings to enforce the law rests with the vaccination officer. As Channell, J., during the argument pointed out, there are cases—in lunacy, for instance—where the *fiat* of the Attorney-General has to be obtained and has to be proved, but this forms no ground for saying that the consent of the guardians must be taken to be a condition precedent to a prosecution under the Vaccination Acts. But the question went further. [His lordship read question (1).] We are not asked by it to decide any question between the guardians and the officer, as, for example, how they should deal with him, or as to any question of expenses he had incurred, or any other such matter that might arise between them. It is a question dealing simply with the public duties of the vaccination officer, and therefore, before we can decide it, we must go back and see the scheme of the Legislature. As we have seen, section 29 of the Act of 1867 is the section which creates the offence. By section 31 the justices may make an order for the vaccination of any child, and the section gives an alternative method of getting the child vaccinated, which was originally imposed on the registrar, or an officer appointed by the guardians, and later upon the vaccination officer under the Local Government Board (Vaccination) Rules, 1874. Having regard to the provisions of the Act, I should have come to this conclusion quite independently of the order of the Local Government Board under the Act of 1898, but the order makes the matter more abundantly clear. This is not the first time this kind of order has been made. From 1871 these orders have been made under the statutes, and have all the force of a statute. There were provisions in the old order of 1874, articles 16 and 17 of which were discussed in *Bramble* v. *Lowe*, 45 W. R. 366, [1897] 1 Q. B. 283, where Wright, J., expressed the opinion that for the purposes of section 31, notwithstanding the provisions of the then existing order as to the power of the guardians, the vaccination officer had the duty to proceed. That is a decision on an analagous matter to the appeal now before us. In that case there was a positive order under the Act of 1898 that the instructions of the Local Government Board were to be obeyed by the vaccination officer. It was ordered that the vaccination officer should give a certain notice, and that if that notice was not complied with, it then became his duty to take proceedings for the enforcement of the law. The officer was bound to obey the order of the Local Government Board, and any order of the guardians interfering with that he would not be bound to obey. It cannot be said that the proceedings could not be entertained by the magistrates because the guardians had not given authority for them. This court cannot assume that there had been a *bonâ fide* investigation by the guardians. In my opinion it is the duty of the vaccination officer under these statutes and orders to see that the provisions for enforcing them are observed. For these reasons the appeal fails.

DARLING, J.—I agree. In my opinion question (1) in effect, if one looks at the case on which it is founded, comes to this—Whether the guardians, who have been compelled by *mandamus* to appoint an officer to enforce the vaccination laws, can satisfy the law by appointing an officer and then order him by resolution never to prosecute unless he has their sealed order to do so, and then never issue any sealed order and probably never intend to order one, so that to allow these guardians to act as they wish to do would be to reduce the vaccination law to an absolute nullity. They said that they would authorize him to prosecute, not such as had broken the law, but "such as they desired to be prosecuted." Their action reminds me of a celebrated recipe for preparing a cucumber

You were to choose it very carefully, as no doubt they chose their officer, peel it, cut it up into delicate slices, add to it expensive things like vinegar, pepper and oil, and then throw the whole mixture out of the window. In simple language, that is what the claim of the guardians came to. I cannot believe that Parliament devoted a world of trouble to bringing the vaccination laws to such a pass.

CHANNELL, J.—I agree. I do not think it is necessary to add anything to my lords' judgments.

Appeal dismissed with costs.

Solicitors for the appellants, *Owston, Dickinson, & Simpson*, Leicester.

Solicitors for the respondent, *Fowler, Warwick, & Fowler*, Leicester.

Solicitors for the Local Government Board, *Sharpe, Parker, Pritchards, Barham, & Lawford.*

IN BANKRUPTCY.

K. B. Div. (Wright, J.) — Jan. 27; Feb. 18.

In re WEIBKING.
Ex parte WARD. (a.)

Bankruptcy—Property of bankrupt—Reputed ownership—Building agreement—Mortgage—Power of mortgagee to seize if builder "become bankrupt"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A builder entered into a building agreement which provided that all the materials and plant brought upon the ground should "be deemed to be annexed to the freehold," and mortgaged all his interest under the agreement by a deed providing (inter alia) *that if the builder should "become bankrupt" the mortgagee might take possession and complete the buildings. The mortgagee took possession on the day a receiving order was made against the builder on which he was subsequently adjudicated bankrupt.*

Held, that the mortgagee was not entitled to seize because "become bankrupt" meant "be adjudicated a bankrupt."

Held, also, that the plant and materials on the land at the date of the commencement of the bankruptcy were in the order and disposition of the bankrupt, with the consent of the freeholder, who was the true owner, and passed to the trustee in the bankruptcy.

In re Ginger, 46 *W. R.* 144, [1897] 2 *Q. B.* 461, *followed.*

Motion by the trustee in the bankruptcy of Weibking, a builder, against Mrs. Ann Hartley, the mortgagee of the bankrupt's interest in a building agreement, for a declaration that the plant and materials on the spot where the building was being carried on at the date of the commencement of the bankruptcy were the property of the bankrupt and passed to his trustee.

On the 22nd of July, 1901, Weibking entered into an agreement with the North London Ground Co. to erect fifty houses on certain plots of land of which the company was the freeholder. This agreement contained the following clauses:

"16. That Weibking was to be deemed tenant at will to the freeholder of the land until the leases agreed to be granted on completion of the houses should have been granted.

"17. That all builder's erections, building materials, and plant on the said land could be taken possession of by the lessor in the event of the tenant making default in erecting any of the houses, &c.; and thereupon the agreement was to cease, but without prejudice to the freeholder's right of action for rent, &c., or in respect of any breach by the tenant.

"18. That all materials and plant brought upon the said premises were to be deemed to be annexed to the freehold, the tenant, however, to have the option of purchasing the freehold."

On the 2nd of August Weibking mortgaged his interest in the building agreement to the respondent Ann Hartley by a deed assigning the building agreement and all interest thereunder as security for repayment to her with interest of moneys then advanced and to be advanced by her to him. The deed further provided that if Weibking should make default in payment of any principal or interest, or should not duly observe and fulfil the terms and conditions of the building agreement, or should "become bankrupt," then and in any such case, Ann Hartley might at any time thereafter enter into and upon and take possession of the land and buildings comprised in the building agreement, and complete any houses or buildings which might be unfinished in such manner as she should think fit, subject to the provisions of the building agreement.

On the 17th of August Weibking presented his own petition, on which a receiving order was made, and he was adjudicated bankrupt upon the 30th of August.

On the 17th of August, after the receiving order was made, Ann Hartley, with the consent of the freeholder, and on the ground that Weibking had "become bankrupt," entered and took possession of the land comprised in the building agreement, and afterwards completed some of the houses, using for that purpose loose plant and materials to the value of about £900, which were on the premises at the date of the receiving order.

Subsequently the trustee in bankruptcy disclaimed the building agreement, and launched the present motion.

Reed, K.C., Muir Mackenzie, and *A. A. Hudson*, for the trustee.—The goods were in the order and disposition of the bankrupt at the date of the commencement of the bankruptcy, for they were not seized by the mortgagee until the 17th of August, the date of the receiving order, and the receiving order, being a judicial act, dates back to the earliest moment of that day, thus making the commencement of the bankruptcy prior to the seizure. Nor was the mortgagee entitled under the agreement to seize when she did, for the debtor had not then been adjudicated bankrupt, and the words "become bankrupt" in a commercial document should be construed to mean "be adjudicated bankrupt" Further, if anyone has a right to these goods as against the trustee it is the freeholder and not the mortgagee, for by clause 18 of the building agreement they are to be deemed to be annexed to the freehold: see *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436. The trustee's contention is that the freeholder was the true owner, and that the goods were in the order and disposition of the bankrupt with his consent.

Warmington, K.C., and *Lewis Thomas*, for the mortgagee.—The goods were not the property of the bankrupt at the commencement of the bankruptcy, the freeholder had the legal property in them by clause 18 of the building agreement, and if the bankrupt had no property in them it follows that the trustee has no claim to them. They were not a security to the freeholder for any debt, and consequently not within the Bills of Sale Acts. The mortgagee took possession of the goods with the

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

assent of the freeholder, and was entitled to do so under the terms of the mortgage because the debtor "became bankrupt" on the 17th of August by committing an act of bankruptcy on which he was afterwards adjudicated bankrupt. In any case the trustee cannot establish his claim to the goods without bringing the freeholder before the court.

Reed, K.C., replied.

WRIGHT, J.—This is a most embarrassing case. It seems to me neither of the parties here is in a position to make out a sufficient title. As regards the mortgagee, the mortgage gives to her no right to the chattels as such, but it gives to her the right on behalf of the builder to make the same use of them as the bankrupt himself could have made The mortgagee did nothing but what was right under the circumstances, provided she had a right to enter. It seems to me that no right to enter under the mortgage has arisen, because the only right given to the mortgagee is a right to enter if the builder should "become bankrupt." I think that in a contract those words ought to be construed strictly, being words of forfeiture. One knows of many leases and agreements of various kinds in which words of forfeiture occur, such as "if he shall commit an act of bankruptcy or petition the court," and so forth—words which are not found here. It seems to me, therefore, that the right to enter had not arisen in this case, and therefore no question arises as to whether the mortgagee became entitled. On the other hand, supposing the words "become bankrupt" are satisfied by an act of bankruptcy, then the mortgagee appears to me to be in another difficulty. There being an act of bankruptcy, the trustee's title accrued subject to any charge in favour of the mortgagee. There was not any charge in her favour over these chattels so far as I can see. The mortgagee only had the right to build and receive the leases, as the mortgagor would have done. Therefore it seems to me, as the matter stands at present, the mortgagee has no title. But I do not see how I am to give any relief to the trustee in bankruptcy without the presence of the freeholder. I cannot decide the question of order and disposition as against the freeholder in his absence. The building agreement purports to give to him the title to these chattels. I cannot say that the trustee has it. As between the trustee in bankruptcy and the mortgagee it seems clear enough that there was reputed ownership, because, if the freeholder was the true owner, then at the time of the act of bankruptcy I should hold on the evidence that the chattels were in the apparent possession of the builder, as the owner of them with the consent of the freeholder. I cannot decide that. But I think that the mortgagee has no title to these chattels.

Feb. 18.—The freeholder having been served with notice of the motion, the case came on for further hearing.

Reed, K.C., Muir Mackenzie, and *A. A. Hudson*, for the trustee, relied upon *In re Ginger*, 46 W. R. 144, [1897] 2 Q B. 461.

Beddall and *S. R. Earle*, for the freeholder.—*In re Ginger* is a decision upon the Bills of Sale Acts, which do not apply to this case, for the chattels were not a security for money lent. but were annexed to the freehold by clause 18 of the building agreement: *Brown* v. *Bateman*, 15 W. R. 350, L. R. 2 C. P. 272; *Ex parte Newitt, In re Garrud*, 29 W. R. 344, 16 Ch. D. 522; *Blake* v. *Izard*, 16 W. R. 108. The order and disposition clause does not apply because the freeholder is not deemed the true owner until he exercises his right of entry. As to the point that possession was not taken before act of bankruptcy, the court will take notice of fractions of days in calculating the date of an act of bankruptcy: *Green* v. *Lawrie*, 1 Ex. Ch. 335; *Ex parte Bignold*, 3 Mon. & Ayr. 477.

WRIGHT, J.—In my opinion this case is governed by the principle of *In re Ginger*. In the present case the freeholder had a clause in the building agreement which annexed to the freehold unconditionally all materials and plant brought on to the premises. Therefore the freeholder was the true owner of the materials and plant in a general sense. Then by the same instrument which gave him the ownership of the chattels he consented to their remaining in the possession of the builder as if the builder were the true owner. That being so, according to the principle laid down in *In re Ginger*, the assent given at the time of making the instrument operates as an assent for the purposes of the doctrine of reputed ownership. That being so, I think the case of the trustee is made out. But of course it does not apply to any plant and materials that had been built into and become part of the houses at the date of the act of bankruptcy. It only applies to the plant and materials which were loose on the premises at that date.

Solicitors for the trustee, *Braby & Macdonald.*

Solicitors for mortgagee, *Moodie & Son.*

Solicitors for freeholder, *Croft & Mortimer.*

Court of Appeal.

Appeal.
(Henn Collins, M.R., and Mathew, L.J.) } Dec. 5, 13; Feb. 13, 14.

LONDON AND INDIA DOCKS CO. *v.* GREAT EASTERN RAILWAY CO. AND MIDLAND RAILWAY CO. (*a.*)

Railway—Dock company—Railway lines and sidings on docks—Communication with railway company—Through rates—Regulation of Railways Act. 1873 (36 & 37 *Vict. c.* 48), *s.* 3—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 25.

The London and India Docks Co., constituted under powers conferred by various Acts of Parliament, had, under the provisions contained in such Acts, laid down lines of railway within their docks, forming a junction with the lines of the Great Eastern Railway Co., and extending for a distance of about three miles to the various warehouses and quays of the docks, for the purpose of the carriage of goods in the trucks and wagons of the railway company to and from the railway company and the warehouses and quays, and had also constructed a group of sidings for the accommodation of the trucks, wagons, and engines used in such traffic.

The Acts under which the dock company was constituted did not, in respect of such lines and sidings, incorporate the provisions of the Railways Clauses Consolidation Acts or contain any of the usual statutory provisions relating to railways.

The dock company applied under section 25 of the Railway and Canal Traffic Act, 1888, *to have through rates fixed by the Railway Commissioners in respect of the traffic from their warehouses and quays to certain places on the Midland Railway Co.'s system, viâ the Great Eastern Railway Co.'s lines.*

Held, reversing the decision of the majority of the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Railway Commissioners, *that the dock company under the provisions of their Acts of Parliament were not a "railway company" nor were their lines and sidings part of a continuous line of railway communication within the meaning of the Railway and Canal Traffic Act*, 1888, *and, therefore, the dock company were not entitled to through rates under section* 25 *of that Act.*

Semble, *a railway company entitled to demand a through rate under section* 25 *must be a railway company constituted by statutory authority and owning a line which forms part of a continuous route, that section presupposing that the demanding company has itself a line which is to form a substantial part of the route.*

This was an appeal by the defendants, the railway companies, from the judgment of the Railway and Canal Commission (Wright, J., and Viscount Cobham, Sir Frederick Peel dissenting), on an application made by the London and East India Dock Co. under section 25 of the Railway and Canal Traffic Act, 1888.

The application was as follows:

The applicants were the owners of certain docks in the port of London, and in particular they had vested in them the control and management of the docks known as the Royal Victoria and Albert Docks.

The docks had been constructed under the powers conferred by various Acts of Parliament, of which those most relevant to the present application are the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.) and the London and St. Katharine Docks Co. Act, 1875 (38 & 39 Vict. c. cliii.).

Under the powers of these Acts the applicants (including under this term their predecessors in title) constructed lines of railway forming a junction with the lines of railway of the Great Eastern Railway Co. and extending for a distance of three miles or thereabouts on either side of the Victoria and Albert Docks to the various warehouses and quays of these docks. In particular they constructed at great cost a group of sidings known as the "exchange sidings," commencing at a distance of twenty-nine chains from the junction with the Great Eastern Railway. Such sidings were authorized to be constructed as being "necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, wagons, and engines used for purposes of dock traffic passing or intending to pass to or from the Victoria Dock extension from or to the North Woolwich branch, so as to render unnecessary the shunting or stopping of such trains, carriages, wagons, or engines, on the North Woolwich branch. The applicants conveyed traffic by means of their own engines and servants from all parts of the Victoria and Albert Docks to the exchange sidings and there placed the trucks containing it in train order on lines appropriated for the time to the traffic of the defendants and of the several other railway companies respectively conveying traffic from these docks. The total length of the lines of railway constructed upon the Royal Victoria and Albert Docks for the purpose of bringing railway traffic to and from the Great Eastern Railway was about forty-five miles.

As regards the construction of the lines of railway and the carrying on upon them of the traffic referred to, the applicants contended they were a railway company within the meaning of the Regulation of Railways Act, 1873, and were entitled under that Act, as amended by the Railway and Canal Traffic Act, 1888, to apply to the Court of the Railway and Canal Commission for the order hereinafter prayed for.

Under the terms of an agreement made on the 18th of April, 1864, between the dock companies of the one part, and the London and North-Western Railway Co., the Great Eastern Railway Co., and the Great Northern Railway Co., of the other part, the applicants performed the service of loading the traffic referred to in the third paragraph, and the further services therein mentioned for the all-round sum of 1s. 5d. per ton, and the applicants were willing to submit to the order of the court as proposed herein under which the terms of the agreement were made applicable to the through rates proposed. There was a large volume of traffic landed ex ship on to the quays of the Royal Victoria and Albert Docks and dispatched thence, either direct or after warehousing in the applicants' warehouses, to stations on the Midland Railway. The defendants refused to quote appropriate or reasonable through rates to be charged upon such traffic. Instead thereof they charged the rates published in the rate-book of the defendants, the Midland Railway Co., at their Victoria Dock station. Such rates in respect of traffic classified in classes 1 to 5 of the Railway Clearing House classification included, in addition to charges in respect of station and service terminals, a charge for cartage in London over an area extending as far as Stroud Green on the north, Forest Gate and Galleons on the east, Wandsworth-road on the south, and Ladbroke-grove on the west, and varying in amount, according to the class of traffic, between 3s. 9d. and 6s. 8d. per ton.

It was not in the interest of the public that freighters should be required to pay such sums for the service of cartage when, as was the fact in respect of the traffic hereinbefore referred to, no such service and no equivalent for such service was actually performed, and it was in the interest of the public that through rates, omitting charges for such services not rendered, should be quoted for the traffic in question.

The applicants wrote to the defendants on the 12th of June, 1901, proposing the through rates for traffic passing over their lines of railway to certain stations on the Midland Railway—namely, to Bedford, Northampton, Leicester, Derby, Sheffield, and Nottingham.

The route proposed: To the exchange sidings, thence by the Great Eastern Railway to Tottenham, thence by the Tottenham and Hampstead Junction Railway to Junction-road, and thence by the Midland Railway to destination.

The above-mentioned class rates include the provision of station accommodation upon the dock premises, the service of loading and covering, conveyance to the dock company's exchange sidings, conveyance thence to destination and unloading, and also the service of carting within the ordinary cartage boundaries of the towns named.

The apportionment proposed: To the London and India Docks Co. in respect of the following services—namely, haulage of empty trucks belonging to the Great Eastern Railway Co. from the exchange sidings to the point of loading at warehouse, shed, or quay, as the case may be, the loading of the goods and the covering of the same with sheets provided by the said railway companies or either of them, and the haulage of the loaded trucks to the exchange sidings, 1s. 5d.; to the Great Eastern Railway Co., 1s.; to the Midland Railway Co., the remainder of the rate.

The defendants replied on the 21st of June, 1901, to the effect that they objected to the proposed through rates as not being a due and reasonable facility in the interest of the public, to the amounts of the proposed rates, and to the proposed apportionment thereof; and, further, that the proposed through rates would, if sanctioned, create a preference in favour of the Victoria and Albert Docks over other London docks; that the proposed rates

were not and could not be made applicable in both directions, and that the London and India Docks Co. were not a railway company and were not entitled to propose through rates in the capacity of a railway company.

The applicants applied to the Court of the Railway and Canal Commission under the above-mentioned Acts, and more particularly under section 25 of the Railway and Canal Traffic Act, 1888, for an order allowing the through rates, and the apportionment of the same, as proposed by the applicants and set out in the schedule appended to the application.

In their answer the Midland Railway Co. alleged (*inter alia*) that the applicants were not a railway company, and were not entitled to require the defendants to quote the through rates proposed; that the proposed through rates were not required in the public interest as due and reasonable facilities for receiving, forwarding, or delivering traffic to which the through rates applied; that the defendants carried, and were willing to carry, traffic from the docks, quays, and warehouses to the places mentioned in the application at through charges which were lower than the charges which the railway company had power to make and were reasonable, and that the applicants were bound to perform part of the services for which these charges were made as the agents of the company for the sum of 1s. 5d. per ton under an agreement between the company and the applicants' predecessors in title, dated the 18th of December, 1877; and that if the applicants were a railway company and entitled to require through rates, there were through rates already in force, and that the company could not be required to quote any other through rates, and that the proposed through rates were insufficient in amount.

The Great Eastern Railway Co. answered (*inter alia*) that under an agreement made between the Midland and Great Eastern Railway Co., the Midland Railway Co. exercise running powers over the Great Eastern Railway between the Royal Victoria Dock and the junction at Tottenham with the Tottenham and Hampstead Junction Railway; that the Midland Railway Co. fix the through rates to the Royal Victoria Dock, and pay to the Great Eastern Railway Co. for the use of their line a proportion of receipts.

When the application was first made to the court, the docks company were the only applicants; then a second application was made, in which the Mansion House Association on Railway and Canal Traffic were added to the dock company as applicants, but the dock company did not apply as a railway company. In consequence of the opinion of the court that the dock company were a railway company and ought to apply as such, the application was then made in the present form by the dock company alone, claiming as a railway company.

Section 3 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), provides: "In this Act—the term 'railway company' includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament; the term 'person' includes a body of persons corporate or unincorporate; the term 'railway' includes every station, siding, wharf, or dock of or belonging to such railway, and used for the purposes of public traffic."

Section 25 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), provides: "Subject as hereinafter mentioned, the said facilities [that is, facilities for the receiving and forwarding and delivering of traffic] to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates," &c.

The London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), provides: Section 146. "It shall be lawful for the company on the one hand, and the Great Eastern Railway Co., the London and North-Western Railway Co., the North London Railway Co., the Great Northern Railway Co., the Midland Railway Co., and the Great Western Railway Co., or either of them, on the other hand, to enter into agreements with respect to the rates and charges to be levied by the company upon railway traffic using the said docks, and as to the making of any through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded to such traffic to and at such docks, and as to the use by the said railway companies of the railways, tramways, jetties, and other conveniences at the said docks."

Section 147. "It shall be lawful [for the above railway companies respectively] with their carriages, wagons, and servants, to use free of charge, the railways, tramways, and other conveniences at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from the shipping there, subject only to such reasonable rules and regulations as the company may find it necessary in the public interest to make; and the company shall provide space at the Victoria Dock for the erection of offices by [the above-named railway companies, omitting the Great Eastern Co.] for clerks and for storage of sheets, ropes, and other necessary articles required by the said railway companies, or either of them, for the conduct of their business."

The London and St. Katharine Docks Co. Act, 1875 (38 & 39 Vict. c. cliii.), provides: Section 4. "Subject to the provisions of this Act, the company are further hereby empowered to execute and do the following works and things (that is to say), (*b*) The making, providing, and maintaining, in connection with the aforesaid works or any of them, of all necessary or convenient locks, gates, graving docks, shipping places, wharves, quays, slips, jetties, landing-places, stages, rails, trams, sidings, stations, platforms, ways, approaches, warehouses, sheds, . . . and other works and conveniences."

Section 6. "With respect to the alteration which will be rendered necessary by the execution of the Victoria Dock extension of the line and levels of the North Woolwich Branch Railway of the Great Eastern Railway Co. (which railway and company are in this section referred to respectively as "The North Woolwich Branch" and "The Great Eastern Co."), the following provisions shall have effect:

"(*k*) The company shall either set apart such sidings, or shall allow the Great Eastern Co. upon the company's Victoria Dock estate to lay down free of charge and maintain such sidings as may be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, wagons, and engines used for purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich branch, so as to render unnecessary the shunting or stopping of such trains, carriages, wagons, or engines on the North Woolwich branch; and the company shall permit any such sidings, whether set apart by them or laid down by the Great

Eastern Co., to be fully and freely worked and used by the last-mentioned company for dock traffic."

Balfour Browne, K.C. (*Freeman, K.C.*, and *Waghorn*, with him), for the applicants.

Cripps, K.C., *Asquith, K.C.*, and *E. R. Moon*, for the Midland Railway Co.

E. R. Moon, for the Great Eastern Railway Co.

Cur. adv. vult.

Dec. 13.—WRIGHT, J., read the following judgment: This case is an application by the London and India Docks Co. against the Great Eastern Railway Co. and the Midland Railway Co. for through rates, and the application alleges that the dock company are owners of the docks, and the docks have been constructed under powers of Acts of Parliament; that under those Acts the applicants or their predecessors in title have constructed lines of a railway forming a junction with a railway of the Great Eastern Railway Co. and extending for a distance of three miles on either side of the docks, to various warehouses and quays, and in particular that they have constructed the exchange sidings commencing about twenty-nine chains on the dock side from the junction with the Great Eastern Railway. Then they quote the provision of the Act under which those sidings were constructed, and state that they, the dock company, convey traffic by means of their own engines and servants from all parts of the dock to the exchange sidings, and there place the trucks containing the traffic in train order on lines appropriated for the time to the traffic of the defendants, and of other railway companies conveying traffic from the docks. The total length of the lines of railway within the dock property for the purpose of bringing railway traffic to and from the Great Eastern Railway is about forty-five miles. Then the applicants refer to an agreement of 1864, and then state the facts and claim an order allowing a through rate with a particular apportionment.

To-day we have not to deal with any question of the merits. We have merely to deal with the question of jurisdiction, and that is, put shortly, whether the dock company are for this purpose in the position of a railway company owning and working a railway. There is no doubt or question whatever but that for some purposes the dock company are a railway company. Of course they have railways—that is clear, and a very extensive system of railways—on their dock estate. They are a railway company unquestionably for some purposes, and for some purposes of the Railway and Canal Traffic Acts. Under an Act of 1882 they own and work a passenger line in all respects under the same conditions under which ordinary passenger lines are owned and worked. They have been held to be a railway company under the Railway Companies Act, 1867, and the decision holding them to be a railway company, *In re East and West India Dock Co.*, 36 W. R. 849, 38 Ch. D. 576, has been recognized by Parliament in the Act which provides for the amalgamation of the dock companies, which enacted that the amalgamation should not deprive them of their status under that Act. But the question is whether for this particular purpose of through rates they are in the position of a railway company within the meaning of section 25 of the Railway and Canal Traffic Act, 1888. That section provides (without reading it all) that every railway company owning or working railways which form part of a continuous line of railway or railway communication (I leave out about canals) shall afford all due and reasonable facilities, and so forth; and it goes on to enact that one of these facilities shall be the due and reasonable receiving, forwarding, and delivering by every railway company at the request of every other such company, all through traffic to and from the railway of any other such company at through rates tolls, or fares, and also the due and reasonable receiving, forwarding, and delivering by every railway company at the request of any person interested in through traffic, of such traffic at through rates. Now, in determining whether the dock company are within that enactment, there are many things to be considered. There are two categories under either of which the dock company might be supposed to come. First of all, there may be a dock system in which there are laid down, in the docks, railways which may be called simply dock railways—domestic railways for the purposes of dock traffic within the docks constructed under general powers to do what is necessary for the work of the docks, and merely, as it were, by chance, connect at the dock gates with some external railway. In a case like that it may be that there would be some purposes under the Railway and Canal Traffic Acts with regard to which we should have jurisdiction over them as railway companies, but hardly, I think, in relation to the 25th section of the Traffic Act of 1888 as regards through tolls and rates. It is not necessary to express any opinion whether we should have jurisdiction in a case of that kind. In the other category would fall a dock company whose property includes railways or portions of railways, forming in fact a continuation of general railway systems outside the dock estate, connecting the dock railways with those railways as part of one continuous system, and appropriated for that purpose by statute. It is within that latter category that, as it seems to me (I am afraid we are not quite unanimous), the dock company comes. First of all, by the Dock Companies Act, 1864, s. 146, it was provided that it may be lawful for the dock company and a railway company to enter into agreements with respect to the rates and charges to be levied by the dock company upon railway traffic using the docks, and as to the making of through rates and charges and the division and apportionment thereof, and as to the facilities to be afforded. If that section stood alone it would probably not be enough to make the dock railways a continuation of the railways outside. Then comes section 147, which says: "It shall be lawful for the Great Eastern," and other railway companies there specified, "with their carriages, wagons, and servants to use, free of charge, the railways, tramways, and other conveniences at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from shipping there, subject only to such reasonable rules and regulations as the company may find it necessary in the public interest to make," and the dock company shall provide space for offices for the company, and for storage and so forth. Now, if that were the whole of the matter, I should be very much inclined to think it brought the dock company's railways within the scope of the Traffic Act of 1888, because it gives an absolute right for the railway companies named to use these dock railways as a continuation af their own system subject only to reasonable rules and regulations in the public interest. The matter does not rest there, nor does it rest merely on those two sections coupled with the agreement which was made during the passing of the Act of 1864, by which a right was given to the railway companies to exercise their powers on the terms mentioned in the agreement It does not rest there, because there comes next the Dock Companies Act of 1875. By the Act of 1875, s. 6, sub-section (*f*), the company are constituted proprietors of a branch called the North Woolwich branch, and in relation to that branch it

seems to me that they would unquestionably be a railway company for all the purposes of any traffic which passed from outside systems over that branch, but I do not understand that that is the case in this instance, or, at any rate, I have not heard any statement that traffic, to which this application refers, is to be carried over that branch. Then in the same section there is sub-section (*k*), which provides, leaving out the immaterial words, that, "the dock company shall set apart such sidings"—there is an alternative given which has been adopted—"as may be necessary and convenient for the marshalling, reception, delivery, standing, and accommodation of trains, carriages, wagons, and engines, used for the purposes of dock traffic passing or intending to pass to or from the Victoria Dock extension from or to the North Woolwich branch so far as to render unnecessary the shunting or stopping of such trains, carriages, wagons, or engines on the North Woolwich branch; and the company shall permit any such sidings, whether set apart by them or laid down by the Great Eastern Co., to be fully and freely worked and used by the last-mentioned company for dock traffic." Now it seems to me that the proper conclusion is, that under these various powers and regulations the dock company's railways, which are worked in the ordinary manner with locomotives and so forth as if they were ordinary railways, and are worked under powers, not optional, but compulsory, on the dock company in connection with the system of the Great Eastern Railway Co., must be regarded as railways within the scope of section 25 of the Traffic Act of 1888. I do not see what element is wanting. They are unquestionably railways. The railways are owned and worked by the dock company; they are owned and worked by the dock company under Parliamentary authority, and they are part of one continuous route from the system of the Great Eastern Railway Co. to the quay sides. At any rate, they are part of the continuous route from the system of the Great Eastern Co. to a long way within the dock boundary — namely, the exchange sidings — a distance of twenty-nine chains, I think it is, inside the dock boundary. Now, that part, at any rate those twenty-nine chains, or whatever the distance may be, seems to me to be unquestionably part of one continuous system of railway communication. I do not think it is necessary to say whether the rest of the dock railways reached from the Great Eastern system *viâ* the exchange sidings are in the same sense part of the continuation of the general railway system or not; but at any rate, as regards that portion of the exchange sidings it seems to me that the section is applicable, and that is enough to make the dock company interested in a portion of the route, which route consists of the Great Eastern system, and of this portion of the exchange siding in combination with the one route. It is said that there are no statutory tolls. That is quite true. There is no statutory regulation of tolls or rates chargeable by the dock company for the use of this railway, although there is a statutory regulation of the maximum tolls and rates which they can charge for all dock services, but the Railway and Canal Traffic Acts do not provide, either in the definition of a railway company or elsewhere, that the existence of a statutory regulation of tolls or rates shall be essential as a condition for the application of the Act. Then it is said no returns are made to the Board of Trade, and no provisional order was issued by the Board of Trade or passed by Parliament in relation to the dock railway company. There may have been reasons for that, or it may have been a slip on the part of the Board of Trade. That cannot govern the construction of the section. For these reasons, I am of opinion that the dock company are a railway company not merely for some purposes but for this particular purpose, and that the application is well-founded in that respect.

Sir FREDERICK PEEL read the following judgment: This is an application to us to order through rates proposed to the Midland and the Great Eastern Railway Companies by the London and India Dock Co. for traffic from the Victoria and Albert Dock, *viâ* the dock company's lines of railway, to stations on the Midland Railway. The question is whether these dock lines are a railway within the meaning of section 25 of the Traffic Act of 1888, which describes the traffic a railway company may be required to forward at through rates as traffic arriving by the railway of another railway company. Now, a railway for this purpose must be one constructed or carried on under the powers of an Act of Parliament, and I am inclined to think that the dock company's portion of the through route is not a railway of that sort. The three Dock Acts of 1853, 1864, and 1875 are the material we have for judging of this. The Act of 1853 required the dock company to permit the Eastern Counties Railway Co. to lay down railways at the intended Victoria Dock, but gave the dock company itself power only to make tramways in connection with the dock, and the Act of 1864, which transferred the Victoria Dock estate to the London and St. Katharine Dock Co., while it authorized the Great Eastern, the Midland, and other railway companies to use the railways, tramways, and conveniences at the London Dock and the Victoria Dock, left the powers of the dock company for constructing or carrying on railways as it stood under previous Acts. Then under the provisions of the Act of 1875 for the extension of the Victoria Dock, the dock company are either to set aside for the use of the Great Eastern Co., or to allow that company to lay down upon the Victoria Dock estate such sidings as may be necessary for the accommodation of trains with traffic passing between the Victoria Dock extension and the Great Eastern Railway Co.'s North Woolwich branch, so as to dispense with any shunting of the trains on that branch. In the execution of this Act the dock company appear to have constructed on their dock estate large sidings for the exchange of traffic, having a junction at one end with the North Woolwich branch, and connecting at the other end with the docks. By agreement with the Great Eastern and other railway companies they work the dock railway traffic over these lines to and from the exchange sidings to which the railway companies come to receive and forward or deliver it, as the case may be. The sidings and lines so made by the dock company are their portion of the proposed through route, and the question is, I think, does the direction to set apart sidings for dock railway traffic make the sidings so set apart a railway, and the company providing or owning them a railway company? It seems to me that it does not, because the sidings which the dock company are directed to set apart refer, I think, to the sidings which by section 4 of the Act they are authorized to make in connection with the Victoria Dock extension, and, unless these sidings are a railway, I do not think the setting them apart for Great Eastern Railway traffic would make them such. The various works, however, authorized by section 4 are evidently allowed as works incidental to and an integral part of the dock undertaking, and the company's position in relation to them is that of a dock company only. In other respects the applicants have none of the grounds for being regarded as a railway company, which in the case of *Manchester Ship Canal Co.*, 10 Ry. & Can. Traff. Cas. 54, led us to regard that company as a

railway company competent to propose through rates to and from their docks, and on the whole I think the through rates as proposed by the applicants cannot be granted.

Viscount COBHAM.—So far as I have been able to form an opinion on the different points of law and construction which are involved in this case my conclusion is in accord with that of the learned judge, and I shall not attempt to add anything to what he has said.

From this judgment the railway companies now appealed.

The case was heard, by consent of the parties, before only two members of the Court of Appeal.

Moon (*Cripps, K.C.*, and *Asquith, K.C.*, with him), for the appellants.

Balfour Browne, K.C., and *Waghorn* (*Freeman, K.C.*, with them), for the respondents.—The arguments sufficiently appear in the judgments of the court.

The following cases were cited: *In re East and West India Dock Co.*, 36 W. R. 849, 38 Ch. D. 576; *East and West India Dock Co.* v. *Shaw, Savill, & Albion Co.*, 39 Ch. D. 524, 37 W. R. Dig. 153; *Manchester Ship Canal Co.* v. *Midland Railway Co.*, 10 Rly. & Can. Traff. Cas. 54; and *Williams* v. *London and North-Western Railway Co.*, [1900] 1 Q. B. 760, 48 W. R. Dig. 106.

HENN COLLINS, M.R.—This is an application under section 25 of the Railway Traffic Act, 1888, by the London and India Dock Co. in its capacity as a railway company for a through rate from its docks or warehouses on the Victoria or Albert Docks to different places named on the systems of the Great Eastern Railway and the Midland Railway Co. [The learned judge here read section 25.] It seems to me that a railway company which demands a through rate must be a railway company owning a line which forms part of a continuous route. Section 25 presupposes that the demanding company has itself a line which is to form a part of that route, not a mere infinitesimal part, but a part which would be substantially treated as part of the *transitus* between two given places. In this case the applicants are a dock company; they exist for the purpose of making and working a dock, and as incident to that they came into existence under statutory powers, and as incident to that of course they had to take powers to lay down rails or tramways, and generally to bring into existence all the appliances which are ancillary to the working of a dock. I do not propose to go in detail through the numerous clauses in the Act which Mr. Moon, in his very clear argument, has brought to our attention; but I think I am justified in saying this, that you do not find in them provisions treating dock companies as railways, which you would expect to find had the Legislature intended to constitute them railway companies for all purposes. It is a very remarkable thing that in a series of Acts we do not find the Railway Clauses Consolidation Act incorporated except for certain purposes that have no specific relation to the demand in question in this case. They are regarded as dock companies, with the ordinary incidents of dock companies as such; they are not treated as railways in the ordinary sense of the term.

Now it is said that the dock company in this case comes within the statutory definition of a railway which is to be found in section 3 of the Regulation of Railways Act, 1873: "The term 'railway company' includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament." It must be a "railway" to begin with; and then it must be constructed or carried on under the powers of an Act of Parliament. Further down it says: "The term includes every station, siding, wharf, or dock of or belonging to such railway and used for the purpose of public traffic." It seems to me perfectly clear, and Mr. Balfour Browne did not contend to the contrary, that though the term "railway" includes siding, wharf, and so on, a siding or wharf which is not otherwise part of a railway does not of itself constitute a railway; and, therefore, if you have a siding which is used as a siding and is brought into existence under statutory powers, it is not a railway unless it belongs to a railway and is a siding of a railway. You have to find your railway before you can say that the siding itself is a part of the railway or that it comes within the law dealing with railways.

Now in this case the through route in respect of which the applicants desire a through rate is one from their warehouses on either of the said two docks to what are called the exchange sidings, and thence on to the line either of the Great Eastern or the Midland Railway Co. The applicants' share of the route is simply composed of railway lines round about and over the docks by means of which they carry on the ordinary business of the dock. These lines, in no sense, in my judgment, form a continuous route between two given places. They are the lines over which the dock traffic is managed, and I think it would be a departure from common-sense and the ordinary meaning of terms if we were to hold that these lines which constitute the ordinary means of dealing with dock traffic, moving goods from warehouse to warehouse, and so on, are parts of a through route, parts of the *transitus* from one point to a distant point on another railway.

When one looks at the thing broadly, it seems to me that the dock and the appliances about it are really nothing more than a large station, and that all these appliances subsist for the purpose of doing that which would be done at a station, getting traffic about to and fro, where it is necessary in the station. They are not part of a line with a terminus *a quo* and a terminus *ad quem* at all, and, therefore, if Mr. Balfour Browne had been driven to rely on these lines only he would not, I think, have contended that he had any *locus standi* as a railway company.

But the dock company, having been made up of a series of amalgamations, has within it, as it now exists, several docks, to some of which railways in the full sense of the term are annexed, and being in that sense owners of railways, he contends that the dock company is a railway company and entitled to demand a through rate. He points to two lines, the Royal Albert Dock Railway and the Blackwall Railway. With respect to the former it is not one that has anything whatever to do with the point in discussion before us now: it is not part of a route over which the through rate is asked for, because it is a line that at the present time has no power to carry goods, and the through rate is not demanded in respect of it, neither for the same reason is the Blackwall line.

Then we come to what has here been called the transferred line. The facts with respect to that are these: When the Royal Albert Dock was being made it was found that the work would interfere with the already existing line of the Great Eastern Railway Co., which ran across the site of the proposed dock and on to North Woolwich station, and therefore the Great Eastern Railway Co., in order that its traffic might not be interrupted, carried its line under the site by means of a tunnel, but they left the old line which had been used before in its old position.

That had to be interrupted by a drawbridge, and an arrangement was made whereby that part of the line which was so interrupted, and for which the tunnel was substituted, was handed over to the dock company, the Great Eastern Co. still retaining the right in special circumstances to pass trains over it, and they have occasionally done so. The dock company, on the other hand, acquired a right to run trains over it, and it was contended on their behalf that because they own part of a fully-constituted railway line they are railway owners and are therefore entitled to demand a through rate. I do not think they are the owners of this bit of the line in the full sense of a railway company in the ordinary sense of the word. This railway has been denuded of its special railway characteristics in the process of transfer to the dock company, and the dock company do not even now possess over it any charging powers whatever, such as one would expect to find, and such as the Great Eastern Railway Co. did possess over it. It has been taken out of the position of an ordinary railway and is now used by the dock company simply for the purposes of their dock. They cannot be treated in reference to their ownership of this piece of line as a railway company or as the owners of a railway in the proper sense of the terms. Nor do I think if they were a railway company they could avail themselves of the section simply in respect of this particular piece of line and make that their ground for their demand for a through rate, because they had to propose their through route, and their proposal is from the different warehouses along the dock most of which are apparently not in connection with this particular bit of railway line at all.

But it is contended on the part of the dock company that inasmuch as they have a piece of real railway they are a railway company in respect of it, and can draw in all the lines connected with it and say that they are sidings and approaches to a railway, and therefore are entitled to demand over them a through route. I think that it would be quite absurd to say that the sidings in this case and the rest of these lines are ancillary in any sense to that bit of railway. On the other hand, it seems to me that the bit of railway is really merged into what I may call the tramways, and that their lines are used simply as ancillary to the dock system. I think therefore that these lines cannot be called a railway in any sense within the meaning of the Railway and Canal Traffic Act, 1888.

On these grounds it seems to me that the applicants have failed to show anything in the nature of a through route, part of which passes over their own line, or that they are owners of a railway over which they are prepared to offer a through route. But it is said that the decision in the case of the *Manchester Ship Canal Co.* v. *The Midland Railway Co.* concludes this case against the defendants. I was a party to that case, as was also Sir Frederick Peel, and I think that instead of it being an authority in favour of the applicants in this case, it is an authority against them. The decision was in favour of the applicants in that case simply and solely on grounds which do not exist here, and, in fact, it is a decision that, but for the existence of those very special circumstances, must have been the other way. In that case there were special powers whereby the Ship Canal Co. were able to charge tolls on railways, and they had actually an order made by statutory power regulating the tolls and charges which they were to make, and they were therefore held to be in the position of persons who owned a real railway in the proper sense of the term over which the public were allowed to travel at certain given rates, and that they were therefore in the position of a railway company so as to leave it within the jurisdiction of the railway commissioners to grant them a through rate. I think that was an extreme case. I think it was decided on very special circumstances which do not exist here. I think Sir Frederick Peel has taken the right view in the present case. He differs from my brother Wright, and I can say no more than that in this case I prefer his reasoning, which commends itself to me and which I agree with, to that of my brother Wright. I think, therefore, this appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. I think it is clear that section 25 of the Railway and Canal Traffic Act, 1888, explained by the Regulation of Railways Act, 1873, contemplates a continuous line of railway communication with complete different lines of railway, and that it must be a railway created by statutory authority. Has that section any application to the present case? Here it is said: You have tramways worked by steam called railways; they are provided by the dock company for the accommodation of their goods, and are railways within the meaning of this Act. I should have thought that it is perfectly clear that they are not. They are not part of a continuous line of communication from one terminus to another. They are provisions made by the dock company for carrying on its business in a way convenient to itself.

It was said by Mr. Balfour Browne that there was another ground on which these lines of communication and sidings could be treated as a railway. That was that the portion of the railway called the transferred line was a railway constituted by a proper authority created in the ordinary way, and that this line of tramway and sidings must be treated as belonging to that, and forming part of a railway system. Now, I am unable to accept the statement that that transferred line retains its old character of a railway. It seems to me that it has been practically transferred into the group of tramways which were used by the dock company for the purpose of their business. Then we had an argument as to the sidings, and the sidings were said to be of themselves a railway, and that the communication with them therefore belonged to the dock company as a railway company. But suppose the sidings had been placed at the boundary of the dock premises, and the goods had been taken from the railway company there by the dock company, could it be reasonably said that the sidings under those circumstances, because of their communication with the railway lines outside, had become a railway within the meaning of the Act?

I am clearly of opinion that this last argument fails, like the others, and I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, the Midland Railway Co., *Beale & Co.*

Solicitor for the appellants, the Great Eastern Railway Co., *E. Moore.*

Solicitors for the respondents, *Turner, Son, & Foley.*

From Chan. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — March 19.

In re "UNEEDA" TRADE-MARK. (*a.*)

Trade-mark — Registration — Invented word — Non-descriptive word—"Uneeda"—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Patents, Designs, and Trade-Marks Act, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

The word "Uneeda," which was a mere misspelling of the words "You need a," held not to be a proper subject of registration as a trade-mark for biscuits, under either (d) *or* (e) *of section* 64 *of the Patents, Designs, and Trade-Marks Act*, 1883, *as amended by section* 10 *of the Act of* 1888, *as not being either "an invented word" or "a word or words having no reference to the character or quality of the goods."*

Decision of Cozens-Hardy, J., [1901] 1 *Ch.* 550, 49 *W. R. Dig.* 175, *affirmed.*

Appeal from a decision of Cozens-Hardy, J., [1901] 1 Ch. 550, 49 W. R. Dig. 175.

The National Biscuit Co. of New Jersey City, in the United States of America, applied, under section 62 of the Patents, Designs, and Trade-Marks Act, 1883, for registration of a trade-mark consisting of the word "Uneeda" in respect of biscuits and other articles.

Section 64 of the Patents, Designs, and Trade-Marks Act, 1883, as amended by section 10 of the Act of 1888, enacts as follows: "For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars: . . . (*d*) An invented word or invented words; or (*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

An affidavit made in support of the application stated as follows: "The word 'Uneeda' was first invented by H. N. MacKinney, of Philadelphia, Pennsylvania, U.S.A., of the advertising department of the applicant company, and was originally intended to be associated with a picture of an Indian maiden, and was therefore the name of an aborigine of the North American Continent. It was also intended that a pathetic legend or story should accompany this word, but the pictorial part was afterwards abandoned and simply the word used."

The comptroller refused to register the trade-mark on the grounds—first, that the word "Uneeda" was not an invention, but was a mere misspelling of the words "You need a," and misspelling could not be considered invention; secondly, that the words "You need a" were words having reference to the character or quality of the goods, as they conveyed the idea that the prospective purchaser's personal comfort would be promoted by the acquisiton of the article.

The company applied to Cozens-Hardy, J., for an order directing the comptroller to proceed with the application for registration.

Cozens-Hardy, J., refused the application, being of opinion that on both the grounds taken by the comptroller the word "Uneeda" was not a proper subject of registration as a trade-mark.

The company appealed.

Moulton, K.C., and *E. F. Lever*, for the company.—There is as much invention in the word "Uneeda" as there was in the word "Solio," which was held by the House of Lords to be an invented word: *Eastman Photographic Materials Co. (Limited)* v. *Comptroller-General of Patents, Designs, and Trade-Marks*, 47 W. R. 152, [1898] A. C. 571.

Sir R. B. Finlay, A.G., and *R. J. Parker*, for the Comptroller-General, were not called upon to argue.

THE COURT (COLLINS, M.R., and ROMER and MATHEW, L.JJ.) dismissed the appeal.

Appeal dismissed.

Solicitors for the company, *Burn & Berridge.*

Solicitor for the Comptroller-General, *Solicitor to the Board of Trade.*

High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 17.

In re OSBORNE & BRIGHT'S (LIMITED). (*a.*)

Settled land—Conflict between provisions of will and provisions of Settled Land Acts—Consent—Undivided shares—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 56 (2)—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6 (2).

If lands are settled in undivided shares, a power of sale of the whole given to the trustees will conflict with the powers of sale of their shares possessed by the tenants for life under the Settled Land Acts, and cannot be exercised without the consent of all the tenants for life of undivided shares. Each of such persons is merely tenant for life of his undivided share, so that the consent of one of them would not be sufficient under section 6 (2) *of the Settled Land Act*, 1884, *to enable the trustees to sell the entirety.*

Adjourned summons under the Vendor and Purchaser Act, 1874.

By the will of E. C. Osborne all his real estate and also his residuary personal estate were devised and bequeathed to trustees upon trust that they should stand possessed thereof and of the investments and proceeds as to one-fifth part for each of his four daughters, and as to the remaining fifth part for the children of a deceased daughter who being a son or sons should attain the age of twenty-five years, or being a daughter or daughters should attain that age or marry. The share of each daughter was settled upon her during her life, with a restraint on anticipation, with remainder to such person or persons as she should appoint, and in default of appointment for children or other issue who should attain the age of twenty-five years, or in the case of daughters should marry. There was also a gift over in case of the death of any of the daughters without issue and without having exercised her power of appointment, and a power to the trustees to sell or dispose of any part of the real and personal estate either by public auction or private contract as they should think proper and beneficial.

In June, 1901, the trustees of the will contracted to sell certain leasehold property which formed part of the testator's residuary estate.

At that time three of the testator's daughters were still living and had husbands living, and a fourth had died intestate and without exercising the power of appointment, and left a husband and a son who was her heir-at-law. There were five children of the daughter who had died before the date of the will, and three of them had attained the age of twenty-five years. It was stated that only one of the shares of the three daughters who were still living had become vested by the exercise of the power of appointment.

The purchasers required the concurrence of all the tenants for life of undivided shares; the vendors offered the concurrence of only one of them, which they submitted was sufficient.

The present summons was accordingly taken out by the purchasers, who asked for a declaration whether or not the power of sale given by the will to the trustees was exercisable without the consent of any person or persons, and if any such consent was required, then of whom.

Upon the hearing of the summons it was admitted

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

that the limitations in favour of the children of the testator's surviving daughters were void as transgressing the rule against perpetuities.

J. T. Prior, for the purchasers.—There is in this case a conflict within the meaning of section 56 of the Settled Land Act, 1882, between the powers conferred by the Act on the tenant for life and those which the will gives to the trustees: *In re Pocock and Prankerd's Contract*, 44 W. R. 247, [1896] 1 Ch. 302; *Earl of Lonsdale* v. *Lowther*, [1900] 2 Ch. 687, 49 W. R. Dig. 157. Therefore the trustee cannot sell without some consent, and the persons whose consent is required are all the tenants for life of the separate shares.

E. P. Hewitt, for the vendors.—First, there is no conflict within the meaning of the section, for there is no tenant for life of the entirety. Secondly, if there is a conflict, and the consent of some person is required, then the consent of one of the tenants for life of an undivided share is sufficient, under section 6 (2) of the Settled Land Act, 1884.

Prior, in reply.—The section does not apply because there are not two or more persons who together make up a tenant for life, but several tenants for life of undivided shares. *Cooper* v. *Belsey*, 47 W. R. 443, [1899] 1 Ch. 639, shows that the case of a settlement of an undivided share falls within section 56 of the Act.

KEKEWICH, J., after referring to the terms of the will, continued as follows: It is necessary for the present only to notice that the testator's daughters became tenants for life in possession of their shares with absolute powers of appointment by deed or will. The testator gave his trustees power to sell or dispose of his real and residuary personal estate, and they have purported to exercise that power of sale. The question is whether they can exercise that power of sale, or whether by reason of the provision in section 56 of the Settled Land Act, 1882, they are bound to get the consent of some persons to the sale. It seemed good to the Legislature in introducing the new code contained in the Settled Land Act, 1882, to provide for the case of conflict between the provisions of a settlement and those of the Act. [His lordship read section 56 (2), and continued as follows:] If the trustees were selling the share which has been settled in trust for any one of the daughters, no doubt her consent would be required. The sub-section is strangely worded, and it seems to me that the first and second parts of it do not exactly fit together; but it is perfectly clear that the object of the sub-section was to maintain the code of the Settled Land Act, 1882, and to provide that no power exercisable under a will shall in any way conflict with the exercise of the power conferred by the statute on persons beneficially interested under the will. The first argument on behalf of the vendors is that here there is no conflict. It is said that there can be no conflict between a power given to trustees to sell the entirety and the power of a tenant for life to sell his or her part or share of the estate. That there is a conflict as regards the particular part or share of the estate can hardly be denied, and I think that if authority were wanted to show that, it is supplied by the case of *Earl of Lonsdale* v. *Crawford*. But the main point is that the sale of the entirety by the trustees does not conflict with a sale of one fifth part or share by the particular tenant for life thereof. I think that this first contention is not well founded. This lady, on the assumption I am now making, is tenant for life of a share, and that share has been settled. No doubt she can sell the share under the Settled Land Act if she pleases, and so, as between herself and the purchaser, convert the beneficial interest under the will. It is perfectly competent to her to exercise that power under the Act. If, therefore, the trustees sell the entirety, they are depriving her of the power to sell her share. That immediately raises a conflict, and makes it necessary that she should be a consenting party to the sale by the trustees.

But then it is observed that the provision in section 56 applies only when there is a tenant for life, but that this lady is not a tenant for life, but only a person having the powers of a tenant for life. That she is such a person is, I think, clear from *In re Pocock and Prankerd's Contract*. Does the provision bear that meaning? The second branch of section 56 (2) does not say "tenant for life, or person having the powers of a tenant for life"; but the word "accordingly" does not imply that the the powers of the Act are to prevail in the case specified and in no other case. The clause is brought in by way of illustration of the cases in which the first branch of the sub-section is to apply. Then it is said that there again it is only "the tenant for life" that is mentioned. There is a little obscurity in the language there; but the object of the section was to provide against conflict, so that where there are two powers, one outside the Act, and one under it, then the Act shall be called in; the former power shall not be exercised without the consent of the person having the latter.

Then there is a further argument that under section 6 (2) of the Act of 1884 only the consent of one of the tenants for life is necessary, and that the consent of one being obtained, that of the others is not required. It is said that the different tenants for life are tenants in common, and therefore they together constitute the tenant for life, and the consent of one of them only is necessary. It seems to me that the lady whose consent has been obtained is not one of several persons who together constitute a tenant for life, but is simply tenant for life of an undivided fifth. She is not tenant for life of the entirety, nor is she one of several persons who are together tenant for life of the entirety. There is no person who is tenant in common with her of the undivided fifth. And the same is true of any other person in a similar position with respect to any other undivided share. Accordingly, I think I ought to make an order declaring that the power of sale given by the will is not exerciseable without the consents of the persons beneficially interested under the will who are tenants for life, or entitled to exercise the powers of a tenant for life under the Settled Land Acts.

Solicitors, *Vallance & Vallance*, for *Herd & Nutt*, Birmingham; *Sandars & Harding*, for *J. C. Fowke & Son*, Birmingham.

Chan. Div.
Byrne, J. } March 15.

In re ROBERTS.
ROBERTS *v.* PARRY. (*a.*)

Will—Satisfaction—Bequest of legacies to several persons of sums equal to debts secured by promissory notes—Time for payment of legacies.

Pecuniary legacies which by the express terms of the will were not payable until a period of four years after testator's decease are not a satisfaction for debts of equal amount secured to the legatees by a negotiable instrument made by the testator.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Summons.

This was a summons in an action commenced in 1898 by originating summons for the administration of testator's estate and the payment of certain sums due for the costs of a probate action in connection therewith.

The whole of testator's personal estate having been exhausted in the payment of his debts, his real estate was directed to be sold and paid into court.

The present application was by Humphrey Pritchard on behalf of himself and others for payment of certain legacies mentioned in testator's will.

The question was as to whether the doctrine of satisfaction applied to the legacies.

The facts of the case were as follow:

The will of the testator so far as it is material was as follows: "This is the last will and testament of me, Richard Roberts, Cefnpontref Aberwch, Carnarvonshire. I give all my property to Elizabeth Pritchard, who is at present in service here, and I appoint her executrix. And I direct that she is to pay the following sums—to Humphrey Pritchard, Ponfras, £50, to Hugh Pritchard, brother of Elizabeth Pritchard, £200; to Robert Pritchard, her brother, £100; to Humphrey Pritchard, her brother, £80" (the applicant); "and I direct that Elizabeth Pritchard is to have four years after my death to pay the above money, and that she is after that, to pay £40 a year from the land to Mary, the daughter of my son Robert."

The testator was indebted to the above-named pecuniary legatees on the joint and several promissory note of himself and his son in sums equalling in amount the legacies bequeathed to them under his will, in respect of advances made by them to his son.

With the exception of two sums of £50, all the liabilities had been discharged by the testator before his death.

Brydges, for Humphrey Pritchard.—This is not a case in which the doctrine of satisfaction applies. The rule has no application when the debt is of greater value than the legacy. Here there is a debt on a negotiable instrument, on which interest will run immediately; but in the case of the legacies under this will interest will not run until four years after testator's death.

Matthews v. *Mathews*, 2 Ves. sen. 635; *In re Fletcher*, 36 W. R. 841, 38 Ch. D. 373; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; *Nicolls* v. *Judson*, 2 Atk. 300; *In re Horlock*, 43 W. R. 410, [1895] 1 Ch. 516.

W. Ll. Williams, for the executrix.

Corrie, for the plaintiff in the action.—The doctrine of satisfaction applies here, as in this case there are a number of different sums bequeathed to different persons which exactly correspond in value to the debts due to the same persons by the testator.

Farrer v. *Park*, 3 Ch. D. 309, 29 W. R. Dig. 323; and Theobald on Wills (5th ed.), p. 673, were also referred to.

Brydges replied.

BYRNE, J., after stating the terms of the will and the facts of the case: The fact is that the precise sums which the testator in his will bequeathed to the legatees were the sums in which he was indebted to them. The legacy to Humphrey Pritchard is a legacy of the sum of £80, the amount of his debt. Is this sufficient to establish satisfaction? I do not think that it is. Construing the will it appears, firstly, that these legacies could not be sued for until four years after the death of the testator, while the debts could be sued for at once; there is therefore here a difference of time between the payment of the debt and the legacy, and this will negative satisfaction. Secondly, it appears that the debts were secured by negotiable instruments, and the authorities show that where this is the case the doctrine of satisfaction does not apply. Thirdly, it appears that the legacy is not for the same sum as the debt. No interest is given on the legacy for four years, but interest is payable on negotiable instruments. I have not gone at length into all the authorities. They have been lately carefully examined by Stirling, L.J., in *In re Horlock*. There will be judgment for the defendant H. Parry for payment of the legacy of £80 subject to legacy duty and liberty to the other persons to whom legacies were given in the will to apply in chambers for the payment of such legacies.

Solicitors, *Lloyd-George & Roberts*; *Harvey Clifton*, for *Lloyd-George & George*, Criccieth; *Huntley & Son*, for *Evan Robert Davies*, Pwllheli.

Chan. Div. } March 17, 18.
Farwell, J. }

FINCHLEY ELECTRIC LIGHT CO. (LIMITED) v. FINCHLEY URBAN DISTRICT COUNCIL. (a.)

Local government—Street—Fee simple of road—Vesting in local authority—Electric light company—Overhead wires—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*General Turnpike Act*, 1822 (3 *Geo.* 4, *c.* 126), *s.* 84.

A strip of land was acquired in 1828 *in fee simple by trustees under the General Turnpike Act*, 1822, *for the purpose of making a public road. In* 1872 *the turnpikes were removed from the road, and from* 1878 *onwards the Finchley Local Board and its successors, the Finchley Urban District Council, maintained the said road. In* 1901 *an electric light company carried their wires across the road, and the urban district council caused these wires to be cut. The electric light company now brought an action for an injunction to restrain the district council from interfering with their wires.*

Held, that the legal estate in the road lay in the real representative of the surviving trustee of the original conveyance in 1828, *who held for the local authority, and that the land in fee simple had been in this case acquired and still was required for the purposes of the street, and consequently the action was dismissed.*

This was an action for an injunction to restrain the defendants, the Finchley Urban District Council, from breaking, cutting, severing, or otherwise interfering with the electric cables of the plaintiffs over or across the Regent's Park-road, Finchley, or from hindering and obstructing the plaintiffs in the erection of electric lines over or across roads or streets within the urban district of Finchley.

The plaintiffs were a limited company incorporated in August, 1900, having offices at 17, South-street, Finsbury, and having as one of the objects of its formation the supply at Finchley and elsewhere of electricity for lighting and other purposes. Since the incorporation of the company the plaintiffs had begun to develop their business in the district of Finchley.

The Urban District Council of Finchley, who were the defendants in the action, had obtained in 1899 a provisional order from the Board of Trade empowering them to undertake the necessary works for supplying electricity to the inhabitants of their district.

On the 19th of April, 1901, a compromise was effected in an action started by the defendants, and an

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

order was taken by consent whereby the present plaintiffs undertook that they would not without the council's licence open or break up any road vested in the council until fourteen days after application had been made to the council for liberty to open the road in question.

On the 28th of September, 1901, the plaintiffs carried their wires across the Regent's Park-road at a height of more than thirty feet above the ground.

On the 1st of October the defendants caused the wires to be cut, and in consequence the present action was brought.

It appeared that the Regent's Park-road was constructed by certain turnpike trustees under the provisions of a special Act of Parliament (7 Geo. 4, c. xc.). The site of one side of the road where the plaintiffs wires crossed formed part of land acquired by the turnpike trustees under an indenture dated the 7th of November, 1828. The said site was duly conveyed to and vested in the turnpike trustees, their heirs and successors, in fee simple free from any reservations in favour of the owners of the adjoining lands or other reservations.

In 1872 the turnpikes were removed from the Regent's Park-road, and from 1878 (on the constitution of the Finchley Local Board) and onwards the road was maintained by the defendants.

Jenkins, K.C., and *Buckmaster*, for the plaintiffs.—The fee simple of the road is not vested in the defendants; it is either in the present real representative of the last surviving trustee or in the county council under section 64 of the Local Government Act, 1888, or in the adjoining owners, or it has reverted to the grantor. The word "street" in the Public Health Act, 1875, is a certain physical thing which is arrived at without reference at all to the fact in whom the real estate in which the street is situated may be vested. The ownership of the fee simple *usque ad coelum* has nothing to do with the "street" defined in the Act: *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104; *The Mayor, &c., of Tunbridge Wells* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92; *Rolls* v. *Vestry of St. George*, 28 W. R. 867, 14 Ch. D. 785; *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904; *Reg.* v. *Thomas*, 5 W. R. 321, 7 E. & B. 399.

Upjohn, K.C., and *Chubb*, for defendants.

FARWELL, J.—This case raises the old question as to the meaning of the words "vest" and "street" in the Public Health Act, 1875. The true view is that what passed to the defendants was "so much of the land in question as is required for the purposes of the road, considering the nature of the particular purposes in a given case." In *The Mayor, &c., of Tunbridge Wells* v. *Baird* Lord Halsbury said, [1896] A. C., at p. 437, "It is intelligible enough that Parliament should have vested the street *qua* street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." [His lordship then read other extracts from the judgments of Lords Halsbury and Herschell in the above case, and from the judgment of James, L.J., in *Rolls* v. *Vestry of St. George*, and proceeded:] Now, the circumstances in the present case are unlike those which have been considered in any of the reported cases. The street had been constructed under the provisions of a private Act of George IV. The piece of land in question was purchased by the turnpike trustees for the purposes of the Act, and it was conveyed to them in fee simple, the conveyance being taken under the powers of section 84 of 3 Geo. 4, c. 126. The trustees being empowered by that Act to purchase land in fee simple—*usque ad coelum* and *usque ad inferos*—the fee simple was vested in them by virtue of the conveyance. Now it was argued that as the result of the Acts of Parliament under which the street became a main road, and became vested in the urban authority of the district, the court should hold that though the fee simple is required for the purposes of the road, there is now vested in the defendants not the whole of the land so acquired, but only so much as, according to the decisions in other cases, is necessary for the purposes of the road. It appears to me that I am bound to say that this land was required and acquired for the purposes of a road. The legal estate in it was conveyed out and out to trustees, and it now lies in the real representative of the last surviving trustee, who holds for the local authority. The local authority is the only possible *cestui que trust*. Why should it vest in the adjoining owners? There is no resulting use in the conveyance. The other suggestion was that the land vested in the county council by virtue of section 64 of the Local Government Act, 1888, but in view of section 11 of the same Act this is an extravagant contention. I desire to point out that the reasoning on which former cases have been decided is inapplicable to the present case, because the land here was acquired for the purpose of making a road, and the doctrine that a public authority should not be presumed to acquire, without compensation, greater rights than is necessary for their immediate purpose is not applicable to the present case. The defendants hold the land for the purposes of a street. The plaintiff had no right to take his wires across the atmosphere above the road and consequently the action is dismissed.

Solicitors, *Benham & Meyer; A. M. M. Forbes.*

Chan. Div. }
Buckley, J. } April 12.

In re ANDREW'S ESTATE.
CREASEY *v.* GRAVES. (*a.*)

Will—Construction—"My personal estates, &c., &c."—Devise of real estate.

A testator, after giving and bequeathing his real estates and all his personal estate and effects to his wife for her life, after her death gave to certain relatives "an equal share of my personal estates, &c., &c."

Held, that the gift after the death of the wife included the real estate of the testator.

Originating summons.

The question raised on this summons was whether, in a will, the words "my personal estates, &c., &c.," included the real estate of the testator.

The will, which was dated the 13th of July, 1859, was as follows: "This is the last will and testament of me, Thomas Andrew, of Partney, in the county of Lincoln, farmer and jobber; I give and bequeath all my real estates consisting of" [describing them], "also I give and bequeath all my personal estate and effects whatsoever and wheresoever (subject to the payment of my just debts, funeral and testamentary expenses, with nineteen guineas to William Sherwood Mawer, John Mawer, Maria Mawer) unto my dear wife, Eliza Andrew, for and during her natural life, and from and after her (*sic*) decease of my said wife I give to my brother Joseph Andrew, sister Mary Graves, sister Ellen Briggs, also all my nephews and nieces, an equal share of my personal estates, &c., &c. And I revoke all former wills by me

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

at any time heretofore made and declare this to be my last will and testament, and I appoint my said wife, Eliza Andrew, executrix of this my will."

The testator died in October, 1861, possessed of personal property, and also of some freehold cottage property which his widow took possession of as tenant for life. She died in November, 1901.

This summons was taken out by one of eight co-heiresses of the testator against two nephews and a niece of the testator, and against his legal personal representative, for a determination of the question whether the real estate as well as the personal estate of the testator was included in the gift after the death of his wife.

G. Brodie Cooper, for the co-heiresses.—"Etcetera" must be construed *ejusdem generis* with "personal estates," and does not include real estate; *Newman* v. *Newman*, 7 W. R. 6, 26 Beav. 220. The heir can only be disinherited by clear devise of the real property. Here there is none. The cases of *Chapman* v. *Chapman*, 4 Ch. D. 800, 25 W. R. Dig. 314, and *Mullaly* v. *Walsh*, Ir. R. 6 C. L. 314, where the word "etcetera" occurred, are distinguishable. In the former the testator directed his real property to be sold by his executrix, to whom the bequest in question was made, while in the latter the bequest was of "the remaining part of my *whole* property."

Peterson, for the respondents, was not called upon.

BUCKLEY, J. (after reading the will).—I hold that the persons claiming under the gift upon the death of the testator's wife are entitled to the real estate of the testator.

Solicitors, *R. Brooks*, for *S. B. Carnley*, Alford; *Taylor, Hoare, & Pilcher*, for *Thimbleby & Son*, Spilsby.

Chan. Div. Joyce, J. } March 19, 20, 24.

EASTON v. ISTED. (a.)

Light—Ancient lights—Consent or agreement—Prescription Act (2 & 3 *Will.* 4), *s.* 3.

In 1873 *E., the owner and occupier of an hotel, erected on the northern side of his premises a conservatory adjoining the defendant's property, and entered into an agreement, dated the* 13*th of July*, 1873, *with the defendant's predecessor in title, whereby E. agreed to pay* 1*s. a year to defendant's predecessor for allowing "the window" of his conservatory to overlook and open on to the defendant's property. The sloping top of the conservatory was of glazed glass, as also was the whole of the vertical side adjoining the defendant's property above a few feet from the ground. Portions of the glazed side of the conservatory were movable, so that, when opened, they overhung the defendant's property. The yearly rent was duly paid until* 1888, *when the conservatory was converted into a passage or corridor of the hotel, the sloping top of the conservatory being retained in its former position and by means of its glazed glass giving light to the hotel corridor, and forming the roof to the corridor. The defendant erected certain buildings which obstructed the access of light to the hotel corridor through the glazed roof; and the plaintiff, E.'s successor, brought an action for an injunction and damages.*

Held, that the agreement of the 13*th of July*, 1873, *referred to the sloping roof of the conservatory as well as the vertical side.*

Held, also, that E. and his successor, the plaintiff, enjoyed the light only by virtue of the said agreement, which was a consent or agreement within the meaning of section 3 *of the Prescription Act, and therefore that the plaintiff's action failed.*

Action.

The plaintiff, who was the owner and occupier of certain premises known as the Golden Fleece Hotel, Commercial-road, Portsmouth, brought this action against the defendant, who was the owner and occupier of the adjacent premises in the said road, in respect of the obstruction by the defendant of the access of light over a yard at the back of his premises to a window or skylight over a passage or corridor on the north side of the plaintiff's hotel.

The plaintiff alleged in his statement of claim that the skylight was an ancient light, and that free and unobstructed access thereto of light had been enjoyed as of right for twenty years and upwards prior to the commencement of the action without interruption.

The defendant did not admit that the said skylight was an ancient light, or that free and unobstructed access thereto of light had been enjoyed as of right for twenty years without interruption before action brought; and he denied that the buildings recently erected by him (in respect of which this action was brought), seriously obstructed the access of light to the plaintiff's skylight.

The defendant's buildings, of which the plaintiff complained, consisted of a wall recently erected along or close to the boundary line of the plaintiff's and defendant's properties, which obstructed the access of light over the defendant's property to the plaintiff's window or skylight.

The window or skylight in question was inclined at an angle of somewhat less than forty-five degrees to the plane of the horizon, and at somewhat more than forty-five degrees to the vertical plane, and its northern or lower side was practically on the boundary line between the plaintiff's and defendant's properties.

It appears that this window or skylight originally formed the sloping top of a conservatory erected by the plaintiff's predecessor in title in the year 1873 on the northern side of the hotel, and abutting on to the defendant's property. This top was entirely glazed, as also was the vertical side of the conservatory adjoining the defendant's property to within a few feet of the ground. Portions of the glazed side of the conservatory, amounting to less than one-half thereof, were movable and opened out in such a way as to overhang the defendant's property.

It further appeared that an agreement in writing was entered into in the year 1873, at the time when the conservatory was built, between the predecessors in title of the plaintiff and defendant, but which was only signed by the plaintiff's predecessor in title

The agreement, which was dated the 13th of June, 1873, was as follows: "I hereby agree to pay Mr. Isted, of No. 43, Commercial-road, Landport, the sum of one shilling a year as an acknowledgment for allowing the window in my conservatory adjoining to open on to and overlook his property, and do also agree to close the same when required to do so." The yearly payments of one shilling were duly paid under this agreement until the year 1888, when the conservatory was pulled down, and the space converted into a passage or corridor in the hotel by building a brick wall where the glazed side of the conservatory formerly stood, to the height of the skylight, and retaining the skylight, with its glazed glass in its original position.

The plaintiff alleged that the buildings which the defendant had recently erected at the rear of his

(a.) Reported by C. B. CAMM, Esq., Barrister-at-Law.

premises were of such a height as to obstruct the access of light to the glazed roof of the passage or corridor in the hotel, and he brought this action claiming an injunction and damages.

Hughes, K.C., and *Ward Coldridge*, for the plaintiff.—The agreement of the 13th of June, 1873, only referred to the windows in the vertical side of the conservatory, which, when opened, overhung the defendant's property, and it did not refer to the skylight or glazed roof at all. There was no mention of the skylight in the agreement. The ordinary and natural meaning of "window" does not include "a glazed roof." The court will grant a mandatory injunction against interference with light, even although the plaintiff allow some time to elapse before asserting his right, in cases where the buildings are of such a nature as to be easily altered: *Baxter* v. *Bower*, 23 W. R. 334, 805, 44 L. J. Ch. 625.

Kenyon Parker, for the defendant.—The agreement of the 13th of June, 1873, is conclusive, and includes the skylight or glazed roof. The right to light in respect of the skylight or glazed roof has been enjoyed merely by consent or agreement within section 3 of the Prescription Act: *Bewley* v. *Atkinson*, 28 W. R. 638, 13 Ch. D. 283.

JOYCE, J., after stating the facts: The plaintiff's window or skylight having been in existence ever since 1873 must be what is called an ancient light, unless the right to the access of light thereto has been enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing," as provided by section 3 of the Prescription Act. It appears, however, that with respect to the construction of the conservatory an agreement evidenced by writing was entered into in 1873 by the then owners of the respective properties. [His lordship then read the agreement, and continued:] It was not contended, nor, in my opinion, could it have been contended with success, that this agreement was limited to the movable sashes in the northern or verticle side of the conservatory. It certainly extended and applied to the whole of the glazed portion of that side. But it is obvious that the object of the arrangement was to preclude the acquisition by the owners of the plaintiff's property of a statutory right to light over the defendant's property. It is suggested, however, that although, while the arrangement continued and the annual payment of one shilling was duly made—as it was until the year 1888—no right was being acquired in respect of the glazed portion of the sloping top, notwithstanding the existence of the arrangement and the continuance of the payment.

In my opinion it is impossible that this was intended by the parties to the arrangement, and I think that the agreement will very well bear the construction that will effectuate what must, I think, have been their intention. The sloping top receives rays of light across, and in that sense overlooks, the defendant's property in the same manner as, though to a less degree than, the fixed portions of the side; and it is in respect of the obstruction by the defendant of these very rays of light that the action is brought. If the written agreement applied, as it did, to the fixed and glazed portions of the side, it equally, in my opinion, applied to the glazed portion of the sloping top. A window is not less a window because it is not capable of being opened, nor because it is not fixed in a vertical plane. The glazed top is just as much a window as the fixed portion of the vertical side, and inasmuch as it receives light over the defendant's property, it overlooks that property in the sense in which that term was used in the agreement.

Judgment for the defendant.

Solicitors, *James, Mellor, & Coleman*, for *Hobbs & Brutton*, Portsmouth; *A. W. Mills*, for *Cousins & Burbidge*, Portsmouth.

Chan. Div.
Swinfen Eady, J. } Feb. 14, 18, 22.

In re PEACOCK.
KELCEY v. HARRISON. (*a*.)

Administration — Power of appointment — Appointed fund—Valid receipt—Administrator with will annexed.

Where a married woman having a general power of appointment over a fund of personalty makes an appointment of the fund by will and appoints executors, and the said executors die without having proved the will,

Held, that the administratrix with the will annexed of the testatrix could give a valid receipt and discharge for all the settled funds.

This was an originating summons by the administratrix with the will annexed of Lucy Jemima Peacock, deceased, asking to have the question determined whether she could give to the defendant, who was the trustee of a marriage settlement dated the 20th of January, 1875, a valid receipt and discharge for the moneys comprised in the settlement which had become divisible.

The settlement was made upon the marriage of Lucy Jemima Ogilvie, spinster, with Henry Peacock, and thereby certain funds and securities were settled for the husband and wife for their lives and the life of the survivor, and after the death of the survivor if (as happened) there should be no issue of the marriage, upon trust for such persons as Lucy Jemima should during coverture by will or codicil, and when not under coverture by deed, will, or codicil, appoint.

The marriage took place on the 21st of January, 1875.

Lucy Peacock died on the 14th of September, 1882, and Henry Peacock on the 6th of April, 1900.

By her will dated the 30th of September, 1880, Mrs. Peacock, after referring to the settlement and her general power of appointment thereunder, appointed and directed that the settled funds should be paid or transferred to her sister Eliza Jane Ogilvie and her brother Charles Frederick Ogilvie, upon trust to pay £200 to her niece Mrs. Ashe, and to divide the residue among certain named persons, and she appointed her said sister and brother executrix and executor of her will.

By a codicil, dated the 5th of October, 1881, the testatrix made a different disposition with regard to certain policy moneys, part of the settled property, and in all other respects she confirmed her will. The said Eliza Jane Ogilvie and Charles Frederick Ogilvie respectively died without having proved the will of the testatrix, and on the 31st of May, 1901, letters of administration to the estate of Mrs. Peacock with the will and codicil annexed were granted to the plaintiff.

The plaintiff then applied to the defendant, the trustee of the fund, to pay and transfer to her the funds subject to the settlement, in order that she might carry out the testamentary directions of the testatrix, but the defendant objected to do so, alleging that the plaintiff could not give him a valid discharge.

A. J. Chitty, for plaintiff.—The administrator is in the same position as an executor would be, and no

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

distinction can be drawn: *In re Philbrick's Trusts*, 13 W. R. 570, 34 L. J. Ch. 368. The executor receives the fund, and gives a discharge as the person having administration of the estate. The administrator should have the administration of the appointed fund: *In re Hoskin's Trusts*, 25 W. R. 779, 6 Ch. D. 281.

Counsel also referred to *The London Chartered Bank of Australia* v. *Lemprière*, 21 W. R. 513, L. R 4 P. C. 572.

Martelli, for defendant.—The real question is in what capacity the executor of a married woman takes the appointed fund: *In re Philbrick's Trusts; In re Roper*, 36 W. R. 750, 39 Ch. D. 482.

Counsel also referred to *Hayes* v. *Oatley*, L. R. 14 Eq. 1, 20 W. R. Ch. Dig. 4; *In re Treasure*, 48 W. R. 696, [1900] 2 Ch. 648; *Moore* v. *Moore*, 49 W. R. 373, [1901] 1 Ch. 691; *In re Maddock, ante*, p. 54, [1901] 2 Ch. 372.

Chitty replied.

SWINFEN EADY, J.—It was settled by the cases of *In re Philbrick's Trusts* and *In re Hoskin's Trusts*, that where a married woman or any other person having a general power of appointment over a fund of personalty makes an appointment of the fund by will and appoints an executor, such executor after he has proved the will is entitled to receive and give a valid discharge for the appointed fund. Counsel for the defendant did not dispute the authority of those cases, but contended that they only established the proposition that an executor was so entitled and that an administrator with the will annexed stood in a different position. It was conceded that there was no authority which showed that such an administrator stood in any different position, and I am not aware of any principle which requires any distinction to be made. If the donee of a power does not exercise it she leaves the funds to go as in default of appointment and to be administered by the trustees of the instrument, and the like result will follow if she exercises the power by deed and appoints only to beneficiaries; if, however, she exercises the power by deed, and wishes other trustees to administer the fund, she has only to appoint the fund to those trustees to be held by them upon the trusts then declared. If the donee exercises the power by will, and still wishes the original trustees to administer the fund, she can appoint them her executors, or, if she so desires, she may appoint different persons to be her executors, and those persons will then distribute the appointed funds. If, however, she appoints by will, and does not appoint any executors, or if executors appointed by her die or disclaim, I am of opinion that she commits the distribution of the fund to the person to whom the Probate Court shall grant letters of administration with the will annexed. It has been the practice of the Probate Court for many years to grant administration with the will annexed in the case of the will of a married woman, made by virtue of a power, where no executor is named: see rule 15 of the Rules and Orders for the Principal Registry in Non-Contentious Business, 1862. If the contention put forward by defendant were correct, such an administrator would have no duties whatever to perform. Moreover, a rule that an executor should be the person to administer, but not an administrator, might give rise to considerable difficulties, thus an executor might prove the will and receive the trust fund and die intestate before administering. Who, then, is to complete the administration and division? If an administrator *de bonis non* cannot do so, is it to be held that the funds must in such a case be repaid to the original trustees? Again, it has long been settled that by exercising a general power of appointment by will a testator subjects the appointed property to the payment of all his debts, if and so far as his own property may be insufficient for that purpose; the appointed fund becoming equitable assets. Practical convenience requires that the person to administer these assets shall be the person whose duty it is as executor or administrator to ascertain and provide for the debts in due course of administration. Again, it is settled law that where a testator with a general power of appointment gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it, is required to make the legacies effective, and the same rule would apply though no executor were appointed: *In re Davies' Trusts*, 20 W. R. 165, L. R. 13 Eq. 163. Now the executor or administrator, as the case may be, is the person to pay these legacies, and the only person who can ascertain in the event of the testator's own estate being insufficient, how much of the appointed funds will be required to make up the deficiency so as to render the legacies effective. Upon these grounds I decide that the plaintiff in the present case can give a valid receipt and discharge for all the settled funds.

Solicitors for the plaintiff, *Harry Wilson & Co.*, for *St. George Ashe*, Cambridge.

Solicitor for the defendants, *H. P. Spottiswoode*.

K. B. Div. (Bigham, J.) — Jan. 31; April 16.

MILLAR v. LAW ACCIDENT INSURANCE SOCIETY (LIMITED). (a.)

Insurance—Marine—Policy on cattle—"Restraint of people"—Inability to land cattle at foreign port owing to order prohibiting landing—"Warranted free of capture, seizure, and detention."

Under a Lloyd's policy cattle were insured for a voyage from Liverpool to Buenos Ayres against "arrests, restraints, and detainments of princes and people." The policy also contained the following clause: "Warranted free of capture, seizure, and detention." Prior to the shipment the Argentine Government passed a decree prohibiting the entry of animals suffering from contagious diseases. On arrival at Buenos Ayres the authorities refused to allow the cattle to be landed, as they were found to be suffering from a contagious disease. The cattle, being transhipped, were subsequently sold at a considerable loss.

Held, in an action on the policy, that such a loss was not a loss within the policy, and that the mere operation of a municipal law affecting or preventing the delivery of the insured goods at their destination was no "restraint of people" within the meaning of the policy; that the words did not cover the operation of the ordinary law of the land, but related only to some violent departure from the ordinary course of things.

Held, also, that "warranted free of capture, seizure, and detention" freed the underwriters from liabilities under the words arrests, restraints, and detainments in the body of the policy.

Action tried in the commercial list without a jury.

This was an action brought on a policy of insurance on live stock dated the 24th of August, 1900, to recover as for a total or a partial loss.

The live stock were on board the steamship *Bellevue*; and the policy contained the following clause:

"From Liverpool to Monte Video and/or Buenos

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Ayres, and so far as actual mortality is concerned for three days after landing."

Amongst the risks insured against were: "Arrests, restraints, and detainments of princes and people . . . and all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said goods . . . or any part thereof."

The policy also contained the following clause: "Warranted free of capture, seizure, and detention."

The facts sufficiently appear from the judgment.

Hamilton, K.C., and *Maurice Hill*, for the plaintiffs.

Scrutton, K.C., and *H. W. Lochnis*, for the defendants.

The following cases were cited: *Rodocanachi* v. *Elliott*, 21 W. R. 810, L. R. 8 C. P. 649, see also L. R. 9 C. P. 518; *Nobel's Explosives Co.* (*Limited*) v. *Jenkins & Co.*, 1 Com. Cas. 436, 45 W. R. Dig. 147; *Brunner* v. *Webster*, 5 Com. Cas. 167; *Cory* v. *Burr*, 31 W. R. 894; *Hadkinson* v. *Robinson*, 3 Bos. & P. 388; *Ruys* v. *The Royal Exchange Assurance Corporation*, 2 Com. Cas. 201, 45 W. R. Dig. 74; *Finlay* v. *Liverpool and Great Western Steamship Co.*, 23 L. T. Rep. 251; *Field Steamship Co.* (*Limited*) v. *Burr*, 47 W. R. 341, [1899] 1 Q. B. 579; *Robinson Gold Mining Co.* v. *Alliance Marine and General Assurance Co.* (*ante*, p. 109), 6 Com. Cas. 244, at p. 250; *Barker* v. *Blakes*, 9 East, 283; *The Pomeranian*, [1895] P. 349, 44 W. R. Dig. 81; *Cologan* v. *London Assurance*, 5 M. & Sel. 447; *Progresso*, 50 Federal Reporter, 835.

Cur. adv. vult.

BIGHAM, J., delivered the following judgment: This action is brought to recover the amount of a total or partial loss of cattle under a Lloyd's policy of marine insurance granted by the defendants to the plaintiffs. The risks insured against are described in the usual way, and include "arrests, restraints, and detainments of princes and people . . . and all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said goods . . . or any part thereof." It is under these words that the claim is made, and the question for me to determine is whether the facts of the case bring the loss within the meaning of the words. The story is short. The plaintiffs shipped a number of bulls by the steamer *Bellevue*, to be carried from Liverpool to Buenos Ayres; and having made the shipment they effected the policy sued on. Many months before the shipment was made the Argentine Government had passed a decree forbidding the entry of animals suffering from contagious diseases, or coming from countries where such diseases prevail. The decree contained articles describing the diseases and providing how animals suspected of being affected were to be dealt with. *The Bellevue* arrived at Buenos Ayres on the 10th of September, 1900, and the cattle were duly inspected on board the vessel by the Argentine officials, with the result that the Ministry of Agriculture came to the conclusion that they were suffering from disease within the meaning of the decree, and ordered the vessel to leave the port. The order contained a provision that the captain, if he so wished, might tranship the cattle to another vessel outside the limits of the port for carriage to some other destination. On the next day, the 11th of September, the ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom until further notice. I find as a fact that the animals were suffering from disease within the meaning of the decree, and that the order forbidding the landing was lawfully made by the Argentine authorities. In obedience to the order *The Bellevue* left the dock in Buenos Ayres, and on the 14th of September the cattle were transhipped into lighters at a place called Santiago, which is outside the limits of the port. On this day notice of abandonment was given. The cattle remained in the lighters for some days, when a ship called *The Sallust* was found to take them on to Monte Video, at which place, after being forty days in quarantine, they were landed and sold, and of course at a considerable loss. It is in these circumstances that the plaintiffs claim for a total or partial loss, alleging (to follow the words of the pleader) that the prohibition of the landing constituted a "restraint of people" within the meaning of the policy.

The right to recover depends upon whether the loss is directly due to a "restraint of people." I am of opinion that it is not. It is not necessary for me to give an exhaustive definition of the expression "restraint of people," and I shall not attempt to do so. It is sufficient to say that the mere operation of an ordinary municipal law affecting or preventing the delivery of the insured goods at their destination is no "restraint of people" within the meaning of the policy. As in the case of perils of the sea, there must be something violent and out of the ordinary course of things before the peril is brought within the meaning of the policy. The maker of a bill of lading protects himself by an exception of the acts and restraints of princes. Such an exception was held in *Finlay* v. *Liverpool and Great Western Steamship Co.*, not to cover the case of a judgment in a court of law of the United States of America directing the goods to be delivered to third parties who had claimed them. The "acts and restraints of princes," said Baron Martin in that case, mentioned and provided against in the bill of lading, have reference to the forcible interference of a state or of the government of a country taking possession of the goods *manu forti*, and do not extend to the legal proceedings which take place in the courts of the country. So in the present case the words do not, in my opinion, cover the operation of the ordinary law of the land, but relate only to some violent departure from the ordinary course of things. The plaintiffs relied upon the authority of *Rodocanachi* v. *Elliott*. There goods were in transit from Marseilles to London. They had to pass through Paris, and no their way they came within the lines of the German army by which Paris was then completely invested. In consequence of this state of things the goods could not be moved. This was held to constitute a restraint of princes. Baron Bramwell, in delivering the judgment of the Exchequer Chamber, says (at p. 522): "But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there has been no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of the goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army." This shows that the court was of opinion that the goods were, for all effective purposes, seized by the German army and taken out of the control and disposition of the owners; it was by the forcible and therefore by the violent act of the German army that the goods were prevented from reaching their destination. No other view of the facts in that case could have been taken, and having regard to that view, no other conclusion could be arrived at than that the plaintiffs had lost their goods by a "restraint of princes." But in the present case no force of any kind was used; the captain was required to obey the ordinary law existing in the country at the time when

the goods arrived; and he obeyed it. To call the resulting consequences a loss by restraint of peoples or princes is, in my opinion, to give to the expression a meaning which it was never intended to bear.

A further point arose in the case, on which I also think I ought to give judgment for the defendants, although, having regard to my decision on the first point, it is not really necessary to consider it. The policy contained the following clause: "Warranted free of capture, seizure, and detention." It was said that this exception ought not to be interpreted to include "restraint." I think, however, that the very object of this exception is to free the underwriters from liability under the words arrests, restraints, and detainments in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before; and to what if not to the words I have mentioned? An attempt was made to bring the loss within the general words "all other perils, losses, and misfortunes that shall come to the damage of the goods," but as to this it is sufficient to say that these words only cover losses of a kind similar to those particularly enumerated in the previous part of the policy, and do not include a loss of an exceptional kind like that which has happened in this case.

Judgment for the defendants.

Solicitors for the plaintiffs, *Rowcliffes, Rawle & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wright and Ridley, JJ.) } Feb. 14; March 3.

REX *v.* ARCHBISHOP OF CANTERBURY.
In re GORE.
Ex parte COBHAM AND GARBETT (No. 2). (*a.*)

Practice—Costs—Crown—Prerogative writ of mandamus *—No jurisdiction to give costs to Crown.*

Rules nisi *were granted at the instance of certain prosecutors calling on the Archbishop of Canterbury and his vicar-general to show cause why a prerogative writ of* mandamus *should not issue commanding him to hear opponents of the confirmation of a bishop-elect. Notice of the rules was directed to be served on the dean and chapter. There was no similar direction to serve the Treasury on behalf of the Crown, but the application affected the rights of the Crown. Cause was shown by the law officers appearing on behalf of the Crown without any objection being raised, and by counsel on behalf of the archbishop and the vicar-general. The rules were discharged, costs being allowed to the archbishop and the vicar-general. Subsequently the case came before the court again on the question whether the court had jurisdiction to order the prosecutors to pay costs to the Crown.*

Held, that the court has no jurisdiction to order such costs, and that the ancient doctrine that in matters at common law the Crown neither pays nor receives costs had not been altered either by 1 *Will.* 4, *c.* 21, *s.* 6, *or the Rules of the Supreme Court.*

In this case, reported *ante* at p. 348, rules *nisi* were granted, at the instance of the prosecutors Cobham and Garbett, calling on the Archbishop of Canterbury and his vicar-general to show cause why a prerogative writ of *mandamus* should not issue commanding him to hear opponents of the confirmation of Canon Gore as bishop-elect of the diocese of Worcester.

Notice of the rules was directed to be served on the dean and chapter.

There was no similar direction to serve the Treasury on behalf of the Crown, but the application affected the rights of the Crown.

Cause was shown by the law officers appearing on behalf of the Crown without any objection being raised, and by counsel on behalf of the archbishop and the vicar-general, and after argument the rules were discharged, costs being allowed to the archbishop.

The question now raised was whether the court had jurisdiction to order the prosecutors to pay costs to the Crown.

Danckwerts, K.C. (*Morton Smith* with him), for Garbett.—In this case two questions arise. Firstly, as to the costs of the Crown, which was not a party to the original rules, and only came in to show cause. [Lord ALVERSTONE, L.C.J.—That makes no difference, for I think that these rules ought to have been served on the Crown.] Secondly, as to the costs of the archbishop and of the vicar-general. Their right to the costs they had personally incurred is not disputed, but such costs were very little, if any, as the Crown took up their case, and instructed counsel to appear for them, and their costs stood on the same footing as the costs of the Crown. The inflexible rule of the common law, apart from any Act of Parliament, is that the Crown neither pays nor receives costs: Kerr's Blackstone's Commentaries (4th ed.), vol. 3, p. 402; Chitty on Prerogatives of the Crown, p. 310; West on the Law of Extents, c. 22, p. 227; Manning's Exchequer Practice, p. 69; Burton's Exchequer Practice, vol. 1, p. 248. Modern practice has not altered this rule: *Rex* v. *Corum*, 1 Anstr. 50; *The Lord Advocate of Scotland* v. *Lord Dunglas*, 9 Cl. & Fin. 173; *Smith* v. *Earl of Stair and Others*, 2 H. L. Cas. 807; *The Lord Advocate for Scotland* v. *Hamilton*, 1 Macq. 46; *Kane* v. *Reynolds*, 3 W. R. 85, 4 De G. M. & G. 565, at p. 571; *The Queen* v. *Burial Board of Bishop Wearmouth*, 5 Q. B. D. 67, at p. 72, 28 W. R. Dig. 31 (in which case the order as to costs was subsequently reversed); *Mews* v. *The Queen*, 31 W. R. 385, 8 App. Cas. 339, at p. 353; *The Queen* v. *Justices of Middlesex*, 33 W. R. Dig. 49, 9 App. Cas. 757, at p. 786; 9 Anne, c. 20, is the only statute which ever gave the court power to give costs in proceedings upon writs of *mandamus*, see section 5; but that statute only deals with costs where a rule is made absolute. The costs were payable by common law as a punishment for erroneously putting the jurisdiction of the court in motion: see vol. 6 Viner's Abridgment, p. 322. The Judicature Acts and the Rules of the Supreme Court, 1883, ord. 65, r. 1, do not enable the court or a judge to order costs to be paid by persons who before the Acts came into operation could not have been ordered to pay them; they only regulate the mode in which costs are to be dealt with in cases where the court antecedently had jurisdiction, either original or statutory, to award costs: *In re Mills's Estate*, 35 W. R. 65, 34 Ch. D. 24; *Pringle* v. *Secretary of State for India*, 40 Ch. D. 288. A person who is not called upon to show cause is not entitled to costs.

Bramwell Davis, K.C. (*B. Whitehead* with him), for Cobham, did not argue.

Sutton, for the Crown.—The Crown is entitled to costs. In *Moore* v. *Smith*, 7 W. R. 206, 1 E. & E. 597, which is a decision under section 6 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43),

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

it was held that the court, on confirming a conviction on an information laid on behalf of the Crown, had jurisdiction under section 6 to award costs to the Crown. Under 1 Will. 4, c. 21, s. 6, costs have been given both in favour of and against the Crown. The words of that section are quite wide enough to include proceedings by or against the Crown. This section was repealed by the Statute Law Revision Act, 1881 (44 & 45 Vict. c. 59), which extended the powers in the Judicature Acts to make rules of court. The general effect of the Supreme Court Rules is to give the court a discretion as to costs in all cases. In *The Queen* v. *Secretary for War*, 40 W. R. 5, [1891] 2 Q. B. 326, the Crown obtained an order for costs.

Cur. adv. vult.

March 3.—Lord ALVERSTONE, L.C.J., read the following judgment of the court: In this case rules *nisi* were granted at the instance of the prosecutors Cobham and Garbett, calling on the Archbishop of Canterbury and his vicar-general to show cause why a prerogative writ of *mandamus* should not issue commanding him to hear opponents of the confirmation of Canon Gore as Bishop-Elect of the Diocese of Worcester. Notice of the rules was directed to be served on the dean and chapter. There was no similar direction to serve the Treasury on behalf of the Crown, but the application affected the rights of the Crown, and, in our opinion, the Attorney-General had a clear right to oppose the motion. Cause was shown before us by the law officers appearing on behalf of the Crown without objection raised, and by counsel on behalf of the archbishop and vicar-general, and after argument the rules were discharged, costs being allowed to the archbishop.

The only question remaining to be considered is whether we have jurisdiction to order the prosecutors to pay costs to the Crown. We have not been referred to any case, nor have we been able to discover any, in which the ancient doctrine that in matters at common law the Crown "never paid nor received costs," as it is laid down by Lord Campbell in *Reg.* v. *Beadle*, 5 W. R. 498, 7 El. & Bl. 492, and in *Rex* v. *Miles*, 7 Term Rep. 367, *Lord Advocate* v. *Lord Dunglas*, 9 Cl. & Fin. 173, and *Smith* v. *Earl of Stair*, 2 H. L. Cas., at p. 809, has been expressly questioned in regard to the prerogative writ of *mandamus*. There certainly have been some instances in which the doctrine has been disregarded, whether from inadvertence or otherwise we do not know; but in the only reported cases in which it has been considered, the doctrine has been admitted at the bar, whether in favour of or against the Crown; and we think it clear that neither the Act 1 Will. 4, c. 21, s. 6, nor the existing Rules of the Supreme Court have altered the law as affecting the present case. We must not be understood as expressing any opinion either in relation to matters other than the prerogative writ of *mandamus*, or even as to that writ when it is applied for by or against the officers of executive departments of the public service in relation to their statutory or other duties. On the one hand, the fact that statutes have been passed providing for payment of costs to the Crown in relation to Crown specialties (33 Hen. 8, c. 39), and by or to the Crown upon petitions of right (23 & 24 Vict. c. 34), or upon revenue suits (18 & 19 Vict. c. 90 and 22 & 23 Vict. c. 21), proceedings in relation to customs (40 & 41 Vict. c. 13, s. 5), and upon proceedings by the Commissioners of the Admiralty (27 & 28 Vict. c. 57, s. 11; 28 & 29 Vict. c. 124, s. 2; and 31 & 32 Vict. c. 78, s. 5), is of some weight as an indication that express legislation was necessary in order to exclude the rule of the common law. On the other hand, as incidental to departmental administration, there must often be litigation which does not directly affect any prerogative of the Crown and as to which no good reason can be assigned for the denial of costs to the successful party. And the case of *Moore* v. *Smith* supports this view. The question does not arise in this case, but the question may be worthy of consideration whether the Act of 1881 (44 & 45 Vict. c. 59, s. 6) gives power to make Rules of the Supreme Court in relation "to proceedings by or against the Crown." The words are *primâ facie* wide enough to include power to make provision for costs, but it may be that the decision in *In re Mills's Estate* shows that the terms of this section cannot be construed so widely as to enable rules to be made binding the Crown to pay costs in all cases. We agree with the Court of Queen's Bench in *Reg.* v. *Beadle* that it is very desirable that such provision should be made, and, if effectual and proper provision cannot be made by rules for enforcing payment of costs by the Crown, the matter is one very proper for the consideration of the Legislature. In the Crown Suits Act and the Petition of Right Act a special procedure is provided, but in the Customs and Admiralty Acts a simple declaration of liabilility was regarded as sufficient. In the present case, for the reasons which we have given, we cannot make any order for payment of costs to the Crown.

Solicitor for Garbett, *R. Todd.*

Solicitors for Cobham, *Wainwright & Co.*

Solicitor for the Crown, *Solicitor to the Treasury.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — March 10.

REX *v.* TRISTRAM. (*a.*)

Ecclesiastical law—Consistory court—Jurisdiction of bishop—Jurisdiction of chancellor—Patent appointing chancellor—Reservation to bishop of certain causes—Validity of reservation—Prohibition.

Letters patent granted by a bishop, appointing an official principal and vicar-general, and conferring on him power to determine suits in the consistory court, contained the following reservation: "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment."

Held, that the reservation was valid, and that prohibition lay to the official principal to prohibit him from proceeding without the bishop's consent in a suit in which one of the parties earnestly craved the bishop's judgment.

Judgment of the Divisional Court, [1901] 2 *K. B.* 141, *reversed.*

Appeal from the judgment of a Divisional Court (Darling and Channell, JJ.) discharging a rule *nisi* for a prohibition to the Chancellor of the Diocese of Chichester: [1901] 2 K. B. 141, 49 W. R. Dig. 61.

On the 18th of January, 1899, a suit was brought in the Consistory Court of Chichester for the purpose of obtaining a faculty authorizing the removal out of the Church of the Annunciation, in the town of

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Brighton, in the Diocese of Chichester, of certain ornaments which were alleged to be illegal.

The petitioner was George Davey, a parishioner of the parish of the said church.

The opponents were the Rev. Henry Fitzrichard Hinde, the vicar, and William Henry Hammond and William Henry Funhall Littlechild, the churchwardens.

The opponents, by their answer, *inter alia*, alleged and propounded that "before any decision or final determination of the cause aforesaid, the Right Reverend Father in God, Ernest Roland, Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the said Lord Bishop should examine and determine the said cause in his own proper person in this court."

The petitioner, by his reply, submitted that the consent of the Lord Bishop of Chichester prayed for by the answer was not necessary to the hearing and determination of the cause, and humbly supplicated that the said cause might be examined and determined by the official principal of the court.

The cause came on to be heard before Dr. Tristram, Q.C., the Chancellor of the Diocese and Official Principal of the Consistory Court of Chichester, sitting alone, the bishop not being present. The objection on the part of the opponents that the bishop ought to be consulted and that they were entitled to his judgment, was taken at the hearing and was argued.

The letters patent under which Dr. Tristram held his appointment as chancellor and official principal were dated the 30th of August, 1892, and were granted by the then Bishop of Chichester, Dr. Durnford. So far as material they were as follows:

"Richard, by divine permission, Lord Bishop of Chichester, to all the faithful in Christ to whom this present writing shall come, grace and health in the Lord Everlasting. Know ye that we, regarding the holy doctrine, life, manner, integrity, and learning, as well as knowledge in all law, and his dexterity, fidelity, and prudence in transacting business, have given, granted, and confirmed, and by this present writing do for us and our successors, give, grant, and confirm to our beloved in Christ, Thomas Hutchinson Tristram, of 12, King's Bench-walk, Temple, one of her Majesty's counsel and a doctor of civil law, during his natural life, the office or offices (hereafter and in the manner hereafter defined) of our vicar-general in spirituals and official principal of our consistory and our successors in and throughout the Archdeaconry of Lewes, also of our sequestrator and administrator-general within the archdeaconry aforesaid (which said office is now vacant by the death of our beloved in Christ, Robert Wintle Wintle, Esq., Master of Arts). And we do by these presents ordain, constitute, and make him the said Thomas Hutchinson Tristram our commissary, official principal, and vicar-general in spirituals of us and our successors in and through the whole Archdeaconry of Lewes, with power of surrogating, substituting, constituting, and making any other and others fit person or persons in his stead and place in this behalf as often as he shall happen to be hindered, and of recalling or removing them as often as need shall be (nevertheless and in either case consulting us and our successors and having first our consent and approbation). Moreover, we do for us and our successors give, grant, and confirm unto the said Thomas Hutchinson Tristram during his natural life that in our absence from our Consistory Court of Lewes he shall and may proceed by himself, his assignee or substitute, assignees or substitutes, as well in all and singular causes, businesses, suits, and complaints, spiritual and ecclesiastical, at the instance or promotion of whatsoever parties as by our mere and mixed office; also in all causes of dilapidation of the goods of the church and robbing of churches, and in all other businesses and causes whatsoever (except hereafter excepted) in our episcopal Consistory Court of Lewes moved or to be moved, the cognizance and decision whereof is known by law or custom of the realm to belong to our ecclesiastical court, and to decide and finally determine all and singular those the causes aforesaid (except hereafter excepted) with all the rights thereto incident issuing, depending, annexed, and connexed without breach of the laws and statutes of this excellent kingdom; Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment. . . . Except, notwithstanding, and always reserved to us and our successors the complaints and applications hereafter to be made by whatsoever clergy in all and singular causes, and reserved also to us and our successors equally to examine and determine every cause in our proper person in our Court of Consistory."

Dr. Tristram, after taking time to consider, held that the question of the validity of the reservation of the bishop's jurisdiction, contained in the letters patent, was for the determination of the High Court, and expressed an opinion that such reservation was invalid; and he gave judgment on the merits of the case, decreeing a penalty for the removal of certain ornaments from the church: see the report of *Davey* v. *Hinde*, [1901] P. 95, 49 W. R. Dig. 59.

The opponents then applied for and obtained a rule *nisi* calling on Dr. Tristram and George Davey to show cause why a writ of prohibition should not issue to prohibit them from further proceeding in the suit.

The Divisional Court discharged the rule on the grounds, first, that, even if Dr. Tristram ought to have consulted the bishop, he had at the utmost merely adopted a wrong procedure, and, had not acted without jurisdiction; and, secondly, that, even if there had been a want of jurisdiction, it was not apparent on the face of the proceedings.

The opponents appealed.

Duke, K.C., and *E. W. Hansell*, for the appellants.—The chancellor acted without jurisdiction, and prohibition ought to be allowed to issue. The patent by which the Bishop of Chichester conferred jurisdiction on the chancellor to hear and determine causes contains this reservation: "Nevertheless, first consulting us and our successors, and having our consent in case either party earnestly crave for judgment." Where either party earnestly craves the judgment of the bishop, his consent is a condition precedent to the jurisdiction of the chancellor to hear the cause. Either party has a right to have the cause heard and adjudicated upon by the bishop. Even if the consent of the bishop is only necessary to the judgment which the chancellor proposes to deliver, no such consent was obtained in this case. The want of jurisdiction appears plainly on the face of the proceedings—viz., in the pleadings.

They referred to *Mayor of London* v. *Cox*, 16 W. R. 44, L. R. 2 H. L. 239; *Ex parte Medwin*, 1 E. & B. 609; *Bishop of St. David's* v. *Lucy*, 1 Salk. 134; *Serjeant* v. *Dale*, 2 Q. B. D. 558, 25 W. R. Dig. 106; *Hudson* v. *Tooth*, 26 W. R. 95, 3 Q. B. D. 46; *Farquharson* v. *Morgan*, 42 W. R. 306, [1894] 1 Q. B. 552; *Boyd* v. *Phillpotts*, L. R. 4 Adm. & Ecc. 297; *Buggin* v. *Bennett*, 4 Burr. 2035; Gibson's Codex, vol. 2. 986.

Dibdin, K.C. (*Reginald Dodd* with him), for the

respondents.—The Divisional Court were right in refusing to grant a prohibition. The appellants did not continuously crave the bishop's judgment. They asked for it in their pleading, but they appeared before the chancellor and argued various points, and took their chance of a judgment in their favour. Further, no want of jurisdiction is apparent on the proceedings; for it does not appear that the bishop's consent was not in fact obtained. But there is another answer to the application for a prohibition The reservation in the patent of the bishop's jurisdiction is invalid. Such a reservation was required to be inserted in a patent appointing a chancellor by Canon 11 of the Canons of 1640. But the Canons of 1640 were annulled by 13 Car. 2, c. 12, s. 5. The respective jurisdictions of the bishop and the chancellor are shown by Canon 122 of the Canons of 1603. The chancellor has sole jurisdiction in all cases except where a sentence of deprivation is to be pronounced against a clergyman. The patent in use in the diocese of Ely is the only patent which has a reservation similar to this; such a reservation must now be treated as obsolete.

He cited 4 Co. Inst., p. 338; Ayliffe's Parergon, p. 160; Godolphin's Repertorium Canonicum, p. 80; *Procurator-General* v. *Stone*, 1 Hagg. Consist. 424, at p. 433; *Middleton* v. *Crofts*, 2 Atk. 650, at p. 664; *Phillimore* v. *Machon*, 1 P. D. 481, 25 W. R. Dig. 10.

Duke, K.C., in reply.—The appellants never gave up their point that the chancellor had no jurisdiction, but continued to take that objection at every step in the proceedings. The case of *Ex parte Law*, 2 A. & E. 45, shows that they were right in waiting for the judgment of the chancellor before they asked for a prohibition. As to the validity of the reservation in the patent, there is nothing repugnant to good sense in it, neither has it ever been suggested until now that it was obsolete. It is true the Ely patent is the only one which has a reservation in exactly similar terms. But the patents in use in the dioceses of St. Asaph, Bangor, and Carlisle contain a reservation of jurisdiction to the bishop, though there are no words giving power to the parties to crave the judgment of the bishop. This reservation is not based on the Canons of 1640. The right of the bishop to reserve jurisdiction to himself existed long before that date: see Dr. Stubbs's Historical Appendix to the Report of the Ecclesiastical Courts Commission. And this right was not taken away by section 5 of 13 Car. 2, c. 12.

He referred to several instances of jurisdiction being exercised by the bishop collected in Rothery's Returns, and cited *Gibbons* v. *Bishop of Cloyne*, Holt 599, and *Boyd* v. *Phillpotts*, L. R. 4 Adm. & Ecc. 297, at p. 316.

Cur. adv. vult.

March 10.—COLLINS, M.R., read the following judgment: This is an appeal from a decision of the Divisional Court discharging a rule *nisi* for a prohibition obtained by the appellants prohibiting the respondents from proceeding further in a certain suit instituted in the Consistorial Court of the Bishop of Chichester, in which the respondent Mr. Davey was the petitioner and the Rev. Mr. Hinde and others were respondents, and of which court Dr. Tristram is the official principal.

Dr. Tristram holds his appointment as vicar-general in spirituals and official principal of the Consistory Court of the Bishop of Chichester under a patent from the bishop; and the question is whether, having regard to the terms of that patent, Dr. Tristram had jurisdiction to hear and determine the case. The patent confers jurisdiction in the following terms: "Moreover we do for us and our successors give, grant, and confirm unto the said Thomas Hutchinson Tristram during his natural life, that in our absence from our Consistory Court of Lewes he shall and may proceed by himself, his assignee or substitute, assignees or substitutes, as well in all and singular causes, businesses, suits, and complaints, spiritual and ecclesiastical, at the instance or promotion of whatsoever parties as by our mere and mixed office; also in all causes of dilapidation of the goods of the church and robbing of churches and in all other businesses and causes whatsoever (except hereafter excepted)"—the exceptions are not material in this case—"in our Episcopal Consistory Court of Lewes moved or to be moved the cognizance and decision whereof is known by law or custom of the realm to belong to our Ecclesiastical Court, and to decide and finally determine all and singular those the causes aforesaid (except hereafter excepted) with all the rights thereto incident issuing, depending, annexed, and connexed, without breach of the laws and statutes of this excellent kingdom; nevertheless, first consulting us and our successors and having our consent in case either party earnestly crave our judgment."

The respondents on the face of their answer pleaded "that before any decision or final determination of the cause aforesaid the Right Reverend Father in God Ernest Roland, by Divine permission Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the said Lord Bishop should examine and determine the said cause in his own proper person in this court." To this paragraph the petitioner in paragraph 4 of his reply "submits that the consent of the Right Reverend the Lord Bishop of Chichester prayed for by paragraph 5 of the respondents' answer is not necessary to the hearing and determination of this cause, and humbly supplicates that the said cause may be examined and determined by the Worshipful Thomas Hutchinson Tristram, Doctor of Laws, the official principal of this court."

The point was again raised by counsel for the respondents at the hearing before Dr. Tristram (see the report of *Davey* v. *Hinde*, [1901] P. 95, 49 W. R. Dig. 59), who, nevertheless, proceeded with the hearing of the case, and, after the determination of another preliminary point made by the respondents, delivered judgment on the 21st of August, 1900, holding that he had jurisdiction and dealing with the merits of the case. Though the fact was not and could not be averred on the face of the proceedings, it is clear from Dr. Tristram's judgment that he did not consult the bishop or obtain his consent either to his hearing the case or to the terms of his judgment. The question is whether the qualification contained in the concluding words in the grant of jurisdiction above set out deprived Dr. Tristram of the right to determine the case without first consulting the bishop and obtaining his consent, the respondents having earnestly craved the bishop's personal judgment.

The case was argued and decided in the Divisional Court only on the grounds (1) that, assuming the qualification in the patent to be valid in point of law, it went to procedure only, and not to jurisdiction; and (2) that in any view the objection was not sufficiently raised on the face of the proceedings to entitle the respondents, the now appellants, to apply for prohibition. Before us the additional point was made and argued that the qualification in the patent was itself illegal and nugatory.

First, then, with respect to the grounds on which the case was decided in the court below. Does the limitation or qualification in the grant go to the

jurisdiction, or is consultation with the bishop a mere matter of procedure not affecting jurisdiction, as the court below held? On the hypothesis that the patent is valid, the chancellor takes no jurisdiction but that which it confers. He is a delegate, and is bound by the terms of the instrument of delegation. Two constructions have been put upon the limiting words; but in either view it seems to me that they go to jurisdiction, and that under the patent the grantee does not acquire jurisdiction to determine the case when either party craves the bishop's judgment, unless the bishop has been consulted and consented. It seems to me that the clause, read in its context, has the effect of shutting out from the jurisdiction of the chancellor such cases unless he has consulted and obtained the consent of the bishop to his entertaining them. I think the word "nevertheless" at the beginning of the clause, coming as it does after a general delegation of authority, points to an exclusion from the jurisdiction of a certain class of cases, unless the bishop has after consultation consented to his grantee entertaining them. Without such consent there is no grant of jurisdiction at all. But, even if the construction of the clause is that adopted in the Divisional Court by Darling, J., and, I think also, though I am not quite sure, by Channell, J., it seems to me that it also goes to jurisdiction. They treat it—the consultation and consent—as having regard to the judgment only and not to the entertaining of the case; but they did not and could not ignore the fact that the clause does require consultation with the bishop and his consent to the judgment to be given. If this is the true meaning of the clause it seems to me that the judgment given in such a case, without consultation and without the consent of the bishop, would be a judgment given without jurisdiction. It is a condition precedent to the right of the grantee to give judgment, and unless he fulfils the condition he exceeds his jurisdiction in pronouncing judgment.

It was, however, argued that the objection to jurisdiction had been waived, and that whether it had been waived or not it was not sufficiently raised on the face of the proceedings to justify the appellants in asking for a prohibition. Mr. Dibdin did not insist upon waiver in the ordinary sense, as being capable of founding jurisdiction, but he urged that in truth and in fact the now appellants had shown by their conduct of the case that they did not earnestly crave the bishop's judgment and that in that sense the objection to jurisdiction must be taken to have been waived. I can see no ground whatever for saying that the appellants ever receded from the position which they took up in their pleadings. They there formulated a demand for the bishop's personal intervention; they took the point at the trial; they never receded from it, and the learned judge obviously did not consider that they had abandoned it, for in his judgment given in August he discusses and deals with it. It is true they had, in the meantime, raised another preliminary point, as to the *locus standi* of the petitioner, which was decided against them, the learned judge holding over his judgment until that point was determined. But these facts seem to me to afford no evidence whatever that the appellants had ceased to desire the bishop's judgment; nor could they know, nor were they bound to anticipate, that, in his judgment so given, the learned judge would, from their point of view, exceed his jurisdiction. There is clear authority that the right to ask for prohibition, if not otherwise defective, still remains open to them. "For till sentence be given," says Lord Ellenborough in *Gould* v. *Gapper*, 5 East. 345, at p. 364, "the courts of common law have no reason to suppose that the Ecclesiastical Court will determine wrong; which, however, if it should do, it is not too late to come then, that is, after sentence, for a prohibition; for the sentence is in such case the gravamen; and so it was expressly stated to be by Holt, C.J., and the court in *Shotter* v. *Friend*, 2 Salk. 547."

As to the objection not appearing on the face of the proceedings, I think it was sufficiently apparent to take the case out of the principle on which courts act in refusing prohibition on that ground, which is really one not letting in jurisdiction, but going only to the discretion of the court in granting prohibition in cases where there was in fact no jurisdiction. The rule laid down in the memorable judgment of Willes, J., in the case of *Mayor of London* v. *Cox*, which has been frequently followed, is really limited to cases where a party has allowed a court to proceed without disclosing his objection and has afterwards come to set aside the proceedings. Its effect is well summarized by Lopes, L.J., in *Farquharson* v. *Morgan*: "The result of the authorities appears to me to be this, that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled." There is really nothing like laches or misconduct in the present case; on the contrary, the point is sufficiently apparent on the proceedings, and it was taken in court and never withdrawn. Therefore I am of opinion that the decision of the Divisional Court cannot be supported on the grounds on which they have placed it.

It is, however, necessary to consider the larger question raised by the argument of Mr. Dibdin—viz., that the limitation to the grant in the patent is itself void. This raises an historical question of some interest, but I think the burden rests on the respondents, and in my judgment they have not satisfied it. The form of the patent is, from its phraseology and the matters it embraces, obviously of very considerable antiquity. The exact form of this patent appears to be peculiar to the dioceses of Chichester and Ely; but forms reserving the bishop's jurisdiction in some shape, in cases such as the present, are still in use in sixteen dioceses (see the report of the Ecclesiastical Courts Commission, 1883), and it has not been suggested that these forms have not all been in use, at all events from 1640 onwards. Mr. Dibdin, indeed, suggested, but he failed to support the suggestion by any authority, that the origin of these reservations of jurisdiction to the bishop was to be found in certain canons, of which Archbishop Laud was said to be the author, and which were promulgated in 1640, but were subsequently, as he said, abrogated by the statute of 13 Car. 2, c. 12, s. 5; in fact, he contended, broadly, that, before those canons were promulgated, the bishop had no jurisdistion whatever in cases of this class, but that the exclusive jurisdiction was in his chancellor. There is no doubt that a chancellor may be imposed upon a bishop: see Godolphin's Repertorium Canonicum, p. 81, quoting Ridley, "Chancellors of dioceses are nigh of as great antiquity as bishops themselves, and are such necessary officers to bishops that every bishop must of necessity have a chancellor; and that if any bishop should seem to be so complete within himself as not to need a chancellor yet the archbishop of the province in case of refusal may put a chancellor on him, in that the law presumes government of a whole diocese a matter of more obligation than can be well sustained by one person alone; and that, although the nomination of the chancellor is in the bishop, yet his authority is derived from the law. . . . It is most probable

that the multiplicity and variety of ecclesiastical causes introduced the use and office of chancellor originally; for after that princes had granted to ecclesiastical persons their causes and their consistories, and circumstances varying these causes into a more numerous multiplication than were capable of being defined by like former presidents, necessity called for new decisions, and they for such judges as were experienced in such laws as were adapted to matters of an ecclesiastical cognisance, which would have been too prejudicial an avocation of bishops from the exercise of their more divine function, had not the office of the chancellor in determining such matters been an expedient to prevent the said prejudice or inconvenience." But that the chancellor's power, whatever the extent of it, is a delegated power only is clear—see Gibson's Codex, vol. 2, p. 1027, ed. 1713, quoting Stillingfleet: "And the law nowhere determines the bounds of a chancellour's power as to such acts, nor can it be supposed so to do since it is but a delegated power, and it is in the right of him that deputes to circumscribe and limit it." In a manuscript in the Public Record Office of 1636-37, apparently drafted by Sir John Lambe, Dean of Arches, and copied in Rothery's Returns, Appendix, p. xxvii., there is this passage: "Note that in all these offices derived from and under the bishop the bishop cannot so graunt his jurisdiction to his chauncellor, comissary, archdeacon, deane, and chapter, &c., or so abdicate it from himself, but that he also may use the same, not by prohibiting them (unlesse by way of appeale where it lieth to him), but by doing also with them or without them." It was nevertheless suggested by Mr. Dibdin, as I have said, that the reservations of jurisdiction to the bishop, which continue to be found in the patents in use in so many dioceses down to the present day, took their origin from the canon of 1640 (the 11th). But the language of the canon (see it set out in Gibson, p. 1028) seems to assume an existing power of reservation. And though by 13 Car. 2, c. 12, s. 5, these canons were expressly not confirmed, that statute saves all jurisdiction existing in 1639. If the effect of the Act of 13 Car. 2, c. 12, passed in 1661, was to leave the bishop denuded of all jurisdiction in his Consistorial Court, as Mr. Dibdin's argument assumes, it is certainly very strange to find Lord Holt no more than forty years later asserting the bishop's right to sit there himself, and reiterating the same opinion some years afterwards. In *Bishop of St. David's* v. *Lucy*, decided in 1699, he says: "The archbishop may hold his court where he pleaseth and he may convene before himself and sit judge himself, and so may any other bishop, for the power of a chancellor or vicar-general is only delegated in case of a bishop." And in *Bishop of Cloyne* v. *Gibbons*, decided in 1706, he says: "As to what is said that a bishop may sit in his own court and that the vicar and he are but one person, it is true a bishop may sit when he pleases in his own court, but the vicar, chancellor, shall have fees." In 1853 a patent in the same form as at present, being that in use in the diocese of Chicester, came before the court of Queen's Bench, consisting of Lord Campbell, C.J., and Coleridge and Wightman, JJ., in *Ex parte Medwin*. In delivering the considered judgment of the court, Lord Campbell says: "We desired to look at the patent before we granted or refused a rule. We have now examined it." He then summarizes it, and refers to the qualifying clause. He then proceeds: "The court therefore is in style the bishop's court, as this is the Queen's, and the chancellor is the bishop's chancellor, as we are the Queen's judges. By a special provision, at the prayer of the party, the bishop's judgment may be invoked, in which respect the analogy fails. But where this prayer is not made, the chancellor, or official principal, seems to be an independent judge; nor is he the less so because some cases are expected from his jurisdiction, or because that jurisdiction ceases, or is suspended, when the bishop is present. If absent the bishop cannot interfere; the parties are never supposed, by the citation or other proceedings, to be before him; nor is there any appeal from the chancellor to him." Again, after citing two passages from Ayliffe, he says: "This passage is not very accurately expressed; but the meaning is sufficiently clear in one sense. The chancellor, or the official, has a delegated power as much as the commissary, because they equally receive from the bishop a power which was originally in him, and which originally he might have exercised himself, and probably often did. But it was a power to be exercised in a court, open to the subjects of the diocese, for the trial of all causes over which he has jurisdiction." This suggestion that they "often did" finds support in the diary of Cartwright, Bishop of Chester, in the years 1686 and 1687, cited to us by Mr. Duke, as also from some of the cases mentioned in Rothery's Return, though that collection is limited to those cases only which found their way to the Court of Delegates. In his Historical Appendix (I.) to the report of the Ecclesiastical Courts Commission (1883), p. 32, Bishop Stubbs says: "The commission of the chancellor or official principal of the bishop differed from that of the official principal of the archbishop in not necessarily conferring the whole judicial authority of the bishop, who in some instances reserved particular portions of jurisdiction for his own hearing, as is done at the present day." He casts no doubt on the legality of this practice. At p. 46, paragraph 3, he says: "The Court of King's Bench, in the case of *Bishop of St. David's* v. *Lucy*, held that the commission of chancellor, or vicar-general, could not be regarded as excluding the archbishop or bishop from sitting in his own court (Stephens, I., 289). But, although this is reasonable as an affirmation of law, it is not easy to adduce instances in which the power has been exercised since the Reformation. It appears, from the return on the patents of official principals, made for the present commission, that in several dioceses it is the practice of the present day to reserve to the bishop himself important sections of judicial work, or a general right to execute in person the offices otherwise deputed." From the references above given it would seem that the power has been in fact occasionally, if not frequently, exercised since the Reformation. There seems to be no judicial pronouncement to be set against those above cited. The passage in Sir G. Lee's judgment in *Hillyer* v. *Milligan*, 2 Lee, 8, does not seem necessarily to involve the question of a reservation in the patent itself. I think therefore that it is impossible to hold void a proviso which merely excludes the jurisdiction of the chancellor in cases where the parties or either of them crave the judgment of the bishop himself unless upon consultation the bishop consents to his assuming it. The demand of a party and the good sense of the bishop would seem to be sufficient safeguard against abuse. With regard to the form of the rule, we think it would be sufficient if the prohibition went *quousque*—that is to say, as against Dr. Tristram, until consultation with the bishop and consent by him to the judgment, and as against the other respondent until there has been such consultation and consent or until the bishop agrees to hear the cause himself. I have to add that Romer, L.J., agrees with this judgment.

MATHEW, L.J., read the following judgment: I

agree with the reasons given by the Master of the Rolls for allowing this appeal. In the judgment of the Divisional Court it would seem to have been supposed that the bishop was bound in every case by the decision of his chancellor, that his assent was a ministerial act only, and that the omission of a mere formality was no objection to the chancellor's authority to pronounce a final judgment. It is difficult to reconcile this view with the language of the patent. The authority conferred upon the chancellor to decide and finally determine causes is subject to this proviso: "Nevertheless first consulting us and our successors and having our consent in case either party earnestly crave our judgment." The legal construction of the patent would seem to be clear. Before the chancellor can pronounce his decision, where either party earnestly craves "our judgment," it is for the bishop to determine whether or not he will give his consent. But it was argued for the respondents that the patent gave rise to no question of construction. It was said that the terms might be disregarded because the document should be treated in law as obsolete and illegal. It was pointed out that the bishop was bound by ancient usage to nominate a chancellor, and it was said that when the appointment was made the bishop was divested of every judicial function, even where, as in the present case, the patent contained express reservations. The bishop, it was contended, was prohibited by law from interfering with an official who appeared to derive such powers as he possessed from his patent, but who might, nevertheless, repudiate the terms by which he had undertaken to be bound. No reliable authority was cited in support of this proposition. The law would seem to have been laid down in the contrary sense in the decisions and records which have been fully discussed by the Master of the Rolls. It is clear that patents in analogous forms have been long in use in many of the English dioceses, and the instrument in question was considered in the Court of Queen's Bench in the case *Ex parte Medwin*, and was treated as unobjectionable. No reason was given for holding the clause in question to be contrary to public policy, and no ground suggested for the suspicion with which the control retained by the bishop would seem to be regarded. It may be true that the judgments of chancellors have not in recent times been interfered with, and that litigants have been left to their remedy by appeal; but this does not show that the form of patent continuously used had become obsolete or invalid. It was next contended that, even if some of the provisions of the patent were lawful and binding, the particular clause upon which the appellants rely was illegal and had been condemned by the Legislature. To establish this the canons of 1640 were referred to, and it was suggested that then, for the first time, it was declared by convocation that the bishop might reserve to himself the right to examine and determine every cause in his court. These canons were promptly condemned by the Long Parliament and were treated as being subversive of the constitution in matters relating to Church government (see Gibson's Codex, p. 956*n*.). It perhaps would be sufficient to dispose of this argument to point out that the clause we are dealing with was not that provided for by the canon of 1640. But there is the further answer that there would seem to be no good ground for the assertion that the general reservation which is found in this patent "to examine and determine every cause in our proper person in our court of consistory" was intended to be stamped by Parliament with illegality. The statute of 13 Car. 2, c. 12, recited the Act of 17 Car. 1, and by section 2 repealed all other provisions with the temporary exception of what concerned the High Commission Court. [His lordship then read sections 1 and 5, saying that section 1 contained a clear reservation of the jurisdiction of the bishop in all causes and matters belonging to ecclesiastical jurisdiction.] It has not been shown that the reservation of causes from the chancellor's jurisdiction has been condemned or even questioned in any decision of the courts of common law; and the fact that so many patents still contain a similar clause would seem to show that in this respect the forms in use before 1639 continued to be followed. Another point made for the respondents was this—that no effect could be given to the clause which permitted the litigant in the consistory court to crave the judgment of the bishop, because it was not pointed out by what method or to what extent inquiries were to be made by the bishop before he consented to adopt or to differ from the judgment of the chancellor. But no such directions would seem to be required. It would be the duty of the bishop to obtain all necessary information, and there would seem to be no reason to suppose that the duty would be neglected. Moreover, it should be borne in mind that the determination of the bishop would be subject to appeal. A further point was made for the respondents that, even if the patent must be regarded as valid and binding, the appellants had so acted in the course of the litigation as to show that they had abandoned their earnest craving for the judgment of the bishop. In the fifth paragraph of the answer the respondents raise the point and pray "that before any decision of the cause the bishop should be consulted and his consent had," and they earnestly crave his judgment. In the reply the petitioner objected to the bishop being consulted or to his sitting to try the cause. It appears from the report of *Davey* v. *Hinde*, [1901] P. at p. 105, that the point was argued, and the chancellor dealt with it at some length in his judgment. There was no evidence that the appellants so acted as to indicate that their objection was abandoned. But reliance was placed on the delay which it was said had taken place before the application was made for a prohibition. The facts were these: A question had been raised as to the right of the petitioner to institute proceedings and that point was decided in his favour. The judgment was suspended pending an appeal to the Court of Arches. The appeal was subsequently abandoned, and the chancellor, in August, 1900, proceeded to judgment, and in the following term prohibition was applied for. The delay was thus fully explained. I agree that the appeal should be allowed and the prohibition issued in the terms suggested by the Master of the Rolls.

Appeal allowed.

Solicitors for the appellants, *Brooks, Jenkins, & Co.*

Solicitor for the respondents, *Grantham R. Dodd.*

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) April 30; May 3, 5.

In re JOHNSON & CO. (LIMITED). (*a*.)

Company — Debentures — Registration — Extension of time—Form of order—Saving of prior rights—Rights of debenture-holders inter se—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

The rights of equality inter se *attached to debentures*

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law

of a series ought not to be interfered with by an accidental omission to register some of them within the time required under section 14 *of the Companies Act,* 1900, *and the proviso inserted in orders for the extension of time for registration, saving the rights of parties acquired prior to registration, ought to be framed so as not to make any difference to the rights of debenture-holders* inter se.

Form of order considered.

This was an appeal from orders made by Kekewich and Joyce, JJ.

In 1899 the company passed a resolution to issue £85,000 of debentures.

In 1900 a covering deed was executed conveying property to trustees by way of mortgage.

By the conditions of the debentures the company charged all its property, present and future, including uncalled capital for the time being, by way of mortgage; and the debentures were stated to be part of a series all of which were to rank *pari passu.*

Over £60,000 of debentures were issued before the 1st of January, 1901, on which date the Companies Act, 1900, came into operation.

By section 14 of that Act "(1) Every mortgage or charge created by a company after the commencement of this Act, and being either (*a*) a mortgage or charge for the purpose of securing any issue of debentures; or (*b*) a mortgage or charge on uncalled capital of the company; (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (*d*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is conferred, be void against the liquidator and any creditor of the company unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured."

Since that date the company issued 327 other debentures of the same series.

Owing to a misapprehension these debentures were not registered within the time prescribed by the Act.

The company—which was in a prosperous condition—and the holders of the 327 debentures, whose names and holdings were given in a schedule to the notice of motion, applied for an extension of time for that purpose under section 15 of the Act, which is as follows: "A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge was accidental or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified."

Kekewich, J., made an order extending the time, but following *In re Joplin Brewery Co.* (*Limited*), *ante* p. 75, [1902] 1 Ch. 79, he directed that the order should contain the words, "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debenture shall be actually registered." His lordship refused to qualify these words by a statement that they were not to affect the priorities of the debenture-holders *inter se.*

Joyce, J., subsequently, in the absence through illness of Kekewich, J., further extended the time till the 18th of May so as to give them time to appeal, and made the order in the same form.

The company appealed.

Haldane, K.C., and *Christopher James,* for the company.—By this order as it stands those debenture-holders whose debentures did not require registration will acquire priority over the other debenture-holders. This is directly opposed to the terms of their contract that all shall rank *pari passu.*

They cited *In re Joplin Brewery Co.* (*Limited*); *In re The Spiral Globe* (*Limited*), *ante,* p. 187, [1902] 1 Ch. 396; *In re S. Abrahams & Sons* (*Limited*), *ante,* p. 284, 46 SOLICITORS' JOURNAL, 281, [1902] W. N. 37; and *In re The Spiral Globe* (*Limited*), *Watson & Co.* v. *Spiral Globe* (*Limited*), [1902] W. N. 82.

Neville, K.C., and *J. G. Pease, contra.*

Haldane, K.C., replied.

COLLINS, M.R., stated the facts, and continued: It is not disputed here that the case does come within the 15th section and that the judge has properly exercised his discretion in enlarging the time for registration, but the point that does arise is as to a qualification which has been inserted in the last words of the order, "The court being satisfied that the omission to register" and so forth "was accidental doth, pursuant to the 15th section of the Act, order that the time for registration of the said debentures be extended unto the 18th of April, 1902, inclusive." Then came the words that are objected to, "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." Now, it is said by Mr. Haldane for the appellants that these words are capable of being interpreted, and, in fact, *primâ facie* do involve this, that that proportion of the debenture-holders whose debentures do not require registration will take priority over those as to which this order permitting registration is made, and he says that such a result is one that this court ought not to permit because as regards the contract under which these debentures were created the most fundamental provision provides that all debenture-holders are to rank *pari passu,* and that if the mere omission, under circumstances excused by the judge, is to be held to have the effect of giving different rights between themselves, and giving those who accidentally did not require registration, priority and putting these two sets of debenture-holders upon an inequality, then that is really to defeat the fundamental provision of the contract under which they were issued, and that is a consequence which certainly ought to be avoided if the statute does not compel us to accept it. I assume that the words in the order are capable of and, indeed, *primâ facie* do bear the construction which the appellants object to, and dealing with it on that footing the question is whether or not, construed in that way, it is properly within the section as interpreted by some decisions which have already been made upon it. Now, the decision of Buckley, J., in *Joplin's case* was the decision upon which Kekewich, J., based his decision in this case. I do not think he gave any opinion on the matter himself, but he simply followed the form which Buckley, J., adopted. Buckley, J., in that case says this: He reads the section and then goes on and says: "The language of the latter section is larger than that of the former, but I do not see that the variance makes any difference to the point with which I have to deal. Under section 14 of the Companies Act, 1900, a security if not registered within a given time is void as against the

liquidator and any creditor of the company. These applications are made without serving the creditors, and the orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected just as in the case of bills of sale." He therefore treats the two provisions in the Companies and Bills of Sale Acts as analagous. "I, therefore direct that there be added to the order the words 'But that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered,' and I intimate my opinion that these words ought to be added in every case, unless there is some good ground to the contrary—*e.g.*, in cases in which the order could not prejudice the rights of any creditors." Now, the words in this order are "But that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered." Now, for the purposes of this application, ought there to be any doubt left as to whether the mere fact of a portion of these debentures being issued before registration became necessary, and the second part being issued after it became necessary and requiring the indulgence which is given under the 15th section, ought to make any difference between the rights of the parties *inter se?* It seems to me that it certainly ought not, that the mere fact of having been issued at a time when registration was not required does not and ought not to put them in any better position than those debenture-holders who have had their bonds issued to them after registration became necessary; even although the latter made a slip and did not come within the proper time. It seems to me that the condition under which these debenture-holders took their securities was that, as between themselves, they were to rank *pari passu*. That agreement was made in view of the certainty that they would not in point of fact be issued at one and the same time, and it was to meet that possible contention that those who took first should have the first rights that this provision negativing that and indicating that they should take *pari passu* was introduced.

Therefore, it seems to me that the mere fact of there having been a slip in the matter of registering the second set, and that the first did not require registration at the time they were issued, did not alter the rights of the parties *inter se* and that words ought to be introduced into this order to make this practically clear. At the same time, while the rights of these parties *inter se* ought not to be interfered with merely on the facts that I have stated, it is possible that under the section the rights of other outside persons might intervene. It is impossible to say under what circumstances they could intervene. It is not necessary for us in this case to decide whether any creditor who had not actually issued execution is a creditor who ought to be protected and who ought to displace the rights of those who were not registered until after his debt had accrued. It is not necessary to give a decision upon the point, though I am bound to say that Buckley, J.'s, judgment, which purported to apply this Act on the analogy of the clause in the Bills of Sale Act does seem rather to enlarge the area to which the Bills of Sale Act was held to be limited, for instead of dealing with the creditors who have actually issued execution—that had been the subject of discussion under the former Act—he says this: "The orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale." Now in the case of bills of sale one case has been cited to us which went to the Court of Appeal, and in which Bowen, L.J., gave the judgment in which the late Master of the Rolls agreed. It was the case of *Crew* v. *Cummings*, 36 W. R. 908, 21 Q. B. D. 420 In that case an execution had actually been put in between the date of the bill of sale and the time for the application to enlarge the time for registration, and the court held that registration could not be extended under the 14th section so as to defeat the vested right of an execution creditor. But in that case, the execution being actually put in, the court took time to consider, and, having considered, they based their judgment on the fact that a title had been acquired by the creditor who had put in execution. "I do not think that the Act of Parliament," says Bowen, L.J., "in giving the power to extend the time could have intended that such an extension of time should be granted after the title to the goods had actually vested in the execution creditor by reason of the failure of the holder of the bill of sale to comply with the provisions of the Act." Now it seems to me that that judgment is given on the footing that, but for the execution put in, the creditor would have taken no rights which would have been interfered with by giving permission to extend the time necessary for the registration of the bill of sale. However, it seems to me that it is not necessary for this court to decide any point about creditors, whether execution creditors or others, but what we can decide, and what I think the order ought to provide for, is that as between these two sets of debenture-holders this fact of registration and failure to register ought not to make any difference, and that their rights *inter se* ought to rank *pari passu*. The order will be considered by counsel and will be framed to meet that view, and we shall have an opportunity of considering it; but it seems to me on these grounds the order as it stands ought to be altered, and that, to that extent, this appeal ought to be allowed.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I agree. I only just wish to add this, that section 15 indicates or points out various circumstances under which the court may exercise its jurisdiction. One of those is when the registration is not of the nature to prejudice creditors, but if there has been omission, misstatement, or inadvertence, or some other sufficient cause, the court is empowered to allow registration although it will affect the creditors. The analogy of the Bills of Sale Act which Buckley, J., took in *Joplin's case* seems to me to be very close and precise, but speaking for myself I doubt whether the words which he has inserted—which are a mere transcript of the common form under the Bills of Sale Act—would have any effect in protecting creditors who had not taken some proceeding to get a charge or a security upon the goods. The appeal must therefore be allowed.

[The terms of the variation were subsequently mentioned for the approval of the court; and by the minutes of the order as finally settled it was provided (after extending the time till the 18th of May) as follows: Provided always that this order is without prejudice to any rights (other than rights in respect of debentures of the said series) which may have been or may be acquired against the holders of the said debentures set forth in the schedule to this order prior to the time when the last-mentioned debentures shall be actually registered. And it is hereby declared that, except so far, if at all, as may be necessary for giving effect to the proviso aforesaid, such proviso shall not interfere with the rights of equality among themselves attached to all the

debentures of the said series, but so that, in the event of the debentures set forth in the said schedule being avoided as against parties having any such rights as are preserved by the said proviso, none of the holders of the debentures of the said series, other than the holders of the debentures set forth in the said schedule, shall by reason of such avoidance be required to accept any less share of the assets comprised in his security than he would have taken if there had been no such avoidance.]

Solicitors, *Stibbard, Gibson, & Co.*, for *Gibson, Pybus, & Pybus*, Newcastle-on-Tyne.

From Chan. Div.
(Collins, M.R.. and Stirling and Cozens-Hardy, L.JJ.) April 14, 15.

In re SCHNADHORST.
SANDKUHL *v.* SCHNADHORST. (*a.*)

Will—Construction—Gift to a class—Gift over on death "leaving issue"—Period of indefeasible vesting.

In a gift to a class with a gift over of the shares of any members of it who die "leaving issue," the members of the class take vested indefeasible interests only if and when they die leaving issue, unless there be some context limiting and defining the natural and proper meaning of the words, which is, death at any time.

O'Mahony *v.* Burdett, 23 *W. R.* 361, *L. R.* 7 *H. L.* 388, *discussed and applied.*

Decision of Joyce, J., [1901] 2 *Ch.* 338, 49 *W. R. Dig.* 198, *affirmed.*

This was an appeal from a decision of Joyce, J. (reported [1901] 2 Ch. 338, 49 W. R. Dig. 198).

By his will, dated the 30th of December, 1889, Francis Schnadhurst, after giving certain legacies, devised and bequeathed the residue of his real and personal estate to his trustees on trust for conversion and investment, and after directing certain investments to be held on certain trusts for the benefit of his wife, children, and sisters, he directed the trustees to pay the income of the residue of the trust fund to his wife during her life or widowhood and to pay her an annuity if she remarried.

The will then proceeded as follows: "And subject to the provision aforesaid upon trust after the decease or second marriage of my wife to apply the income of the trust fund in or towards the maintenance, education, and advancement of my children until the youngest who shall be living shall attain the age of twenty-one years, or being a daughter shall attain that age or marry. Subject to the trusts and powers herein before contained I direct that the trust fund and the income thereof and all accumulations of income or so much thereof as shall not have become vested or been applied pursuant to this my will shall be held in trust for all my children who, being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common."

The testator died on the 2nd of January, 1900, leaving him surviving his widow and three children, the plaintiff May Frances Sandkuhl (wife of Hans Sandkuhl), the defendant Ernest Edward Schnadhorst, and Frank Gladstone Schnadhorst, all of whom were now living, and of whom F. G. Schnadhorst alone was an infant at the date of the testator's death. He had since attained the age of twenty-one years. The defendant E. E. Schnadhorst was married, and had two infant sons, who were also defendants. The executors and trustees having renounced probate of the will and disclaimed the trusts, letters of administration with the will annexed were granted to the defendant E. E. Schnadhorst; the summons was taken out by Hans Sandkuhl and May Frances, his wife, for the determination of the questions whether upon the true construction of the will the children who survived the testator and being sons had attained the age of twenty-one years, or being daughters had attained that age or married, took vested indefeasible interests in the residue subject to the widow's interest, or whether they could only take such interest on surviving the widow, or only if and when they should die without leaving issue.

Joyce, J., held that they took vested indefeasible interests only if and when they should die without leaving issue.

Hans Sandkuhl and his wife appealed.

Younger, K.C., and *Peterson*, for the appellants.—The testator gave the capital and income of his residuary estate to his children. He could not have meant that the trustees were to hold the fund after the youngest child attained twenty-one, and pay the income to the children for the rest of their lives. There are two separate gifts—(1) of the income till the youngest child attains twenty-one, (2) of the capital and income to those who have attained twenty-one. The testator only meant that there was to be no distribution till the youngest child attained twenty-one. He meant the shares to vest at twenty-one or marriage. "Die" must mean die under twenty-one, or in the widow's life, or before the youngest child attains twenty-one. The trustees are clearly intended to pay the shares over. *Home* v. *Pillans*, 2 My. & K. 15, is not inconsistent with *O'Mahony* v. *Burdett*, 23 W. R. 361, L. R. 7 H. L. 388, and Lord Cairns expressly approved of it in that case. We have here a context excluding the supposition that death at any time is contemplated, therefore this case is outside *O'Mahony* v. *Burdett*. *Bowers* v. *Bowers*, 18 W. R. 301, L. R. 5 Ch. App. 244, can be distinguished.

They also referred to *Monteith* v. *Nicholson*, 2 Keen 719.

Micklem, K.C., and *W. H. Cozens-Hardy*, for E. Schnadhorst, supported the appeal.—The gifts are alternative, or if not the period of defeasance is limited to the period of distribution, which is to be on the death of the widow or on the youngest child attaining twenty-one, which shall last happen.

They cited *Da Costa* v. *Keir*, 3 Russ. 360.

Dibdin, K.C., and *R. J. Parker*, for the infants, were not called on.

COLLINS, M.R.—This case has been very ably and clearly argued by Mr. Younger, who has put his contention in a very captivating light; and if it were not governed by authority I might be disposed to agree with him as to the testator's intentions. But we have to see what, on the fair and grammatical construction of his will, the testator must be taken to have meant, having in view the authorities by which the case is governed. [His lordship stated the facts and the provisions of the will, and continued:] Mr. Younger has put before us the four possible constructions of the words "die without issue"—(1) that it means "die under twenty-one," (2) "die during the lifetime of the widow," (3) "before the youngest child attains twenty-one," (4) "die at any time." He presses us to adopt one of the first three constructions, and to reject the last.

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

In support of the first construction he relies on *Home* v. *Pillans*, but he has to meet the difficulty that there there was a gift to two ladies if they should attain twenty-one, while here the gift is to daughters at twenty one or marriage. Therefore *Home* v. *Pillans* is not to be relied on as regards the daughter; and though Mr. Younger says at all events it applies as regards the sons, it would be difficult, I think, to apply different rules in the cases of the sons and of the daughters. And with regard to *Home* v. *Pillans* it is enough to quote the words of Lord Cairns in *O'Mahony* v. *Burdett*: "*Home* v. *Pillans* was a case of an entirely different kind. There was there a bequest to the testator's nieces when and if they should attain twenty-one, and in case of the death of either niece leaving children or a child the testator gave the share of the niece so dying to her children or child. This was not the case of an absolute gift with a gift over in a certain event. There was no gift over and no gift at all till a niece attained twenty-one and the child of a niece marrying and dying under twenty-one would have been wholly unprovided for if the court had not held that the words 'in case of the death of my said nieces or either of them leaving children or a child,' pointed to a death under twenty-one." This is enough to dispose of *Home* v. *Pillans* as regards this case, and Mr. Younger relied more on constructions (2) and (3). Mr. Micklem, too, pressed on us that as Lord Cairns said there was no defeasance or gift over in *Home* v. *Pillans*, so there was none here, but the gifts were alternative. But this contention is really disposed of by Lord Cairns' words which I have just quoted. Here we have clearly an absolute gift to the children who attain twenty-one or marry, with a clause of defeasance in the case of any dying without issue. I will now refer to the head-note in *O'Mahony* v. *Burdett*: "A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A. defeasible by an executory gift over in the event of A. dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. A gift to X. for life with remainder to A., and if A. dies unmarried or without children to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children. There is no rule of construction arising from possible delay in the vesting of a gift which evades the natural meaning of the terms of the bequest." This is a clear authority for the proposition that death in the will before us means death at any time. It is true that here the defeasance is in the event of death with issue, and in *O'Mahony* v. *Burdett* it was in the event of death without issue; but this is immaterial, and no argument was in fact addressed to us on this distinction. Further, it is worthy of note that in *Ingram* v. *Soutten*, 23 W. R. 363, L. R. 7 H. L. 408, the report of which immediately follows that of *O'Mahony* v. *Burdett*, the principle laid down in *O'Mahony* v. *Burdett* is reiterated. Authority clearly lays down that without some special words limiting the meaning, death means death at any time. Is there any such excluding context here? Mr. Younger has pressed on us that it is to be found in the testator's evident wish that the beneficiaries should take their shares at some time or other, but there is no direction to pay over the shares at a particular time. I will refer to Lord Hatherley's words in *O'Mahony* v. *Burdett*: "I apprehend in another class of cases, many of which were cited before us, which have been decided since *Edwards* v. *Edwards*, 15 Beav. 357, one of them having been before myself, in those cases when the court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will, of course, spend it without any further trust, and, on the other hand, that a subsequent event—namely, a certain person dying childless after that distribution has taken place—should divest the property—that is to say, make it necessary for the executor to take steps to get back again and recall that money which he has paid in order to hand it over to those who would take under the executory devise." Mr. Younger gets such a direction out of the words "to whom I give and bequeath my residuary estate." But this would be to put a very large interpretation on those words. There is, in my opinion, no context here narrowing or defining the period of vesting fixed by authority, and the appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion, and I should be content to say no more were it not out of respect to the learned arguments which have been addressed to us. Mr. Younger and Mr. Micklem have satisfied me that on the construction which Joyce, J., put on this will the testator has framed a distribution of his property which is very inconvenient to his children, and that if his attention had been called to the matter he would have done differently; but we cannot speculate as to this, and must construe this will according to the natural and proper meaning of the words used, in the absence of any context requiring a different meaning to be given to them. As to the meaning of a gift over if any child die leaving issue, I adopt the statement of Lord Cairns that the words indicate death at any time, unless there be some inconsistent context. What sort of context is this? In *O'Mahony* v. *Burdett* Lord Selborne pointed out two classes of cases in which such a context can be found; the first, cases where an express period for distribution is fixed; the second where there is an indication on the face of the will that the legatee is in some event to take an absolute interest. Is there any such indication here? The testator, after providing for his widow's life interest and for the maintenance, &c., of the children, directs that the fund shall be held in trust for all the children at twenty-one or marriage. Two points were dwelt on—(1) that the direction for the application of the income lasts only till the youngest attains twenty-one, and it is not to be supposed that the trustees are to go on paying interest to the children for the rest of their lives; (2) that we have an absolute gift in the words "to whom I give and bequeath my residuary estate." But I can see no expression of the testator's intention that there was to be a distribution at the death of the widow or when the youngest child attained twenty-one; indeed, the will points the other way, since it says that the property is to be held in trust, and so remain in the hands of the trustees. But, further, the testator has given the trustees full discretionary power to apply the whole income in maintenance and education, and no express direction to distribute the property after that; and the words "I give and bequeath" do not amount to a direction to divide at any particular period, or imply

an intention that on any particular event the objects of the testator's bounty were to take an absolute interest. Lord Selborne clearly meant an event in which the property was to be at the legatee's own disposal, and the present case does not fall within either of his two classes. No doubt there may be others, but the present case has been argued as falling within one of these two. There only remains the contention that the language here closely resembles that used in the will in *Home* v. *Pillans*; but this is not well-founded, since in *O'Mahony* v. *Burdett* Lord Cairns treated *Home* v. *Pillans* as a case of alternative gifts, not a gift taking effect by defeasance, and so *Home* v. *Pillans* does not apply here. The testator here must have contemplated that his daughter would survive him, and we must treat the clause in the same way as regards all the children. And I should have come to the same conclusion if all the children had been under twenty-one. I agree with Joyce, J.'s, reason for holding that *Home* v. *Pillans* does not apply, and I think the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. I cannot find any context excluding the natural meaning of the words, or any direction for a particular period of distribution.

[On the application of *Younger, K.C.*, to which *Dibdin, K.C.*, assented, the court ordered the costs as between solicitor and client to be paid out of the residue.]

Appeal dismissed.

Solicitors for the appellants, *Swann, Green, & Co*

Solicitors for the respondents, *Flux, Leadbitter, & Neighbour.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) And K. B. Div. (Lord Alverstone, L.C.J.) — March 1, 3, 4; April 8.

NEALE *v.* GORDON-LENNOX. (*a.*)

Practice—Compromise—Authority of counsel—Limitation of authority by client—Reference of action—Interlocutory order.

Where a limitation has been placed by a client on the authority of his counsel with regard to the reference of an action, which is not communicated to the other side, and counsel agrees to a reference in disregard of that limitation, the agreement to refer is binding on the client, whether it results in an interlocutory or a final order.

In this case an application was made to Lord Alverstone, L.C.J., to rescind an order made by him referring the action which was brought to recover damages for slander. When the case came on for trial, the learned judge, having looked at the pleadings, intimated that it was undesirable that the details should be discussed in open court, and that the best course would be that there should be an inquiry by some independent person. Counsel for both parties thereupon agreed that the case should be referred.

Prior to the consent given by counsel the plaintiff signed the following document: "Defendant stating by her counsel that she never imputed or meant to impute anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation; case referred to —— to say what should be done between the parties in satisfaction of all matters in difference between them; case referred to —— to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action. I consent to either alternative Sir E. Clarke adopts. 12/2/02."

From an affidavit made by the plaintiff it appeared that after consultation with her counsel she consented to the reference on the understanding that the defendant admitted in court by her counsel that the plaintiff's character was exonerated and that no imputation was to rest on it; and further, from other affidavits, that immediately after it was announced in court that the action was referred, the plaintiff communicated with her solicitor, and instructed him to see her counsel with reference to the case having been referred without such statement having been made.

Application was therefore made to the learned judge that the case might be restored to the list on the ground that the plaintiff had not authorised the arrangement arrived at and that counsel had exceeded his authority, and the learned judge, in view of the question being an important one, decided that the matter should be argued before him.

Sir E. Clarke, K.C. (*R. J. Drake* with him), for the plaintiff.

Isaacs, K.C. (*Norman Craig* with him), for the defendant.

The facts and arguments sufficiently appear in the following judgment.

Cur. adv. vult.

Lord ALVERSTONE, L.C.J., read the following written judgment: This is an application to rescind the order of reference of the action to Mr. Dickens to which the parties consented through their counsel on the 12th of February, and which consent was subsequently embodied in an order of the 17th of February. I need not repeat the statement of facts as to the case which I made when I dealt with this matter on the 19th of February, but that statement should be taken as part of my present judgment. The only additional facts I need add are those which appear in the affidavits which have now been produced and the documents which have been handed to me by Sir Edward Clarke. From these it appears that prior to the consent given by counsel the plaintiff had signed a document which had been drawn up by Sir Edward Clarke, and which was in the following terms: "Defendant stating by her counsel that she never imputed or meant to impute anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation, case referred to —— to say what should be done between the parties in satisfaction of all matters in difference between them. Case referred to —— to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action. I consent to either alternative Sir E. Clarke adopts. 12/2/02. (Signed) DORA BEATRICE NEALE." If the matter had rested there it would, in my opinion, have been impossible to hold that any restraint was actually put upon Sir Edward Clarke's discretion in dealing with the case; but the plaintiff swears in her affidavit, made upon the 17th of February, that after consultation with her counsel, whom I understand to have been Sir E. Clarke's junior, she consented to the reference on the understanding that the defendant admitted in court by her counsel that the plaintiff's character was exonerated and that no imputation was to rest upon it. I must take it that this statement in the affidavit was true. It further appears from

(*a.*) Reported by F. G. RÜCKER and E. G. STILLWELL, Esqrs., Barristers-at-Law.

the affidavits that immediately after it was announced in court that the action was referred the plaintiff communicated with her solicitor and instructed him to see Sir E. Clarke with reference to the case being referred without such statement having been made, and that on the 14th the plaintiff had a consultation with Sir E. Clarke, which led to the application being made to me upon Monday, the 17th. In these circumstances I come to the conclusion, as a matter of fact, that the plaintiff had only consented to the action being referred upon the condition that the statement was made, and did, before the order was drawn up, communicate with her counsel and solicitor with a view to the arrangement being set aside and the case being restored to the list. The case was argued before me on Saturday last by Sir E. Clarke for the plaintiff and Mr. Rufus Isaacs for the defendant, and a great many authorities bearing upon the question were cited and discussed before me. I do not propose to go through all these cases, as my so doing would serve no useful purpose; but I will state what, in my opinion, are the propositions of law to be derived from them, and then consider their bearing upon the present case.

I think it is now clearly established that counsel appearing for a party in an action was held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement; and further, that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement unless the fact that the counsel's apparent authority had been limited was communicated to the other side. These propositions are, I think, established by the cases of *Wright* v. *Soresby*, 2 Cr. & M. 671; *Prestwich* v. *Poley*, 13 W. R. 753, 18 C. B. N. S. 806; *Strauss* v. *Francis*, 14 W. R. 634, L. R. 1 Q. B. 379; and *Matthews* v. *Munster*, 36 W. R. 178, 20 Q. B. D. 141; and were stated to be clear law by Coleridge, L.C.J., in *Harvey* v. *Croydon Union*, 32 W. R 389, 26 Ch. D. 249, at p. 256. It is equally well established that the authority of counsel does not extend to matters collateral to the action: see *Furnival* v. *Bogle*, 4 Russ. 142; the various reports in *Swinfen* v. *Swinfen*, 5 W. R. 203, 1 C. B. N. S. 364, and 6 W. R. 480, 2 De G. & J. 381; *Matthews* v. *Munster*; and *Kempshall* v. *Holland*, 14 R. 336. Whether agreeing to a reference is part of the conduct of a case and not collateral has not, as far as I know, been decided by authority. Crowder, J., clearly thought it was not within the authority of counsel: see his judgment in *Swinfen* v. *Swinfen*, 1 C. B. N. S., at p. 403, but I doubt whether this opinion is consistent with the view expressed by Pollock, C.B., in *Swinfen* v. *Lord Chelmsford*, 8 W. R. 545, 5 H. & N. 890, or with the judgments in *Strauss* v. *Francis*, where withdrawing a juror—or *Rumsey* v. *King*, 33 L. T. Rep. 728, 24 W. R. Dig. 81, where entering a *stet processus*—was held to be within the authority of counsel. Sir Edward Clarke said he could not argue that agreeing to a reference was collateral to the action; and for myself I should hold that having regard to the existing rules and the power of judges thereunder to refer actions or send them to referees for trial, it was within the authority of counsel to consent to a reference. It is further clearly established that, if the counsel consenting to a compromise is mistaken as to the facts, the client may have the right to set aside the arrangement on the ground of mistake: see *Holt* v. *Jesse*, 24 W. R. 879, 3 Ch. D. 177; *Hickman* v. *Berens*, [1895] 2 Ch. 638, 44 W. R. Dig. 41; *Wilding* v. *Sanderson*, 45 W. R. 452 and 675, [1897] 2 Ch. 534.

There is, however, as far as I know, no case which has decided that the compromise will be set aside merely on the ground that the counsel has exceeded his authority; and, as I have already indicated, such a view would, in my opinion, be inconsistent with the first proposition which I have formulated and the cases therein referred to. If, therefore, the arrangement come to by Sir E. Clarke had been a final settlement of the action, I am of opinion that it would be binding upon the plaintiff, even assuming that she had limited Sir E. Clarke's authority at the time when he entered in the arrangement. None, however, of the authorities to which I have referred, in which the compromise or arrangement has been held binding upon the client, were cases of interlocutory orders; and in my judgment, in considering the principles which have been and ought to be applied, there is a broad distinction between interlocutory and final orders. This distinction has often been pointed out: see the judgment of Sir George Jessel, M.R., in *Mullins* v. *Howell*, 11 Ch. D. 763, 27 W. R. Dig. 148, and also the judgment of Romer, J., in *Ainsworth* v. *Wilding*, 44 W. R. 540, [1896] 1 Ch. 673, at p. 677. There is, in my opinion, a fundamental difference between interlocutory and final orders as well as between interlocutory and final judgments. Interlocutory orders and judgments are only intended to affect the rights of the parties in the litigation. They are always subject to review when fresh facts are brought to the consideration of the court. Judgments passed and entered stand in a very different position. In the case of an interlocutory order it is generally possible to restore parties to their original position by payment of costs or otherwise; final orders are intended to, and do, as a rule, determine the rights of the parties. Perhaps I should add in deference to an argument of Mr. Isaacs that I am clearly of opinion that an order to refer an action is an interlocutory and not a final order: see the authorities collected at p. 842, vol. 1, and p. 507, vol. 2, of the Annual Practice. I cannot help feeling regret that the plaintiff has thought fit to make the present application. The arrangement which was made proceeded, as I pointed out in my previous judgment, from a suggestion made in the first instance by me, and I believe greatly to her advantage. Sir Edward Clarke, in my opinion, had ample reason to think that he was not exceeding his authority at the time his consent was given, and has, with the chivalry which he has always shown in every act of his professional and public life, taken too large a responsibility for the mistake, if mistake there has been. But holding, as I do, that this was an interlocutory order, that it was in fact made without the plaintiff's authority, and that she took steps to set aside the arrangements before the order was drawn up, I am of opinion that I must reverse the order and restore the case to the jury list. The plaintiff must pay the costs of and occasioned by the postponement of the case, including these applications, in any event.

Leave to appeal.

April 8.—The defendant appealed.

Rufus Isaacs, K.C., and *Norman Craig*, for the defendant.

Sir Edward Clarke, K.C., and *R. J. Drake*, for the plaintiff.

COLLINS, M.R.—This is an appeal from a decision of the Lord Chief Justice by which he has undone an agreement to refer an action, and has ordered the case to be restored to the list for trial. The appeal is brought by the defendant, who insists that the terms of the compromise by which the action was referred should be observed. The question is whether

the defendant is entitled to insist on the terms of the agreement for reference which was made at the trial. The point is that Sir Edward Clarke, who appeared for the plaintiff at the trial, acted in making the compromise without the instructions, or contrary to the instructions of his client. With characteristic chivalry, Sir Edward Clarke has taken upon himself the whole responsibility for what has been done. He says that he did not act under any mistake, he admits that a limitation had been placed on his authority by his client, who instructed him not to consent to a reference except on terms that all imputations against her were withdrawn, but he says that, notwithstanding those instructions, he made a compromise outside the authority given to him by his client. The question we have to decide is whether, in these circumstances, the defendant is entitled to insist on the compromise as binding. The matter was argued before the Lord Chief Justice, and the authorities bearing on the question were discussed. In his judgment the learned Chief Justice formulated the principles which govern the determination of the case, and after reading that judgment I am unable to find anything to qualify, still less to impugn, the statement of principles there laid down. He summarized the decisions thus: "I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement; and, further, that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's authority had been limited was communicated to the other side." He referred to the authorities, which clearly support that proposition.

I think that the starting-point of the discussion in this case is this, that counsel for the plaintiff had full authority *primâ facie* to refer the case either on terms that all imputations should be withdrawn or without any such terms. The right to agree to a reference of an action is within the general ambit of counsel's authority. The cases show that both counsel and attorney have authority to consent to a reference. It was held in *Smith* v. *Troup*, 7 C. B. 757, that, although the client had not assented to a reference, the attorney had authority to consent. Further, the case of *Matthews* v. *Munster*, shows that the right to make a compromise on terms of withdrawing all imputations is within the authority of counsel. There in an action for malicious prosecution the defendant's counsel, without the express authority of the defendant, assented to a verdict on the understanding that all imputations against the defendant were withdrawn; and it was held that the settlement was binding on the defendant. Those are two points as to which possibly controversy might have been raised, but as to which it is now perfectly clear that they are within the general *primâ facie* authority of counsel.

Now, what is the effect of a limitation of that authority not communicated to the opposing counsel? That question was dealt with in *Strauss* v. *Francis*, L. R. 1 Q. B. 379, at p. 383. There Blackburn, J., said: "All we decide is that, when a counsel acting within his apparent authority consents to withdraw a juror, the other side, acting fairly, may safely rely on the compromise being binding; and that, in order to invalidate the arrangement, not only must it be shown that the counsel's authority was limited, but that the limitation was known to the other side at the time." This has been affirmed in other cases. Here we have a general authority coupled with a secret limitation not communicated to the other side, and a compromise made in those circumstances that the case should be referred. It seems that Sir Edward Clarke's general authority was limited by instructions that he was to consent to a reference only on the terms of there being a complete withdrawal of all imputations. If there was such a limitation (and Sir Edward Clarke dealt with the case on that footing), it was a secret limitation unknown to the other side. The cases establish that a compromise made under those circumstances cannot be undone. There was no element of mistake or inadvertence in the matter. Sir Edward Clarke disclaimed the idea that there was any misapprehension on his part. Therefore the doctrine that mistake constitutes an exception to the general rule has no application to this case.

It is strange that the Lord Chief Justice, having up to this point dealt with the case on these principles, should have decided the case as he did in setting aside the compromise. He said: "If, therefore, the arrangement come to by Sir Edward Clarke had been a final settlement of the action, I am of opinion that it would be binding upon the plaintiff, even assuming that she had limited Sir Edward Clarke's authority at the time when he entered into the arrangement." But the Lord Chief Justice held that this was an interlocutory matter in contradistinction to being a final settlement of the action, and for that reason he appeared to think that the case became subject to a different set of principles. But in my opinion there is no authority for saying that the fact of this being an interlocutory order lets in a different set of principles from those which would have been applicable in the case of a final order. It is true that an interlocutory order may be undone by another interlocutory order, whereas to get rid of a final order may require the bringing of an action. But I think that with regard to the question now in dispute the supposed distinction between a final and an interlocutory order cannot be maintained. In my opinion, therefore, the order appealed from must be reversed.

ROMER, L.J.—I am of the same opinion. It is not disputed that the power to make a compromise such as was made in this case is within the general authority of counsel. But it is said that here the authority of counsel was expressly limited by the client. I am not myself satisfied that counsel's authority was limited in this case; but, assuming that it was so, it is clear that that limitation of authority was not communicated or known to the other side. The general rule is that a compromise is binding; and that rule can only be departed from on certain definite and recognized grounds. There are grounds on which a compromise can be set aside where counsel has disregarded a limitation which has been put on his authority—*e.g.*, mistake or misunderstanding. But it cannot be set aside except on some substantial ground. I am not able to see on what precise ground it is suggested that this compromise could be set aside. There was no mistake in this case. The limitation was not forgotten. It seems to come to this, that counsel made a compromise which he thought was beneficial to his client, and afterwards he found out that his client objected to it, and then he regretted what he had done. But that does not entitle him to come and ask to have the compromise set aside, if the other side insists on its being carried out. I cannot see that the fact of the order which embodies the compromise being an interlocutory order makes any difference. In order to set aside a compromise, whether it is made on an interlocutory application, and results in an interlocutory order, or whether it is made at the trial and effects a final settlement of an action, some definite and substantial ground must be shown. In my opinion no such ground exists here.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *W. H. Jamieson.*

Solicitors for the defendant, *Lewis & Lewis.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) March 5.

ATTORNEY-GENERAL (ON THE RELATION OF THE BROMLEY RURAL DISTRICT COUNCIL) AND THE BROMLEY RURAL DISTRICT COUNCIL *v.* COPELAND. (*a.*)

Highway—Drain—Power of highway authority to keep open drain—Pipe conveying water from highway on to adjoining land—Proper outlet—Long user—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 67.

The defendant was the owner of land adjoining a highway at a place where the highway had an upward gradient in each direction. At the lowest point of the road there had been for many years a catch-pit, into which the rain-water which fell on the road found its way, and from which it passed through a pipe about six feet long, from whence it flowed, not in any defined channel, over the surface of the defendant's land. The defendant having stopped up the pipe, the rural district council, as the highway authority, brought an action for an injunction to restrain him from continuing the obstruction.

Held, that the pipe was such a drain as was contemplated by section 67 *of the Highway Act,* 1835, *and that after user for many years the court ought to presume that it had been made under the power given by that section; and that therefore the plaintiffs were entitled to an injunction.*

Judgment of Lord Alverstone, L.C.J. (49 *W. R.* 489, [1901] 2 *K. B.* 101), *reversed.*

Appeal from the judgment of Lord Alverstone, L.C.J., at the trial of an action without a jury, 49 W. R. 489, [1901] 2 K. B. 101.

The action was brought for an injunction to restrain the defendant from stopping up or obstructing an ancient watercourse.

The plaintiffs, the Bromley Rural District Council, were the highway authority for the parish of West Wickham, in the county of Kent.

About two years prior to the date of the action the defendant had become by purchase the owner of certain land in the parish, adjoining a highway under the jurisdiction of the plaintiff council, and separated from the highway by a bank. At that part of the highway which the defendant's land adjoined there was a rising gradient in each direction, and at the lowest point there had been prior to the year 1868 two catch-pits, one on each side of the highway, connected by a culvert running under the road, the catch-pit on the defendant's side being at the lower level, and from the lower catch-pit there was an old cut or pipe through the aforesaid bank. The rainwater which fell upon the road found its way to the lower catch-pit and thence through the said cut or pipe, from whence it flowed, not in any defined channel, over the surface of the defendant's land.

In the year 1868 the upper catch-pit was enlarged, and the lower catch-pit was replaced by a new one, and the catch-pits were connected by an iron pipe, and from the new lower catch-pit a stone pipe of twelve inches diameter and five six feet in length was put through the bank.

The defendant, who was a builder, having erected some houses and laid out some gardens on his land, blocked up the end of the stone pipe so as to prevent the rainwater from flowing on to his land. The plaintiffs claimed that there was always an ancient watercourse and natural outlet for the rainwater from the highway over the defendant's land.

The plaintiffs' case was—first, that the pipe through the bank was a drain or watercourse within the meaning of section 67 of the Highway Act, 1835, and and that the plaintiff council, as the successors of the surveyor of highways, were entitled by virtue of that section to keep it open; and, secondly, that the public, as occupiers of the highway, had acquired a prescriptive right to have the rainwater from the road discharged through the pipe.

Section 67 of the Highway Act, 1835, provides as follows: "And be it further enacted that the said surveyor . . . shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby."

Lord Alverstone, L.C.J., held, first, that the pipe through the bank was not a drain such as was contemplated by section 67 of the Highway Act, 1835—viz., a drain for the conveyance of water to some proper outlet; and, secondly, that the plaintiffs could not base their case on a prescriptive right in the public to an easement, because there was no dominant tenement to which an easement could be attached. He accordingly gave judgment for the defendant.

The plaintiffs appealed.

Bray, K.C., and *Clarke Williams*, for the plaintiffs.

Dickens, K.C., and *Rashleigh*, for the defendant.

COLLINS, M.R.—In this case the plaintiffs, a local authority, complain that the defendant has stopped up a pipe through which water from a highway was discharged over his land. The Lord Chief Justice has held that the local authority could not rightly complain of the defendant's stopping up the pipe, because it was not a drain in respect of which the local authority could acquire the rights given by section 67 of the Highway Act, 1835. That section gives power to the surveyor of highways to make and keep open all ditches, gutters, drains, or watercourses in and through any lands adjoining any highway on payment of compensation to the landowner. By recent legislation the local authority have taken over the powers and duties of the surveyor of highways. It is proved that this drain—if I may for the moment use the word in a neutral sense—or some other drain for which it was substituted, has existed from a time beyond living memory. When there has been a well-established user like this for many years, the court ought, if possible, to find a legal origin to explain the existing facts. Can a legal origin be found for this user? Under the section the local authority have power to make and keep open such drains as are there mentioned. But it is contended, and the Lord Chief Justice has held, that this is not a drain within the meaning of that section, because it has not got a proper outlet. The road at this point slopes upwards in both directions, and it is therefore necessary that there should be some arrangement for carrying off the water from the surface of the road. There are two catch-pits, one on each side of the road, with a connection between them, and from the lower catch-

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

pit the water is taken by the pipe in question through a hedge or bank and discharged on the defendant's land. That arrangement for carrying off the water, or some equivalent for it, has been in existence from time immemorial. What is there to take the case out of the section? It is compatible with the evidence that there was at one time a ditch on the defendant's land which carried away the water from the point where it entered the land. If so, this contrivance for carrying the water off the road would clearly be a drain within the section. In the circumstances I am of opinion that the user which has been proved may have been perfectly legitimate, and that we ought to presume a legal origin for it. I think, therefore, that the appeal must be allowed. I should add that in my opinion the decision in *Croft* v. *Rickmansworth Highway Board*, 39 Ch. D. 272, 37 W. R. Dig. 84, does not apply to this case.

ROMER, L.J.—I am of the same opinion. There seem to me to be three alternatives in this case. First, there may have originally been on the defendant's land a natural drain to take the water where it entered his land. In that case the defendant would not be entitled to stop up a pipe put down to assist the natural flow of the water. Secondly, the acts done by the surveyor of highways in 1868 may have been done in pursuance of some legal right outside the rights given by the statute of 1835. If, thirdly, there was no such right outside the statute, the question arises whether a legal origin can be presumed for the right now claimed under the statute. This drain, although it is a short one, seems to me to be an important part of a system of drainage, and I think it ought to be presumed to have been made under the powers given by the statute either with the consent of the owner of the land or on payment of compensation to him. It is said that it has no proper outlet. I do not exactly know what is meant by a proper outlet, but after this lapse of time I think the defendant ought not to be heard to say that there was not a proper outlet when the drain was made. I therefore think the appeal succeeds.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitors, for the plaintiffs, *May, Sykes & Co.*

Solicitor for the defendant, *A. Pearce.*

High Court of Justice.

Chan. Div. Byrne, J. } Jan. 24, 25.

PEPPERELL *v.* HIRD. (*a.*)

Practice—Summons for directions—Interlocutory order to dismiss action—R. S. C., ord. 30, *rr.* 1, 2, 4, 5.

An order may be made in chambers on an application under the summons for directions to strike out a statement of claim as disclosing no reasonable cause of action and as frivolous.

An application so made to strike out a statement of claim is an interlocutory matter within the meaning of ord. 30, *r.* 5.

Motion.

This was a motion to set aside an order made in chambers to dismiss an action on the ground of want of jurisdiction.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

The facts of the case were as follows: A writ was on the 19th of June, 1901, issued by the plaintiff against the defendant Mr. Hird and certain other defendants alleging wrongful dealing on their part with the funds of a settlement.

A summons for directions was taken out by the plaintiff.

A statement of claim, having been directed, was delivered on the 24th of July by the plaintiff claiming the setting aside of certain deeds, replacement of trust funds, an injunction, and other relief.

Hird on application under rule 5 of order 30 obtained an order in chambers staying all proceedings until certain costs ordered to be paid by the plaintiff to him in respect of certain other proceedings similar in their nature to the present had been paid.

On the 5th of December an order was made on the application of another defendant, Mr. Evans, dismissing the action with costs, on the ground that the statement of claim disclosed no cause of action and was frivolous, unless the plaintiff delivered an amended statement of claim within fourteen days.

On the 19th of December the plaintiff delivered an amended statement of claim.

Evans's solicitor subsequently served a notice for further directions in the action on the plaintiff to the effect that the amended statement of claim disclosed no cause of action and was frivolous.

On the 9th of January Evans's solicitor applied in chambers to dismiss the plaintiff's action with costs, and an order was made to that effect.

The plaintiff did not appear on the application.

Plaintiff in person.

E. Clayton, for the defendant Evans.—There was jurisdiction to make the order, the order being an interlocutory matter within ord. 30, r. 5: *Horton* v. *Bosson*, 80 L. T. Rep. 435, 47 W. R. Dig. 155; Daniel's Chancery Practice (7th ed.), p. 314; Annual Practice, 1902, p. 374.

BYRNE, J. (after stating the facts).—There is no doubt at all in my mind that the court has implied jurisdiction to make this order, and the only question is whether it was rightly made under a summons for directions rather than by means of an ordinary summons under ord. 30, r. 4. It is a mere technicality; but if I thought that there was any substance in the plaintiff's case beyond it, I might look at the matter in a different light from that in which I now regard it. The plaintiff is an undischarged bankrupt; he has, prior to this action, taken proceedings against the defendant Hird by originating summons. That summons, which related to some of the matters here referred to, has been dismissed with costs, and an order was made in October last staying all proceedings against the defendant Hird quite independently of the order now in question. In the present case I have been carefully through the amended statement of claim with the assistance of the defendants' counsel, and I am of opinion that there are no merits behind the action. With reference to the plaintiff's other objections, I am of opinion that the notice under rule 5 was duly served, and that the defendants were not in default, nor out of time, for delivering pleadings when the notice was served, and I am of opinion that the application was regularly made and the matter regularly disposed of. I come now to the only question of substance, whether the court has jurisdiction upon an application of this kind to make the order? Had the plaintiff attended before the master in chambers I should have had no doubt at all upon the question, as a matter of this kind might, and probably would, have been taken and dealt with, or the matter might have been adjourned to the judge, because an objection of this kind, if it is taken

at all, ought to be taken at the time the matter is heard, and it is too late to take it after the order has been made. As a matter of fact, the plaintiff did not think fit to attend in chambers, and he now moves to discharge the order then made on the ground of irregularity and want of jurisdiction. Rule 2 of order 30 provides that a court or a judge shall so far as practicable make such order as may be just with respect to all interlocutory proceedings and as to the costs thereof, and particularly mentions the following matters—pleading, particulars, admission, discovery, interrogatories, inspection of documents, inspection of real and personal property, commissions, examination of witnesses, place and mode of trial; and rule 5 provides, "Any application subsequently to the original summons for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application." But for the fact that a regular practice has been established, there might have been considerable difficulty in discovering how far rule 5 was meant to be confined to the special things mentioned in rule 2 which are clearly interlocutory proceedings. In the present case an order has been made under these rules, which in a similar case, *Horton* v. *Bosson*, the Court of Appeal held to be an interlocutory order. I do not mean that the particular order made in this case has been held to be interlocutory; but an order of a similar nature. It is true that no reported case has been produced to me in which the exact point has been decided; but I have the statement in the latest book of practice—Daniell's Chancery Practice (7th ed.). On p. 314 it is stated "that it is the practice in both divisions to make almost any order which is not a final judgment. Thus, orders to stay proceedings, orders for accounts and inquiries, foreclosure and sale are so made, and sometimes even orders to dismiss for want of prosecution." And in the Annual Practice, p. 374, it is stated that in both the Chancery and King's Bench Divisions orders to stay and dismiss are made on summons for directions, and in the Chancery Division orders for accounts under order 15 are so made. I have myself made orders under these rules staying all further proceedings on default of the delivery of further and better particulars, or for non-compliance with some other special directions therein given within a fixed time.

Being, as I am, of opinion that there are neither merits nor substance in the plaintiff's case beyond this application, and finding as I do that there is a well-established practice in both divisions, under which orders similar to the present one have been made on an application for further directions under the summons for directions, I hold that the present application fails, and I dismiss the motion with costs.

Solicitors, *Stanley Evans & Co.*

Chan. Div. }
Buckley, J. } Feb. 19.

In re METAL CONSTITUENTS (LIMITED).
LORD LURGAN'S CASE. (*a.*)

Company — Shares — Memorandum of association — Subscription obtained by misrepresentation — Winding up — Contributory — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18, 23.

A signatory to a company's memorandum cannot claim rescission of his contract to take shares on the ground that he became a signatory in consequence of misrepresentations made to him by a third party.

L. having subscribed the memorandum of a company on the faith of misrepresentations made to him by S., a promoter of the company, held liable on the shares for which he had subscribed the memorandum, because (1) *a company cannot appoint an agent before it comes into existence itself; and* (2) *L. on registration became bound, not only as between himself and the company, but also as between himself and all future members.*

Karberg's case, [1892] 3 *Ch.* 1, 40 *W. R. Dig.* 41, *distinguished.*

Metal Constituents (Limited) was registered under the Companies Acts, 1862 to 1900, on the 10th of May, 1901. Lord Lurgan signed the memorandum of association for 250 shares, but upon the secretary applying to him for payment in August, 1901, he denied that he was a shareholder and refused payment on the ground that he was induced to apply for shares as a signatory by misrepresentations of one Sims, a promoter of the company. Immediately afterwards Lord Lurgan took out an originating summons for rectification of the register in respect of these 250 shares, but nothing was done with the summons before the 23rd of October, 1901, on which date the company passed an extraordinary resolution for a voluntary winding up and appointed a liquidator.

Lord Lurgan now applied in the winding up to vary the list of contributories by excluding his name.

A. Houston, for Lord Lurgan.

Eve, K.C., and *Manning*, for the liquidator.

BUCKLEY, J.—Even assuming that before the company was incorporated Sims made an untrue representation to Lord Lurgan on the faith of which he became a signatory for 250 shares, Lord Lurgan is not entitled to rescission of his contract to take shares. Prior to incorporation there was no company in existence. Sims cannot have been the company's agent, and Lord Lurgan cannot have been induced to become a signatory by the company or its agent. There is no contract in existence down to the moment when the memorandum and articles were taken to Somerset House to be registered; on registration two things occur by virtue of the Companies Act, 1862—first, the company springs into existence; and secondly, the subscribers to the memorandum become by virtue of section 23 of that Act members of the company. In this case the contract came into existence at the same moment as the company and its members, and therefore under the circumstances there can have been no misrepresentation by an agent of the company.

There is the further point raised by Lord Lurgan that he is entitled to rescission of this contract with the company because he entered into it on the faith of misrepresentations of fact made by a third party from which the company has derived a benefit, and he relies on *Karberg's case*, [1892] 3 Ch. 1, 40 W. R. Dig. 41, as an authority in his favour. This contention does not seem to me to assist him. Under the scheme of the Act of 1862 the company owes its existence under section 6 to the signatures of seven persons to the memorandum, and by virtue of section 23 on registration a contract is created not merely as between the subscriber to the memorandum and the company, but as between the subscribers and the company on the one hand and all other members on the other. By section 18 on incorporation the subscribers of the memorandum, together with all such other persons as might from time to time become members, became a body corporate. Lord Lurgan's signature to the

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

memorandum made him on registration a member of the company, and he was placed in a contractual relation not only with the company but with every other person who became a member. He cannot, in my opinion, claim rescission on the ground that he entered into a contract with the company in consequence of a misrepresentation.

His lordship added that on the facts also Lord Lurgan's application must fail, and dismissed the summons with costs.

Solicitors, *H. Percy Becher; Blair & Girling.*

K. B. Div. (Bigham, J.) April 10; May 9.

EDELSTEIN v. SCHULER & CO. (*a.*)

Bond—Bearer bonds—Negotiability by custom—Holders for value—Liability of stockbroker for conversion.

Certain "bearer bonds," consisting partly of bonds of foreign corporations and partly of bonds of an English company, were stolen from the plaintiff by his clerk, who employed M., a provincial stockbroker, to sell them. M. instructed the defendants, who were London stockbrokers, to sell the bonds on the London Stock Exchange. The defendants bonâ fide *and without notice of any defect in the vendor's title effected the sale and remitted the proceeds to M. The plaintiff sued the defendants for conversion of the bonds. Evidence was given of a custom to treat the bonds in question as negotiable in the same way as the bonds of foreign governments.*

Held, that the bonds were negotiable instruments; that the defendants were holders of them for value, and therefore that the action was not maintainable.

The Bechuanaland Exploration Co. *v.* London Trading Bank (Limited), [1898] 2 *Q. B.* 658, 47 *W. R. Dig.* 29, *followed.*

Action tried in the Commercial Court without a jury.

This was an action brought to recover damages for conversion of bonds.

The facts of the case and the arguments appear sufficiently in the judgment.

Danckwerts, K.C., Montague Lush, K.C., and *Waugh,* for the plaintiff.

Duke, K.C., Rufus Isaacs, K.C., and *Ellis Hill,* for the defendants.

Cur. adv. vult.

May 9.—BIGHAM, J., read the following judgment: This was an action in trover to recover the value of certain bearer bonds alleged to have been converted by the defendants to their own use. The bonds in question were those of the De Beers Mining Co., the Denver Railway Co., the Mexican Railway Co., and the Union Pacific Railway Co. All these were bonds of foreign corporations. There were also some bonds of the Bechuanaland Railway Co., which is an English company registered under the Companies Acts. The bonds are in the ordinary form of such securities. It appeared at the trial that the plaintiff, to whom these bonds belonged, kept them in a safe in his office. They were stolen from the safe by one of the plaintiff's clerks. This clerk then from time to time employed a broker named Megson, who traded on the Stock Exchange at Bradford, to sell the bonds. Megson, in the ordinary way of business, sold them through the defendants, who are stockbrokers carrying on their business on the London Stock Exchange. The bonds were sold to jobbers either for cash or for the account, and when sold they were sent to the defendants so that they might hand them to the jobbers in exchange for the price. When the defendants received the money they remitted the amount to Megson, either in cash or in account current, and he in his turn paid the money to the clerk. It was admitted that the defendants had no notice of any infirmity in the vendor's title and that they acted throughout with perfect *bona fides.* On discovering the theft, the plaintiff brought this action. Neither the thief nor Megson was worth suing, and probably the plaintiff doubted whether he could make out a cause of action against the jobbers; but, whatever the reason, he selected the London brokers as the persons whom he would sue, and I have to determine whether they are liable.

A body of evidence was called at the trial to show that all these bonds pass from hand to hand among the people who deal in them, and that they are treated as negotiable in the same way as the bonds of foreign governments. No serious attempt was made to refute this evidence, and it quite satisfied me that all the bonds in question belong to a class which bankers, stockbrokers, and others whose business it is to deal in such securities treat, rightly or wrongly, as negotiable and as passing from hand to hand by mere delivery. It is in these circumstances that the plaintiff seeks to fix the defendants with liability. He says that, though such bonds may in fact be treated commercially as negotiable, they are not in law negotiable; and he further says that even if lawfully negotiable, yet, as the defendants were never holders of them for value, they are liable in trover, having handled them with the intention of vesting the property and possession in the jobbers who bought them. In support of the first of these two contentions Mr. Danckwerts argued that the attribute of negotiability could not be attached to a contract except by the law merchant; and that these bonds are of such recent creation that their negotiability under that branch of the law cannot be justified. It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that in determining whether a usage has become so well established as to be binding on the courts of law the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Cockburn, C.J., in *Goodwin* v. *Robarts,* 23 W. R. 915, L. R. 10 Ex. 337, at p. 346, capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of of trade; our common law, of which the law merchant is but a branch, has in the hands of the judges the

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

same facility for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence. Thus it has been found convenient to treat securities like those in question in this action as negotiable, and the courts of law recognizing the wisdom of usage have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression "bearer bond" connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities. It would be a great misfortune if it were otherwise, for it is well known that such bonds are treated in all foreign markets as deliverable from hand to hand; the attribute not only enhances their value by making them easy of transfer, but it qualifies them to serve as a kind of international currency; and it would be very odd and a great injury to our trade if these advantages were not accorded to them in this country. But I am not to be guided alone by evidence and by questions of expediency. The point is entirely covered by authority. The arguments in support of the contention that these bonds are not negotiable were all adduced before and carefully examined by Kennedy, J., in the case of *The Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658, 47 W. R. Dig. 27, and were dismissed by him as unsound. I have read the judgment in that case, and I desire to say that I entirely agree with the conclusion and with the reasons which leads up to them. I go, perhaps, further than Kennedy, J., intended to go, for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the courts of law ought to take judicial notice of it.

The negotiability of the bonds being established, it is clear that the jobbers who bought them, having given value and having acquired them without any notice of infirmity in the vendor's title, could not be sued in trover by the plaintiff. But can the defendants, the brokers who assisted in perfecting the good title acquired by the jobbers, be sued? It is said they can. A broker who merely negotiates the sale of chattels without the authority of the true owner commits no tort at all. The sale is a mere void act. It divests the true owner of no right, and it does not physically interfere with his control or possession of the goods. But if in addition to negotiating a sale the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorized sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner. It is argued that the defendants by what they did in handing the bonds to the jobbers have brought themselves within this rule of law. But, in my opinion, before the defendants had possession of the bonds at all or physically dealt with them in any way they had become entitled to them for a valuable consideration just as effectually as the jobbers subsequently became entitled to them by paying the purchase price. When in the ordinary course of business the defendants negotiated the sale of the bonds to the jobbers they came under a personal liability to the jobbers to deliver them. This liability they undertook at the request of the Megson, who was acting for the thief, and in consideration of their undertaking the liability, Megson or the thief promised that he would deliver to them the bonds; these circumstances, in my view, made the defendants holders for value, and, as the bonds were negotiable, gave them power to deal with the bonds.

Or it may be put in another way. Megson in the ordinary course of business would look to the defendants (so long as they were solvent), and not to the jobbers for the price of the bonds; it is the defendants whom he would treat as the buyers, and to whom he would look, and, in fact, did look, for his money; this is the way in which the transactions would be carried through, and although this course of business does not make the defendants the buyers of the bonds, it makes them, in my opinion, holders for value as soon as they get possession of them and hand over the money in exchange for them. I think for these reasons that the defendants became as much holders of the bonds for value as the jobbers, and that they are entitled to the same protection.

But even if they were not holders for value, I doubt whether they could be sued in trover, or sued at all. There appears to me to be an essential difference between meddling with goods with the intention of transferring a title which will be bad as against the true owner and the case of assisting in perfecting a title which will be good as against the true owner. It would be very odd that an action should lie against the broker for assisting the jobber to get his title when no action lies against the jobber who gets the title; and to so hold would go far to destroy the advantages of the negotiability of the bonds. It is not, however, necessary for me to decide this point. It is sufficient for me to say that, in my opinion, these bonds were negotiable instruments, and that the defendants were holders of them for value.

Judgment for defendants.

Solicitors for the plaintiff, *Warren, Murton, & Miller*, for *Mossman, Atkinson, & Blankley*, Bradford, Yorks.

Solicitors for the defendant, *Gush, Phillips, Walters, & Williams.*

Prob. Div. & Adm. Div. Probate. } March 13, 15, 24, 25, 26; April 18.

LIGHTBODY v. WEST. (*a.*)

Probate—Marriage—Foreign marriage—Ceremony performed by minister not of the same religious community as one of the contracting parties.

Although by the common and civil law of Western Europe a marriage per verba de præsenti *was valid without the presence of a minister of religion, yet, notwithstanding that, municipal law has superadded the necessity of the presence of a minister as a witness,*

Quære, *whether such a marriage may or may not be considered valid according to the laws and rites of the Church of England, for*

Quære, *whether the decision in* Reg. v. Millis, 10 *Cl. & Fin.* 534, *applies where the presence of an ordained minister of the Church of England cannot be procured.*

Action.

Alfred William Lightbody, the plaintiff as attorney

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

for Rachel Ann West, of Santa Fé, Argentina, claimed letters of administration to the estate of Benjamin West, whose widow Rachel Ann West alleged she was. The deceased was the eldest son of George Thomas West, of Wilby, Northamptonshire, and was born on the 25th of May, 1853, and died on the 19th of September, 1890, at Alexandra Colony, Santa Fé.

The defendants were the brother and sister and next-of-kin of the deceased, and they alleged that the deceased died a bachelor without parents, and intestate. They alleged that the marriage between Benjamin West and Rachel Ann West was not a valid marriage.

In reply to this, the plaintiff alleged that in July, 1897, the Court of First Instance, Civil and Commercial, of the Second Nomination of Santa Fé, had declared that the deceased's only and universal heirs were his surviving widow and his legitimate and only son Benjamin West the younger. To this the defendants rejoined that Benjamin West the elder was never domiciled in the Argentine Republic, and that according to Argentine law the ceremony of the marriage of persons marrying in Argentina, if those persons were not Roman Catholics, must be celebrated in accordance with the rites of the church to which the parties belonged, and that inasmuch as Benjamin West was a member of the Anglican Church and the pretended marriage was celebrated in the Methodist Episcopal Church, Rosario de Santa Fé, and not in the presence of an ordained minister of the Church of England, the marriage was therefore not celebrated according to the rights of the Church of England, which was the church to which the parties belonged, and the defendants therefore claimed a grant of administration.

It appeared from the evidence that about 1879 Benjamin West left this country for Argentina, being sent abroad by his father, who in his will dated the 16th of August, 1879, left him £100 "so long as he remained out of England."

On his father's death Benjamin West returned to this country to see after his father's affairs and arrived back again in the Argentine Republic in January, 1883, where he remained until his death.

On the voyage out from this country Benjamin West fell in with a Mr. Fergusson and his wife, who were lay missionaries working near Rosario, and in 1884 Benjamin West having met Rachel Ann West, a widow, requested Fergusson to marry them. At that time, however, Fergusson was not ordained, and there being no such thing as civil marriage then recognized, the parties lived together as man and wife until on the 14th of April, 1885, their marriage was celebrated by a Mr. Joseph Woods, who was a Methodist Episcopal minister.

Bargrave Deane, K.C., and *A. B. Cane*, for the plaintiff, contended that the marriage was valid according to the law of the Argentine Republic.

They cited the code published in 1889 by the Argentine Republic, and 1894 Blue Book, Part II., Arts. 96, 101, 167, 181, 183.

Inderwick, K.C., and *Dudley Grazebrook*, for the defendants.—The deceased, being a member of the Church of England, ought to have been married by a member of the Church of England. The question of domicil was immaterial on the question of the validity of the marriage.

They cited the case of *Reg.* v. *Millis*, 10 Cl. v. Fin. 534; and *Beamish* v. *Beamish*, 9 H. L. Cas. 274, 3 W. R. H. L. Dig. 3.

JEUNE, P., in giving judgment, said: This is an action brought by Mrs. Rachel Ann West, on behalf of herself and her sons, to obtain administration of the estate of her alleged husband, Benjamin West, who died in Argentina in 1890. The main question in the case is whether the marriage celebrated on the 14th of April, 1885, between the plaintiff and Benjamin West in the Alexandra colony, Santa Fé, was a valid marriage, as having been solemnized according to a form sanctioned by Argentine law. The validity of this marriage does not depend on the domicil of the parties; but, as certain other questions do depend on that fact, I think it well in the first instance to deal with it. Mr. Benjamin West's domicil of origin was clearly English, as his family lived in Northamptonshire. He went to Argentina during his father's lifetime. It was suggested that this happened in consequence of some misconduct on Mr. Benjamin West's part, and there was ground for such a supposition in the fact that the allowance bequeathed to him by his father was to continue only as long as he remained abroad. The evidence, however, of his sister negatived this supposition, and it is not material, as I do not think that the visit to Argentina in 1879 effected any change of domicil. But Mr. West's father died in September, 1879; he then came to this country, probably to see after the distribution of his father's property. In 1882 he returned to Argentina, reaching that country in January, 1883. From that time to his death he lived in Alexandra colony. He seems to have taken out a mill, to have purchased land and established himself in a ranch, which he stocked with cattle, and on which he built a house. In 1884 he made the acquaintance of the plaintiff, and, after no doubt living with her, married her as above-mentioned in 1885. The conclusion at which I have arrived is that after 1882 he did effect a change of domicil. His acquisition of land and building a house point in this direction, and evidence has been given that he expressed his preference for a life in Argentina to one in England. His marriage, I think, confirms this view, though from its circumstances it is not perhaps so weighty an incident as marriage often is in questions of this nature. It was strongly pressed on me that he kept certain funds in England, and had them sent to Argentina only when he needed them for a special purpose. But I do not from this fact draw the inference of an intended return to this country. Having regard to the unsettled condition of the Alexandra colony at that time—we hear of raids by Indians—and the political vicissitudes of South American States, I think that keeping some funds in safety in this country quite as consistent with an intention to remain in Argentina, as to return to England. One fact, however, has great weight with me. Mr. West appears to have carried on a constant correspondence with his sister in England, and it is clear that in that correspondence he never on any single occasion referred to any intention to return. It seems to me impossible to suppose that a man who retained any intention of returning home should not in a long and intimate correspondence with a sister in England ever refer to the probability of his coming home or of his seeing her again. Mr. West appears not to have mentioned his marriage to any of his relatives in England. This is remarkable; but it appears to me to point rather to his intention not to return with her to this country than to an intention to bring her home and introduce her to his family. The strongest facts in the defendants' favour on this question of domicil were, I think, that in 1882 before Mr. B. West left England he gave written directions relating to the collection of certain dividends, in which he spoke of himself "as I am going abroad for a time"; that he expressed to his sister an intention to return, and also that he caused himself about the same time to be put on the register of Parliamentary voters for Northamptonshire. I do not think, however, that any of these facts point very strongly to an intention to return to England on Mr.

West's part; but they do seem to indicate that his mind was not fully made up. But they are quite consistent with a conclusion in which all the facts seem to me to agree, that when he got out to Argentina in 1883 a half-formed intention to remain then hardened into a final decision.

I now come to the main question. Was the marriage of the 14th of April, 1885, a valid marriage? Mr. West was a member of the Church of England, the plaintiff was an Episcopalian Methodist. Mr. West appears to have made several unsuccessful attempts to get the marriage properly performed. He asked a friend, Mr. Fergusson, who gave evidence before me, to marry them. Mr. Fergusson was lay reader and was preparing for ordination, but was not yet a clergyman, and he accordingly refused. He then requested the civil judge to perform the ceremony, but at that time civil marriage had not been rendered legal in Argentina. Eventually Mr. Wood, an Episcopal Methodist minister, came to the Alexandra colony, and he performed the ceremony of marriage according to rites identical with those of the Church of England; and a marriage act was drawn up in which both parties are described as Protestants, signed by them and by Mr. Wood, and by Mr. and Mrs. Fergusson as witnesses. A record of the marriage was also made in a book kept by Mr. Wood. The son was born in September, 1885. The question thus arises, was a marriage between a member of the Church of England and an Episcopalian Methodist good according to the law of Argentina if celebrated by an Episcopalian Methodist minister? I have to determine this question as a question of fact primarily depending on evidence of Argentine lawyers, reference being also had to the language of the Argentine Code and to some other facts which go to show what the Argentine law at that time was. Several articles of the code deal with the question of forms according to which marriages can be legally solemnized. By article 167 of the code in force in 1885 marriage between Roman Catholics (the code, of course, always speaks of "Catholics") must be solemnized in accordance with the canons and solemnities prescribed by the Roman Catholic Church. By article 180, marriages between a Roman Catholic and a Christian not a Roman Catholic, sanctioned by the Roman Catholic Church, are to be solemnized in accordance with the practice existing in the church of the communions of which the party not a Roman Catholic may belong, it being added by article 181 that marriage solemnized by dissenting (that is to say, non-Roman Catholic) ministers is null, when one of the parties is a Roman Catholic, unless it be immediately solemnized by the Roman Catholic parish priest. Then comes article 183 in these terms: "Marriage solemnized without the sanction of the (Roman) Catholic Church is that contracted between Christians not Catholic, or between persons who do not profess Christianity. It produces in the Republic all the civil effects of a valid marriage if solemnized in accordance with the laws of this code, and in accordance with the laws and rites of the church to which the contracting parties belong." The reference to "the law of this code," is, I think, to article 179, which requires marriage to be proved by the inscription in the registers of the parish, or of the communions to which the parties belong. I have already said that a record was made in the book of the Episcopalian Methodist Church. But the question is whether a marriage by an Episcopalian Methodist minister was in accordance with the laws and rites of the church to which Mr. and Mrs. West belonged. I had before me the evidence of Argentine lawyers on both sides. For the plaintiff, Dr. Agode, a doctor of laws in the Argentine Republic, who had practised there for twelve years, informed me that in his opinion if both parties were Catholics, article 167 required one Roman Catholic ceremony, if one only was a Roman Catholic, article 181 required two ceremonies; but that article 183 did not prescribe two ceremonies as necessary, and would have done so if two had been necessary. His view, clearly, is that the code recognized only Roman Catholic and non-Roman Catholic religious communities, and did not discriminate between the various churches of non-Roman Catholics. His evidence was supported by that of Mr. Mallet, who, as I gather, practised rather as a solicitor than what we should understand as a barrister in Argentina, but who certainly received a legal education and passed legal examinations, and carried on important legal business. He said that he had taken many legal opinions about such marriages as the one in this case, and that in his opinion they were clearly valid, the ground being that the Argentine law makes no distinction between non-Catholic sects. In addition to this evidence it was proved before me that, though marriages like the present had often been solemnized, and in one instance at least under circumstances of great publicity, such marriages had never been questioned and certainly had never been declared illegal by any court of law. The circumstances of the present case are also not without significance in this connection. The plaintiffs appear to have obtained by application to the Argentine court a decree recognizing their right of succession. It is true that the defendants had no legal notice of this and were not represented. I do not say, therefore, that they are bound by this decision. But it is at least remarkable that Mr. George West, one of the defendants, afterwards went out to Argentina, and, though he endeavoured to intervene in this suit by a method clearly destined to fail, as it did, never took the legal step which I am assured might have been taken to get the marriage declared invalid. I much regret that the matter was not properly brought before the Argentine court and decided by them. But what I am at the moment concerned to observe is that Mr. George West's omission to take proper proceedings, after, no doubt, obtaining the best advice in Argentina, points to the inference that the advice he received supported the validity of the marriage, an inference which Mr. George West, though present in court, and though challenged to give evidence, did not go into the witness-box to refute. It was shown also that an eminent Argentine lawyer was consulted by the defendants in this country, but he was not called to give evidence before me. I may add that the defendants also by the conduct of their defence prevented a commission going to Argentina to take the evidence of lawyers in that country. If such commission had gone the case would probably have been made quite clear. The defendants, however, called one gentleman as an expert in Argentine law. He was a M. Daveaux, an Argentine barrister of twenty-three years' standing, but who, as I understand, had in recent years resided and practised as a French advocate in Paris. His view was that, according to article 183, if the parties belonged to different non-Roman Catholic Churches, there must be two ceremonies—one according to the law of each such church. This gentleman evidently based his view on the construction he placed on the language of article 183; but he did not say that any decision of the Argentine court supported his view, nor in a work published by himself on Argentine law did he state any such proposition as he advanced before me. On the whole I come to the conclusion that the view of Argentine law advanced by the plaintiffs is that

which I ought to accept. The code, article 183, is no doubt ambiguous on the subject. I do not feel pressed by the argument very strongly urged before me that the view of the plaintiffs would lead to the conclusion that the marriage of persons belonging to two sects of infidels by a minister of one such sect—for example, a marriage by a Jew Rabbi of a Jew and a Mussulman—would be legal. If the parties to such a marriage were willing so to be married, and the minister of one such sect was willing to marry them, it does not seem to me at all unreasonable or unlikely that the law of a Roman Catholic country such as Argentina would recognize a marriage according to rites in which both parties to the marriage were willing to participate. It might have been said in such a case, and indeed in the present case, that if both parties treated the rites as those of the law of the church to which they belonged the Argentine law would not concern itself to nullify their act by discriminating between the laws of their respective churches. But I do not desire to deal with the case as if I had to construe article 183. I need only say that, as the expert evidence of the plaintiff and the defendants differs, I prefer that of the plaintiff as being the more probable, and as being supported by the strong fact that, though marriages like the present have been common and notorious, the Argentine courts have never decided them to be invalid, though questions of property must often have depended on their validity. At the close of the argument before me, and therefore at a time when it could not be fully discussed, there was raised before me a point which, were it not that I am able to decide this case upon the grounds which I have just stated, I should have considered worthy of most careful consideration. The 183rd article of the Argentine Code refers to "the laws and rites of the church to which the contracting parties belong." If, therefore, this was a good marriage, under its circumstances, according to the laws and rites of the Church of England, it would be a valid marriage according to Argentine law. I am, of course, in this court bound by the decision of *Reg.* v. *Millis*, in which case it was held that a marriage in 1829 in Ireland by a Presbyterian minister between a man belonging to the Established Church of Ireland and a woman who was a Presbyterian was invalid on the ground that by the common law the presence, before the Reformation, of a priest, or since the Reformation of a priest or deacon, was essential. It was suggested in argument before me that, although this must be taken to be the common or municipal law, it is clear that by the common and civil law of Western Europe a marriage *per verba de præsenti* was valid without the presence of a minister of religion, and that, therefore, such a marriage might be considered valid according to the laws and rites of the Church of England, although the municipal law superadded the presence of a minister as a witness; and the judgments in the case of *Beamish* v. *Beamish*, were referred to as supporting this proposition and showing that the presence of a witness in the person of a minister was due to a requirement of the state and not of the church. I do not think it necessary to enter into the difficult question thus raised. I would only say that, as far as I am concerned, it must be considered open; and I would add that it is, further, highly doubtful whether the decision in *Reg.* v. *Millis* applies where, as in the present case, the presence of an ordained minister of the Church of England cannot be procured: see on this point the language of Lord Campbell in *Reg.* v. *Millis*, 10 Cl. & Fin., at p. 786, and that of Willes, J., in *Beamish* v. *Beamish*, 9 H. L. Cas. 274, at p. 332, and the cases there referred to, and of Lord Cranworth at p. 353. There are also several other articles of the Argentine Code which, if the domicil of Mr. B. West was, as I have held, in Argentina, would be of importance, even if the marriage was invalid under article 183. By article 224 it is provided that a marriage cannot be annulled except in the life of both spouses; and, though the present proceeding before me is not in terms, it is in substance a proceeding to get the marriage in question annulled. By article 230 it is provided that, if a marriage be contracted in good faith on the part of both spouses, it has, till annulled, all the effects of a valid marriage; but on this article a question may arise having regard to article 233 as to what the Argentine law considers to be the necessary conditions of good faith in such a matter. Finally, it is provided by article 3,577 that, if a man dies leaving no legitimate representatives in an ascending or descending line, and no widow, his illegitimate children take his property—a provision which will apply in the present case if the marriage in question was invalid and the domicil of Mr. West in Argentina. I do not, however, think it necessary to go further into any of these questions. There must be judgment for the plaintiffs, with costs.

Solicitors for the plaintiffs, *Brown, Ringrose, & Co.*

Solicitor for the defendants, *J. T. Davies*, for *Dunn & Co.*

House of Lords.

From C. A. (England). Feb. 7.

LONDON COUNTY COUNCIL *v.* ATTORNEY-GENERAL AND OTHERS. (*a.*)

*Local Government—London County Council—Authority created by statute—Statutory powers—Tramways—Ancillary business—*Ultra vires*—Attorney-General—Local Government Act,* 1888 (51 & 52 *Vict.* c. 41), *ss.* 2. 68, *and* 79.

The London County Council, being a statutory body only, has no powers other than those conferred by statute. Therefore, where it has the power of acquiring and working tramways, it is not entitled to run a service of omnibuses in connection therewith.

The powers and duties of the Attorney-General observed upon.

Decision of the Court of Appeal ([1901] 1 *Ch.* 781, 49 *W. R. Dig.* 97) *affirmed.*

Appeal from a decision of the Court of Appeal (reported [1901] 1 Ch. 781, 49 W. R. Dig. 97).

The appellants, the London County Council, had acquired under statutory powers a number of tramways within the County of London and in connection with them had been running omnibuses.

The respondents, the plaintiffs in the action, were the Attorney-General at the relation of a number of proprietors of London omnibuses, and the proprietors, who were also ratepayers.

They claimed a declaration that the London County Council were not entitled to carry on the business of omnibus proprietors within the county, and an injunction against their doing so.

Section 2 of the London County Tramways Act, 1896 (59 & 60 Vict. c. li.), is as follows: "It shall be lawful for the council to exercise with respect to any

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

tramways authorized by the local Acts mentioned in the schedule to this Act which have been or shall be purchased or acquired by them under their statutory powers the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways, and the council may provide, place, and run carriages thereon and provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them; and the several provisions relating to the working of the tramways and the taking of tolls, rates and charges therefor contained in any Act relating to any such tramway shall extend and apply *mutatis mutandis* to and in relation to such tramway for the time being worked by the council and to the council instead of to the company."

The Court of Appeal held that the council's powers were limited to the terms of the statute.

Haldane, K.C., and *Vernon Smith, K.C.* (*T. T. Methold* with them), for the appellants.

Asquith, K.C., *Macnaghten, K.C.*, and *Blaiklock*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—It appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653, and *Attorney-General* v. *Great Eastern Railway*, 27 W. R. 759, 11 Ch. D. 449, at p. 483, and I do not think that much would be gained by going through each individual topic of it, because I think it cannot now be doubted that those two cases, if we look at them, do constitute the law upon this subject. It is impossible to go behind those two cases; they are now part of the law of this country, and we must acquiesce in them, whether we like it or not.

So far as the particular questions before us here are concerned, depending as they do upon the statute itself, with the utmost respect for the learned counsel I think the contentions hardly admit of plausible statement. The power which is expressly given to the London County Council excludes from them, and to my mind is intended to exclude from them, that which did exist as a separate business under the earlier statute, and which was not intended, obviously, to be conferred upon the London County Council. It appears to me to be, as I say, hardly susceptible of plausible statement to suggest that those words can possibly include this separate business. The only argument which, as it appears to me, is capable of plausible statement in the matter is the argument derived from the somewhat clumsy phrase used in the statute with reference to their being in the same position as the council of a borough divided into wards. At first sight that looks as if they were intended to be identified in all particulars; but when one looks at the context of that section and sees what it refers to, I think it is manifest, to use Vaughan Williams, L.J's, expression, that it is a section for the machinery governing and arranging the powers and the order of their exercise inside the corporation, when you have got the corporation, but not in the smallest degree intended to enlarge the original objects of it, or to give them any power other than those previously conferred upon them by statute. That seems to me to dispose of that point, which was, to my mind, the only thing that caused me to consider whether this question was capable of plausible argument or not.

One question has been raised, though I think not raised here—it appears to have emerged in the court below—which I confess I do not understand. I mean the suggestion that the courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General, and not for the courts, to determine whether he ought to initiate litigation in that respect or not. Considering the profound respect with which I regard all the observations made by the late James, L.J., I cannot help thinking that he did not himself suppose that he was laying down any absolute rule of law in *Attorney-General* v. *Great Eastern Railway*. I think he was only giving, in response to the Attorney-General himself, some sort of pious opinion as to the mode in which the discretion of the Attorney-General, and the Attorney-General alone, should be exercised in a case in which he thought it his duty to intervene. In a case where as a part of his public duty he has a right to intervene, that which the courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the court; but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me to be very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it, by the first law officer of the Crown.

I do not think it necessary to go through this case, because the very elaborate and careful judgments delivered both by Cozens-Hardy, J., and the three learned Lord Justices in the Court of Appeal appear to me to exhaust the whole question; and, as I have said before, I think in a great measure the whole question has been already determined by the two cases which have been referred to. Under those circumstances I think that this appeal should be dismissed with costs.

Lord MACNAGHTEN.—I am entirely of the same opinion. I must say it seems to me to be a very clear case. The London County Council are carrying on two businesses—the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; they may be worked into each other, and, no doubt, that is an advantageous mode of working them; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of a line of steamers in connection with it is incidental to the undertaking of a railway company which has its business at a seaport.

I think it is a perfectly clear case. The only thing

further I should like to say is that I regret most sincerely that the rates and the money of the public should have been spent in defending up to the last tribunal a case as plain as this.

As regards the argument that the county council have all the powers of a common law corporation, I think that is disposed of at once if you look to the Act of Parliament, because the sentence on which the learned counsel for the appellant relies is contained in the first chapter as to the constitution of the council, and there is a separate chapter which deals entirely with the powers of the county council, and in that chapter I can find nothing to warrant the contention of the appellants.

With regard to the position and duties of the Attorney-General, I only want to say that I entirely concur with what has fallen from the Lord Chancellor. I am of opinion that the appeal should be dismissed with costs.

Lord SHAND.—I am of the same opinion.

Lord BRAMPTON.—After hearing the judgments of Cozens-Hardy, J., and of the Lords Justices in the Court of Appeal, I can entertain no doubt at all that this appeal cannot be maintained. I therefore concur in the motion that the appeal be dismissed.

Lord ROBERTSON and Lord LINDLEY concurred.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Hicks, Davis, & Hunt.*

Court of Appeal.

From P. D. & A. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — May 6.

KAYE *v.* KAYE. (*a.*)

Divorce — Wife's petition — Variation of settlement — Settled property wholly brought in by husband — Extinction of husband's life interest — Matrimonial Causes Act, 1859, *s.* 5.

After a divorce on the wife's petition the court extinguished the husband's life interest in the property included in the marriage settlement, the income of which amounted to £45 a year, and the whole of which had been brought into settlement by him. There was one child of the marriage, who had not attained a vested interest.

Held, that this was a proper exercise of the discretion of the court in the interests of the wife and child.

This was an appeal from an order of Barnes, J., ordering a variation of the settlement made on the marriage of Captain and Mrs. Kaye in 1887.

The whole of the settled property (the income of which amounted to £45 per annum) was brought into settlement by the husband.

Under the provisions of the settlement the first life interest in the whole fund was given to the husband, who was an officer in the Indian Army.

The wife was given a life interest on his death, and on the death of the survivor the fund was settled on the children or remoter issue of the marriage, as the husband and wife or the survivor should appoint.

In default of appointment the fund was settled on the children at twenty-one or marriage.

In default of any issue of the marriage attaining a vested interest there was an ultimate trust in favour of the husband.

There was one child of the marriage, a girl, born in August, 1891.

Early in 1900 the wife petitioned for dissolution of the marriage on the ground of the husband's cruelty and adultery, and a decree *nisi* was granted by the President on the 24th of April, 1900, the decree absolute being pronounced on the 5th of November, 1900.

On the 26th of November, 1900, the wife filed her petition for maintenance, and on the 17th of December she filed her petition for variation of the marriage settlement by the extinction of all the powers and interest of the husband in the trust fund as if he were already dead, save and except the ultimate trust for him.

The husband, being in India, was allowed by the registrar four months in which to put in his answer to the petitions, and from this order the wife appealed to the President in chambers, who gave her leave to accept unsworn answers or in the alternative confirmed the allowance of four months. The wife elected to accept unsworn answers, which were accordingly filed, and after hearing the petitions the registrar reported that the wife ought to receive £100 per annum for the maintenance of herself and the child of the marriage, made up as to £45 by the income of the settled fund, the remaining £55 to be paid by the husband.

On the 8th of August, 1901, Barnes, J., confirmed the registrar's report and ordered the life interest of the husband in the settled fund to be extinguished.

The husband appealed.

It appeared that he owed debts and was in arrears with his contributions to the Indian Army Pension Fund, which he had been allowed to make up by monthly payments.

Micklem, K.C., and *Gordon Dill*, for the appellant. —No other case can be found in which a husband's interest in a fund wholly contributed by himself has been extinguished. No doubt the court has jurisdiction to do this; but in every other case where his interest has been extinguished it has been in the wife's fund. Justice would be done by giving the husband a life interest on the death of the wife, which would effect all that is necessary in her interest. As to the child, she will have a right to demand maintenance from her father if she is under age on the wife's death. As the order stands, when she attains twenty-one she and her mother can dispose of the fund though it was entirely the husband's. This cannot be right

They referred to *March* v. *March*, 15 W. R. 799, L. R. 1 P. & D. 440, and *Wigney* v. *Wigney*, 30 W. R. 722, 7 P. D. 177.

Bargrave Deane, K.C., and *Barnard*, for the wife. —In view of the husband's circumstances, the child, if her mother dies while she is under age, may have to compete for her maintenance with creditors. Barnes, J., has exercised his discretion for the benefit of both wife and child in the only way possible in the circumstances of the case. The reason why no similar reported case can be found is that in most cases property is brought into settlement on both sides. In any case an order for maintenance would end when the child attained twenty-one.

They referred to *Thomas* v. *Thomas*, 8 W. R. 504, 2 Sw. & Tr. 89.

Micklem, in reply.

COLLINS, M.R.—I think this order was not only legitimate, but the best one possible for the wife and child. The husband was the guilty party,

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

court had to consider the child as well as the wife. The jurisdiction of the court is not disputed, and as to the suggestion that the husband should have been given a life interest before the child's interest took effect, I think this was a result which the court was bound to guard against. The child would have had to seek her maintenance from the Chancery Division, in competition possibly with creditors, while this order gives it to her direct. The appeal must be dismissed with costs.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellant, *Thorneycroft & Willis*, for *A. Fossick*, Maidenhead.

Solicitor for respondent, *W. H. Blaber*.

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) } April 16, 17; May 5.

In re ALDAM'S SETTLED ESTATES. (*a.*)

Settled land—Mining lease—Varying minimum rent—Way-leave—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7, 9, 53.

The object of the Settled Land Acts is to remove restrictions in dealing with settled land, and though the interests of the remaindermen are to be considered, a possible disadvantage to the remaindermen ought not to be allowed to put a stop to the development of the estate. There is nothing in the Settled Land Acts which makes it necessary that the minimum rent reserved in a mining lease should be uniform or that it should be reserved from the commencement of the term, consequently a mining lease may be granted reserving a minimum rent which does not commence in the first year of the term, and which gradually increases year by year.

A mining lease may also contain a grant of a way-leave, for which no separate rent is reserved, and which is to continue after the rent has ceased on the working out of the coal.

Decision of Byrne, J. (*reported* ante, *p.* 199), *reversed.*

This was an appeal from a decision of Byrne, J. (reported *ante*, p. 199).

The facts were as follows: William Aldam, by his will, dated the 18th of December, 1884, devised his real estate to the use of his son, William Wright Warde Aldam, for life, with remainder to the use of such one or more of the sons or daughters of William W. W. Aldam, for such estates in tail or any lesser estates as William W. W. Aldam should by will appoint, and in default of such appointment to the use of the testator's grandson, William St. Auden Warde Aldam, the son of William W. W. Aldam, for life, with remainders over. And the testator declared that every estate for life under the limitations aforesaid should be without impeachment of waste, and also that under a mining lease, whether the mines or minerals leased were already opened or in work or not, there should be from time to time set aside as capital money arising under the Settled Land Act, 1882, two third parts of the rent, and the residue of the rent should go as rents and profit.

The testator died on the 27th of July, 1890.

William W. W. Aldam is the present tenant for life in possession under the testator's will. His son, the tenant for life in remainder, is an infant. William W. Warde Aldam entered into an agreement dated the 13th of February, 1900, with the Dalton Main Collieries (Limited), whereby he agreed, as the tenant for life under the settlement created by his father's will, to lease the Barnsley thick seam of coal under the settled estate for a term of sixty years from the 1st of January, 1898.

The material clauses of the agreement were as follows:

"(3) The royalty or acreage rent shall be at the rate of thirty pounds per foot per acre, but due allowances shall be made for bad, faulty, or unworkable coal or coal so thin or so cut off by faults of such magnitude that it cannot be worked without loss. The lessees shall also pay a similar royalty rent for all coal and slack other than the Barnsley thick seam got in the drifting and sold off. (4) The minimum or certain rent is to be for the first year nil; for the second year 2s. 6d. per acre; for the third year 5s. per acre; for the fourth year 10s. per acre; and for the fifth and each succeeding year £1 per acre. The minimum rent shall begin to be paid as from the 1st of January, 1899. (6) Undergettings may be made up at at any time during the term. (7) When all saleable coal except such parts (if any) as are not to be worked or paid for shall have been worked or paid for, a nominal rent of 10s. shall be paid for the remainder of the term in substitution for the royalty and minimum rents (9) No way-leave rent is to be paid for any other part of the Barnsley thick seam of coal under any other land in the parish of Wickersley. (13) The lessees are to commence working the coal with all reasonable speed and to work the seam during the lease with all reasonable diligence and bring to the surface as much coal as can reasonably be got with proper diligence."

The property the subject of the agreement consisted of a large number of detached pieces of land intermixed with the lands of other owners, and could only be profitably worked from a pit situated like that of the lessees on property not forming part of the settled estate.

In consequence of doubt raised by the trustees of the will for the purposes of the Settled Land Act, a summons was taken out by W. W. Warde Aldam for the determination of the following questions: (1) Whether a yearly minimum rent not commencing until the second year of the said term and increasing year by year until the fifth year of the said term could be legally reserved; (2) whether a lease could be granted containing a proviso for the cesser of the said minimum rent after all the demised minerals had been worked and paid for; (3) whether a way-leave for foreign coal could be reserved free of rent.

On this summons Byrne, J., made an order declaring:

(1) That the applicant as such tenant for life as aforesaid has no power to grant a lease as aforesaid reserving a minimum yearly rent not commencing until the second year of the said term, and increasing year by year until the fifth year of the said term as proposed.

(2) Assuming there is no other objection to the proposed lease, the applicant has power to insert in such lease a proviso for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as in accordance with the provisions of lease are not to be worked or paid for, shall have been worked or paid for under the terms of the lease, and a proviso permitting undergettings to be made up notwithstanding the determination of the term, but so that the term shall determine at the period of the cesser of the minimum rent.

(3) That if the way-leave for foreign coal continues after the cesser of the minimum rent a substantial and proper rent must be paid for such way-leave after such cesser.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

From this order the applicant, W. W. Warde Aldam, appealed.

By section 2, sub-section 10 (11), of the Settled Land Act, 1882, "Rent includes yearly or other rent, a toll, duty, royalty, or other reservation by the acre, or the ton, or otherwise."

By section 6 "a tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding . . . in case of a mining lease, 60 years"; by section 7, sub-section 2: "Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case."

By section 8 (2) in the case of building leases: "A peppercorn or a nominal or other rent less than the rent ultimately payable may be made payable for the first five years or any less part of the term."

By section 9, in a mining lease (1) "the rent may be made to be ascertainable (*inter alia*) by or to vary according to the acreage worked"; (2) "a fixed or minimum rent may be made payable."

By section 17 (1): "A sale, exchange, partition, or mining lease may be made either of land, with or without an exception or reservation of all or any of the mines or minerals therein, or of any mines or minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for and incident to or connected with mining purposes in relation to the settled land, or any part thereof, or any other land."

By section 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

Neville, K.C., and *Dixon*, for the appellant.—The learned judge was influenced by the fact that under the Settled Estates Act, 1877, there is a provision for the reservation of the best rent that can be reasonably obtained, to be made payable half yearly or oftener without stating any fine or other benefit in the nature of a fine, "provided always that" in the case of (amongst others) a mining lease "a peppercorn rent or any smaller rent than the rent to be ultimately payable may, if the court shall think fit so to direct, be made payable during all or any part of the term of the lease," while the Settled Land Acts contain no such provision as to mining leases. But in the Settled Estates Act building and mining leases are dealt with together, and it is with reference to building leases that the power to reserve a peppercorn rent is peculiarly appropriate. In any case the Settled Estates Act is not a guide to the interpretation of the Settled Land Acts. The latter Acts were framed for different objects and were intended to enable the settled land to be dealt with more freely. To restrict them by a comparison with the Settled Estates Act would be contrary to the intentions of the Legislature. Best rent in section 7 (2) of the Settled Land Act, 1882, does not mean "best rent" as between tenant for life and remainderman, but the best rent that can actually be obtained. As to the way-leave there is nothing in section 17 which makes it necessary to reserve a separate rent for the way-leave. The effect of sections 9 and 17 taken together is that a tenant for life may grant a mining lease coupled with a way-leave at a rent ascertainable by acreage of coal worked.

Bristowe, contra.—A tenant for life in granting a lease which may take effect out of the property of the remainderman can only do so on terms which are fair as between himself and the remainderman. There is nothing in the Settled Land Acts which justifies the reservation of a minimum varying rent. It must therefore be uniform as in the case of surface leases: *Doe dem. Sutton* v. *Harvey*, 1 B. & C. 426. As to the way-leave the effect of only reserving a nominal rent after the coal is worked out is that the tenant for life will probably get the benefit of the rent while the burden will fall on the reversioner without any compensation.

Neville, K.C., replied.

The following cases were also referred to: *In re Lowther*, see MacSwinney on Mines (2nd ed.), p. 178; *Mountjoy's case*, Moore 174; *Hallett to Martin*, 32 W. R. 112, 24 Ch. D. 624; and *Montgomery* v. *Charteris*, 5 Dow, 293.

Cur. adv. vult.

May 5.—COLLINS, M.R.—This is an appeal from the decision of Byrne, J., upon certain questions as to the validity under the Settled Land Acts of certain provisions in an agreement for a mining lease entered into by the tenant for life under a settlement made by the will of William Aldam, deceased. The first question is whether the tenant for life has power under the Act to grant a mining lease for sixty years, reserving a minimum yearly rent not commencing until the second year of the term, and increasing year by year until the fifth year of the term. This question the learned judge has answered in the negative. [His lordship then referred to the Act, and continued:] The affidavits filed in support of the summons, which are uncontradicted, show that it is usual in the district to charge no minimum rent in the first year, and also to charge a gradually increasing rent in the first few succeeding years, till a certain limit is reached, which is always below the value of the probable annual get of coal, and that this is reasonable, having regard to the great initial outlay and time required for the opening out and development of a new mine. They also assert that the rent reserved under this agreement is the best that could be got, and beneficial to all persons entitled. Byrne, J., was of opinion that the fact that no minimum rent was reserved in the first year was fatal, though he would have been satisfied had it been fixed at a nominal amount only, and saw no objection to the graduated scale, provided the maximum rent was made to begin in the fifth year, or on the death of the tenant for life if he died before that date. He based his view on this latter point on the ground that by the will a second tenant for life might possibly succeed before the remainderman. I cannot agree with the learned judge in his answer to the first question. The Settled Land Acts, as the learned judge admits, contain no provision making a minimum rent obligatory in the first year. There need not be any minimum rent at all, though there is power to reserve one. And, while there need be no minimum rent, there may be an acreage rent according to the quantities gotten, which might, and probably would, be nothing in the first year. Whence then comes the obligation to reserve a minimum rent in the first year if one is reserved at all? The epithet "fixed" does not create it. It is, I think, used only in contradistinction to an acreage rent fluctuating according to the amount gotten, and a rent would be "fixed" for any year in which a sum defined beforehand

was reserved as rent. The learned judge founded his view upon the fact that section 4 of the Settled Estates Act, 1877, permitted a peppercorn, or any rent smaller than that ultimately made payable, to be reserved during the first five years of mining and building leases, whereas in the Settled Land Act, 1882, though there is such a provision as to building leases (section 8), it is not extended to mining leases in section 9. But in the earlier legislation building and mining leases were dealt with together in one section; in the present Act they are dealt with separately; and, as Mr. Neville pointed out, a peppercorn may well have been treated as strictly applicable to a building lease creating the true relation of landlord and tenant, but inapt in the case of a mining lease, which is really in its essence rather a sale at a price payable by instalments than a demise properly so-called. But, however this may be, I think the provisions of the Settled Estates Act have very little bearing on the construction of the Settled Land Act, which, as was explained in *Bruce* v. *Marquis of Ailesbury* 41 W. R. 318, [1892] A. C. 356, rests on a very different principle. In that case Lord Macnaghten, speaking of the Settled Land Act, said: "The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce without doing away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act, as far as it was possible to protect them. They must be duly considered by the trustees or by the court whenever the trustees or the court may be called upon to act. But it is evident, I think, that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests." A similar observation was made by Lord Lindley in *In re Gladstone*, 48 W. R. 531, [1900] 2 Ch. 101, at p. 105, where he said: "The Settled Land Act was intended to get rid of a number of old authorities, and to enable a tenant for life to do that which he could not have done before the Act. I do not think that any case decided before the Act can have any application to the present case." Here, on the evidence, the stipulation in question is, from a business standpoint, reasonable and proper, if the best price for the coal is to be realized, and can clearly be no disadvantage to the remainderman, even if that were the paramount consideration, which it is not. It is, I think, clear on the evidence that this agreement was made honestly in the interest of all parties, and the possible difference to a tenant for life succeeding before the fifth year must not be allowed to defeat an arrangement which is the best that can be made for the development of the estate. Questions 2 and 3 are as follows: (2) Whether the tenant for life has power to insert in the lease a power for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof, if any, as, in accordance with the lease, are not to be worked or paid for, shall have been paid for at the acreage rent reserved by the lease; (3) whether the lease may contain a way-leave for foreign coal, to continue after cesser of the minimum rent at a nominal rent, or whether a substantial rent must be reserved for such way-leave. The learned judge has treated these together. As to the first of them, he holds that it can only be permitted provided the term be made to determine at the period of the cesser of the minimum rent, and, as to the second, that a substantial rent must be paid for the way-leave after such cesser. He points out that no separate rent is reserved for the way-leave, and that, though this is permissible under section 17, yet the effect of the provisions referred to in these questions would be that, if all the coal were worked out, there would practically be a free way-leave for the rest of the term, payment having been already made for it in the rent, and that, if the tenant for life were to live till all the coal were got out, the remainderman would be subject to the burden of the way-leave for the rest of the term, without getting anything but a nominal payment for what might have been granted by them for a very substantial rent. I think the same considerations dispose of these difficulties. On the evidence it would seem to be a practical impossibility to deal with the way-leave in any other way. The coal under the land of the lessor (which consists of scattered plots) is only a small part of a seam lying under the land of several different owners, and to be properly developed under modern conditions it must be worked as part of a larger whole. The provisions in the lease are those which have been found to be the most workable in practice, and are those which are in general use in the district. Every special or unusual clause, such as those suggested by the learned judge, would mean a fetter put on the development of the estate, and would involve a diminution in the rent which the lessee would be prepared to give for the coal. The consideration given by the lessee and the rights he gets in return are all part of one bargain, and the fact that the coal under the lands of many different owners has to be worked as part of one enterprize, as to which it is impossible to say beforehand how and in what directions it is to be most economically carried out, makes it essential that the way-leave for foreign coal should be co-extensive with the term. By a provision in the will in this case, two-thirds of the rent is to be set aside as capital moneys, instead of one-fourth, which is all that the statute (section 11) exacts in the case of a tenant for life not impeachable for waste, and the remaindermen will, therefore, suffer no injustice. It is, of course, impossible in every case to put them in precisely the same position, at whatever period during a lease the tenant for life may die, but *primâ facie*, where a substantial proportion is set aside when received for the benefit of the remaindermen, it is best for all parties that the highest obtainable price should be secured for the coal and the way-leave, even though in certain contingencies the rent should drop to a nominal figure before the end of the term. It seems to me that there is nothing in the statutes to vitiate the provisions in question, and that this appeal must be allowed.

STIRLING, L.J., stated the facts, and continued: In dealing with the questions raised in this case, it has, I think, to be borne in mind that the Legislature has on grounds of public policy considerably increased the rights tenants for life of real estate have at law. The alterations are very striking in the case of mining leases. A tenant for life impeachable for waste, and consequently unable at common law to work unopened mines, is now authorized to grant a mining lease of such mines, and to receive for his own use one-fourth of the rent reserved by the lease. It is also to be borne in mind that the object of a mining lease is to enable the lessee to remove for his own benefit the minerals demised and widely differs from that of a lease of a portion of the surface where the lessee is expected after enjoying the use and occupation of the demised property for a term of years to deliver it up to the

lessor in the same state and condition as at the commencement of the lease. The rent received by the mining lease rather resembles an instalment of the purchase-money for the demised minerals than what is understood by rent reserved on an ordinary demise of the surface.

Section 7, sub-section 2, of the Settled Land Act, 1882, applies to all leases granted under the Act, whether of the surface or of minerals. Its provisions are imperative and require the best rent to be reserved that can reasonably be obtained, regard being had to all the circumstances of the case. The word "rent" in the clause includes such rents or royalties as are authorized by the Act to be reserved in mining leases: see section 2, sub-section 10 (ii.). In determining whether the best rent has been reserved, the court, on a question arising between the tenant for life on the one hand and the trustees of the settlement and beneficiaries on the other, must consider not only whether it is the best rent which could be obtained as between an absolute owner and the lessee, but also whether it is such regard being had to the interests of all parties entitled under the settlement: see Settled Land Act, 1882, s. 53.

Section 9 of the Act (which deals with mining leases) is not imperative, but merely permissive. Sub-section 1 (i.) authorizes the reservation of a rent varying according to the acreage worked or the quantities of mineral gotten. Sub-section 1 (ii.) authorizes the reservation of a fixed or minimum rent either with or without power for the lessees to make up deficiencies in working in case the rent, according to acreage or quantity, falls short of the fixed or minimum rent. It is not disputed that under these sub-sections a varying rent may be reserved without the addition of a fixed or minimum rent, but it is said that if a fixed or minimum rent be reserved it must be a uniform rent. This does not appear to me to be expressed by the language of the sub-section, on which (regard being had to the provisions of the Act) I do not think that a narrow construction ought to be placed. In support of his contention the learned counsel for the respondents referred to *Mountjoy's case* and *Doe dem Sutton* v. *Harvey*. Both were cases of surface leases granted under powers very much more limited on their terms than those conferred by the Settled Land Act, 1882. I shall assume, however, that these cases do apply to surface leases granted under the provisions of the Settled Land Act, 1882, except where varying rents are expressly authorized; but no case has been cited in which they have been applied to fixed or minimum rents under mining leases where a varying rent was authorized. It was also pointed out that in section 8, sub-section 2, it is expressly provided that nominal or other rent less than the rent ultimately payable under a building lease might be reserved for the first five years of the term, while section 9 contains no such provision. The answer appears to be that such express provision was unnecessary, for sub-section 1 (i.) of section 9 authorizes the reservation of a rent varying with the actual working, and sub-section 1 (ii.) does not make the reservation of a fixed or minimum rent imperative.

Having regard to the difference already pointed out between surface and mining leases, I am unable to see good ground for holding that as a matter of law the fixed or minimum rent referred to in section 9, sub-section 1 (ii.), must be a uniform rent, and Byrne, J., was also of this opinion; but he held that the provision that no rent should be paid during the first year was unauthorized, and he appears to have considered the proposed arrangement open to objection, as I understand, in the interests of the remainderman and particularly of the infant son of the tenant for life, who is also tenant for life in remainder. The object of a fixed or minimum rent is twofold. First, to provide a specified income on which the tenant for life may rely; and secondly, and this is the more important reason, as a security that the mine will be worked and worked with reasonable rapidity: see the remarks of Erle, C.J., in *Jegon* v. *Vivian*, 14 W. R. 227, L. R. 1 C. P. 9 at p. 34. In the present case it is proposed that the lessee shall pay no rent during the first year, and shall pay rents less than that ultimately payable, during the second, third, fourth, and fifth years. If the fixed or minimum rent may vary, as I think it can, I do not see why in a particular year it may not be nil. The scheme is framed as it is on the view that during the first five years the lessee will in all probability be under the necessity of expending large sums for the purpose of developing the coal field, and the arrangement is both reasonable and usual as between lessor and lessee. *Primâ facie* as between tenant for life and remainderman it is for the benefit of the remainderman; for the less the dead rent paid before he comes into possession the smaller will be the differences in working to be made up during the period of his possession. It is also proposed that the fixed minimum rent shall cease when all the coal has been worked or paid for. This operates as an inducement to the lessee to work rapidly. The consequences may be that the workable coal will be exhausted during the tenure of the tenant for life, and thus the provision may operate to the disadvantage of the remainderman. In the present case, two special circumstances are to be regarded: first, the large proportion—viz., two-thirds—of rent which the settlor has directed to be capitalized, of which the remainderman will have the benefit; secondly, the peculiar nature of the property which is not continuous, but is made up of a large number of small pieces of land situate amidst the properties of other owners. Such a property cannot be advantageously worked for coal by itself; it must almost of necessity be worked along with the lands of other owners as is in fact proposed to be done. If the working of such a mineral property be too long delayed it may get entirely isolated and become workable (if at all) at a great disadvantage. It seems to me that these circumstances may well justify the proposed arrangement as between tenant for life and remainderman, and I confess I cannot see that the circumstances that the next remainderman is an infant tenant for life necessarily requires the court to hold that a substantial rent ought to be reserved during the first year.

A further point to be considered—viz., whether if the way-leave for foreign coal continues after the cesser of the minimum rent a substantial rent must be reserved in respect of it. Now section 17 (i.) of the Settled Land Act, 1882, authorizes mining leases to be made with a grant of (*inter alia*) powers of working way-leaves and rights of way. There is nothing in the section which requires a separate rent to be reserved in respect of any such grant. The propriety of the reservation of a separate rent must depend upon the particular circumstances of the case under consideration. Here again the nature of the property must be considered, and with it this further fact (which is of great importance), that no way-leave rent is to be paid to the owners of the land through which the coal demised must be carried in order to reach the surface, so that the lessees are enabled to give a larger acreage rent they otherwise would. I think that such a state of things may well justify the reservation of a nominal way-leave rent after the cesser of the minimum rent. In the result, therefore, I think that there is nothing in the proposed lease which can as a matter of law be

held to violate the requirements of the Settled Land Act, 1882, that there should be reserved the best rent that can reasonably be obtained, regard being had to all the circumstances of the case, and that due regard should be had to the interests of all parties entitled under the settlement. Whether in fact any particular case satisfies those requirements must depend on the evidence. In cases of this sort I think the court ought not to rely on mere general statements couched in the language of the Act—as, for example, a statement to the effect that the rent agreed to be paid is the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but should require the material circumstances to be set out and the grounds for the conclusions arrived at stated. In the present case I think this has been sufficiently done. For these reasons, and also for those given by Collins, M.R., I think the appeal should be allowed.

COZENS-HARDY, L.J.—This appeal raises questions of great importance as to the power of a tenant for life under the Settled Land Act to grant a mining lease. In considering the case I think I am entitled, and indeed bound, to have regard to the policy of the Act as explained by the House of Lords in *Bruce* v. *Marquis of Ailesbury*, and not to narrow or cut down the language used in the Act so as to make it conform to decisions given prior to the Act upon powers of leasing conferred by other instruments. A tenant for life may now grant such a mining lease as is authorized by sections 6, 7, 9, and 17 of the Act, even though the lease may to some extent prejudice the remainderman, provided only that the tenant for life does not fail to comply with the provisions of section 53 of the Act.

The estate in question comprises about 340 acres of land lying in scattered plots, the coal under which cannot be worked except in conjunction with the coal under the adjoining and intermixed land. It is proved that the terms of the agreement to which I must refer more particularly are such as are usually or indeed universally adopted in the particular mining district, and that the rent is the best rent within the meaning of section 7, sub-section 2. But it is said that the lease is not authorized because it reserves a minimum or certain rent varying from nothing in the first year to £1 per acre in the fifth and succeeding years, and because no special way-leave rent is reserved, although the way-leave may be exercised for many years after the whole of the coal has been won. Byrne, J., has held these objections to be valid, but I am unable to accept this view. It is no doubt true that the rent must be the best rent; but section 9, sub-section 1 (i.), plainly shows that the rent need not be uniform throughout the term. It may vary according to the quantity of the coal got, and cease when all the coal has been got. Section 9, sub-section 1 (ii.), contemplates that there may be, or may not be, a fixed or minimum rent, and when once it is established that the rent is the best rent as between lessor and lessee, I can see no reason why the minimum rent, which need not be reserved at all, should not begin at the second year of the term, or why the minimum rent should necessarily be constant when once it has begun. The use of the word "rent" in the case of a mining lease is somewhat misleading. It is really purchase-money for coal worked, and section 11 provides that a certain proportion of the rent shall be set aside as capital money. In the present case the proportion is two-thirds. There is no objection to the clause providing that what are called "under-gettings" may be made up at any time. Section 9, clause (ii.), contemplates this. The minimum rent is not fixed on a *descending* scale, the effect of which might perhaps be that the tenant for life would get an advantage over the remainderman; on the contrary, there is an ascending scale from the second year to the fifth year. A minimum rent is reserved in order that the lessee may have a strong pecuniary inducement to get the coal with reasonable speed and regularity. It is really a part payment in advance of the purchase-money, and it is not easy to see how the remainder-men can be damnified, inasmuch as their proportion of all money, so paid in advance is secured. Mr. Bristowe, who argued the case with great ability, relied upon the fact that by section 4 of the Settled Estates Act, 1877, a peppercorn rent or any smaller rent than the rent ultimately payable may be made payable during any part of the first five years in the case of either a building lease or a mining lease, and that this provision is repealed in section 8, sub-section 2, of the Settled Land Act in the case of a building lease, but that no similar provision is found in section 9 with reference to a mining lease. I am not impressed by this difficulty. I decline to cut down the Settled Land Act by reference to the Settled Estates Act which is still in force. I think the Legislature has used language which rendered it unnecessary in the case of a mining lease to insert any such provision. With reference to the way-leave, it seems to me that section 17 expressly authorizes the grant on a mining lease of a way-leave during the whole of the term of the sixty years, and I find nothing requiring a separate rent to be reserved in respect of that way-leave. In short, the mining lease must be looked upon as a whole. The rent, or purchase-money, is payable for everything comprised in the lease—*i.e.*, for the coal *plus* the way-leave. This rent or purchase-money may vary according to the acreage worked. The rent will cease when all the coal is won, or, in other words, the whole purchase-money will then have been paid. But the lessee will still be entitled during the continuance of the term to enjoy the property demised. In my opinion the order of Byrne, J., except so far as it provides for costs, should be discharged, and an order made substantially in accordance with the notice of appeal. The costs of all parties of the appeal should be paid out of capital money.

Appeal allowed.

Solicitors, *R. F. & C. L. Smith*, for *Ford & Warren*, Leeds.

From K. B. Div.
(Vaughan Williams, Romer, and Mathew, L.JJ.) — April 9.

ELLIOTT v. GARRETT. (*a*.)

Practice—Discovery—Interrogatories—Slander—Privilege—Question as to information inducing belief—Question as to steps taken to ascertain truth.

Where in an action for slander imputing to the plaintiff that he had received a bribe in respect of a vote given by him as a vestryman, the defendant pleaded privilege, an interrogatory proposed to be administered by the plaintiff, asking the defendant what information, if any, he had that induced him to believe that the words were true, and what steps, if any, he had taken before speaking the words to ascertain whether they were true or not, was allowed.

Appeal from an order of Bucknill, J., at chambers, directing that an interrogatory which was proposed

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

to be administered by the plaintiff to the defendant should be struck out.

The action was brought to recover damages for slander.

The statement of claim alleged as follows: The plaintiff and the defendant were on and prior to the 3rd of November, 1901, and still were, members of the borough council of Islington. In February, 1900, certain gentlemen, including Mr. William John Crump (afterwards Mayor of Islington), being desirous that the Alexandra Palace and Park should be acquired for public purposes, entered into a provisional agreement for the purchase of the said palace and grounds for the sum of £150,000, and paid £5,000 as a deposit. Subsequently the vestry of Islington (now the borough council) resolved to contribute towards the said purchase the sum of £14,000, subject to the necessary legal sanction being obtained by Act of Parliament. The plaintiff, then a member of the said vestry, at first opposed, but subsequently voted for, the resolution authorizing the said expenditure. On the 6th of August, 1900, the Alexandra Park and Palace (Public Purposes) Act, 1900, received the Royal Assent, the firm of Messrs. William A. Crump & Son (of which the said William John Crump was a member) being solicitors for the promotion of the Bill. By section 33 of the Act the costs, charges, and expenses preliminary to and of and incidental to preparing, obtaining, and passing the said Act were to be paid out of moneys contributed under and for the purposes of the Act, and the said William John Crump as a member of the said firm was interested in the passing of the said resolution by the said vestry. On or about the 3rd of November, 1901, the plaintiff was a candidate for the office of mayor of the said borough, and on Councillor Harvey, a member of the said council, on the said date at the Great Northern Hospital asking the said defendant to vote for the plaintiff as mayor of the said borough, the said defendant falsely and maliciously spoke and published of and concerning the plaintiff—"What! Vote for Elliott" (meaning thereby the plaintiff) "after what I have been told?" In response to further questions the said defendant further said—"What? Haven't you heard? Why it is going all round. Why, Elliott has received a bribe of a £50 note in connection with the Alexandra Park affair" (meaning thereby his said vote in favour of the resolution above mentioned). On the same day subsequently, in the presence of Councillors Harvey and Bryett, the said defendant falsely and maliciously spoke and published of and concerning the plaintiff the following words: "I have just been telling Harvey that it is not my intention to vote for Elliott; decidedly not, I do not think that a man like him would do any good as mayor, owing to his having received a certain bank-note from the Alexandra Palace to get their matter pushed through." And on the said Councillor Bryett saying, "That is a serious accusation," the said defendant replied, "Mr. Crump is the man to explain" (meaning thereby that the said William John Crump was able to give all the information proving the truth of the said charge). The said slanders imputed to the plaintiff meant that he had committed an offence under the Public Bodies Corrupt Practices Act, 1889, in that he had received a bribe of £50 and had rendered himself liable to the pains and penalties prescribed by the said Act, and further that he had been guilty of gross misconduct in his office of vestryman, and was not a fit and proper person to be mayor of the said borough or to hold any office as a member of any public body. By reason of the premises the plaintiff had been injured in his credit and reputation and had suffered damages.

The defendant, by his defence, said that if he spoke and published the words complained of, which he denied, he spoke and published them only to Councillor Harvey, and in answer to inquiries made by him, or only to Councillors Harvey and Bryett, and in answer to inquiries made by them, and that the said councillors had a common interest with him in the matters referred to; and that it was the defendant's duty to speak and publish the words complained of; and that the defendant spoke and published the said words, if at all, *bonâ fide* and without malice towards the plaintiff, and in the honest discharge of his duty as a councillor, and with the honest desire to protect, as was his duty, the interests of the councillors and the ratepayers of the said borough; and that the occasion was privileged.

The plaintiff proposed to administer certain interrogatories for the examination of the defendant. The fourth interrogatory was as follows: "What information, if any, had you that induced you to believe that the said words were true, or what steps, if any, had you taken before speaking the said words to ascertain whether they were true or not?"

On the plaintiff's application at chambers for leave to administer the interrogatories, Bucknill, J., was of opinion that the fourth interrogatory ought not to be allowed, and directed that it should be struck out.

The plaintiff appealed.

Witt, K.C. (*Poley* with him), for the plaintiff.—This interrogatory ought to be allowed, as it does not merely go to damages, but is relevant to an issue distinctly raised by the pleadings: *Martin* v. *Trustees of the British Museum*, 10 Times L. R. 215.

Hugh Fraser, for the defendant.—The interrogatory ought not to be allowed, as it is a fishing interrogatory, if not irrelevant. The principle governing this case is laid down in *Hennessy* v. *Wright*, (*No.* 2), 36 W. R. 879, 24 Q. B. D. 445*n*; *Parnell* v. *Walter*, 38 W. R. 270, 24 Q. B. D. 441; and *Ridgway* v. *Smith & Son*, 6 Times L. R. 275.

VAUGHAN WILLIAMS, L.J.—In my opinion this is a clear case, and the appeal ought to be allowed, and our decision does not seem to me to be in conflict with any of the previous cases. The objection taken to the allowing of this interrogatory cannot rightly be based on an allegation that the interrogatory is not relevant. It is obviously relevant to a distinct issue raised in this case. The defendant by his defence has pleaded privilege. He has alleged that the words complained of, if spoken by him at all, were spoken by him in good faith and without malice, and in the honest discharge of his duty, and were therefore privileged. This interrogatory is aimed at enabling the plaintiff to prove that which is an answer to that plea of privilege—viz., that the words were spoken maliciously. It is obvious that if this interrogatory is answered in one way, the answer will support the plaintiff's case. However, it is said that this is a fishing interrogatory. But in my opinion it is not anything of the sort. The plaintiff seeks by it to obtain evidence, which must necessarily be within the knowledge of the defendant, in support of his own case. I think that counsel for the plaintiff was right in saying that *Martin* v. *Trustees of the British Museum* covered this case, and the other cases which were cited do not conflict with that decision. In those cases the interrogatories merely went to damages. I therefore think this interrogatory ought to be allowed.

ROMER and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Samuel Price & Sons.*

Solicitors for the defendant, *Tatham, Oblein, & Nash.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 14.

SKENE v. COOK. (a.)

Limitations, Statute of — Land tax — Redemption — Yearly sum paid by way of interest—Charge on premises—Land Tax Redemption Act, 1802 (42 *Geo.* 3, *c.* 116), *ss.* 123, 125—*Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 1—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *ss.* 1, 8.

By section 123 *of the Land Tax Redemption Act*, 1802, *it is provided that where any person having any estate or interest (other than an estate of inheritance) in any lands, tenements, or hereditaments, shall redeem the land tax charged thereon, such lands, tenements, or hereditaments shall be chargeable for his benefit with the amount of the moneys paid as the consideration for the redemption of such land tax, and with the payment of a yearly sum of money by way of interest thereon, equal in amount to the land tax redeemed. Such "yearly sum" is either "rent," within the meaning of section* 1 *of the Real Property Limitation Act*, 1874, *or the principal sum is a "sum of money charged upon or payable out of land," within the meaning of section* 8 *of that Act, and, therefore, an action to recover such yearly sum is barred by the said sections unless brought within the time thereby limited.*

This was an appeal from the judgment of a Divisional Court (Channell and Bucknill, JJ.), dismissing an appeal by the plaintiff, [1901] 2 K B. 7, 49 W. R. Dig. 94, from Judge Lumley Smith, sitting at Westminster County Court.

The action was brought to recover the sum of £9 as being the amount of a certain land tax payable by the defendant to the plaintiff.

The particulars of the plaintiff's claim were as follows:

The plaintiff claimed the sum of £9, being one year's land tax payable by the defendant to the plaintiff on or before the 1st of January, 1900, charged upon Nos. 61 and 61A, High-street, St. Giles, in the county of Middlesex, to which the plaintiff is entitled as assignee of the benefits arising under the certificate of the contract for the redemption of such land tax, dated the 19th of February, 1874.

These particulars were taken to be amended so as to include an alternative claim for a commuted payment in lieu of land tax.

The defendant filed in the county court as a special defence: "That the claim for which the defendant is summoned is barred by a Statute of Limitations."

The facts, which were not in dispute, were as follows:

In 1873 Sir Theodore Brinckman was the owner in fee simple of three houses, No. 61, No. 61A (which was a yard behind No. 61), and No. 62, High-street, St. Giles.

On the 4th of November, 1873, Sir T. Brinckman, the owner of the fee, demised Nos. 61 and 61A to one W. T. Purkis under a lease for forty-two years, which would expire in the year 1915; and, at the same time, by another lease he also demised No. 62 to the same lessee (Purkis) for the same term of forty-two years.

Under the covenants in these leases Purkis, the lessee, covenanted to pay the land tax, which amounted to £11 14s. per annum.

On the 19th of February, 1874, Purkis, the lessee, contracted with the commissioners acting under the Acts for the redemption of the land tax, for the redemption of the land tax, which for the year 1873 was assessed as follows: No. 61, High-street, £4 10s.; No. 61A, High-street, £4 10s.; No. 62, High-street, £2 14s.; total, £11 14s.

In September, 1874, Purkis paid to the Land Tax Commissioners £327 16s. 6d., the amount of the redemption money, and the land tax was redeemed on the three houses as from the 24th of June, 1874, and this was duly registered on the 10th of October, 1874.

Purkis thereupon became entitled to an annual payment of £4 10s. in respect of No. 61, £4 10s. in respect of No. 61A, and £2 14s. in respect of No. 62.

On the 23rd of June, 1874, Purkis, the lessee, assigned the lease of Nos. 61 and 61A (which were subject to a payment of £9 in lieu of land tax) to one Plumb, and by several mesne assignments and ultimately by an indenture of the 27th of August, 1885, the lease of Nos. 61 and 61A became vested in the defendant, who by mistake had every year paid the land tax to the commissioners until the year 1900, when the mistake was discovered, and notwithstanding the redemption, the revenue authorities had by some mistake been collecting annually the land tax from Cook (the defendant) and his predecessors in title.

On the 30th of June, 1879, Purkis assigned the lease of No. 62 to Skene, the plaintiff, and at the same time Purkis handed the certificate of the redemption of the land tax to the plaintiff, with the intention of transferring the benefit of such certificate to him.

A formal assignment of the benefit of such certificate had since (on the 9th of October, 1899) been made by Purkis to the plaintiff.

The plaintiff on receiving the certificate of redemption of the land tax in 1879 put it away with his title deeds and forgot all about it until the year 1900.

The lease of No. 62 was now vested in the plaintiff, who held, by assignment from Purkis, the certificate of redemption on all three houses.

The lease of Nos. 61 and 61A since 1885 were vested in the defendant, who was bound to make an annual payment of £9 in respect of the land tax redeemed on those two houses, and this payment ought to have been made to the plaintiff as the holder of the certificate of redemption.

The present action was brought to recover one such annual payment of £9, due on the 1st of January, 1900, being one year's land tax payable by the defendant to the plaintiff.

In 1899 the defendant surrendered the lease of Nos. 61 and 61A to the freeholder, and on the 27th of September, 1899, the freeholder granted the defendant a new lease of No. 61, with certain rights over the yard No. 61A, and in this new lease the defendant also covenanted to pay all land tax.

The county court judge held that the claim was barred by lapse of time, and he gave judgment for the defendant, with leave to the plaintiff to appeal.

On appeal by the plaintiff the Divisional Court held that the yearly sum payable under section 123 of the Land Tax Redemption Act, 1802, by way of interest, on the amount paid as the consideration for the redemption of land tax is a "rent" within the meaning of the Real Property Limitation Act, 1874, s. 1, and therefore affirmed the judgment of the learned county court judge.

The Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), provides:

Section 123. And where any person or persons having any estate or interest (other than an estate of inheritance) in any manors, messuages, lands, tene-

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

ments, or hereditaments shall redeem the land tax charged thereon by or out of his, her, or their own absolute property, such manors, messuages, lands, tenements, or hereditaments shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns, with the amount of the three pounds per centum bank annuities which shall have been transferred, or with the amount of the moneys paid as the consideration for the redemption of such land tax, as the case may be, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land tax redeemed. . . .

Section 125. And in all cases where any bodies, politic or corporate, or companies, or other person or persons redeeming any land tax, shall by virtue of this Act be entitled to have and receive out of any manors, messuages, lands, tenements, or hereditaments, any yearly sums of money by way of interest, or by way of rent or of rentcharge, equal in amount to the land tax redeemed, such yearly sum shall be payable on the same day as such land tax was payable at the time of the redemption thereof (unless where any other days are herein specified for that purpose), and shall be recoverable by action, suit, distress, or any other means whereby rents reserved on leases are recovered by law.

Section 1 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27)—which section is not repealed by the Real Property Limitation Act, 1874—provides that

The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: . . . The word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole).

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), provides:

Section 1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

Section 8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments, if more than one, was given.

Martelli, for the appellant.—The decision of the court below was wrong. There is no Statute of Limitations which bars the plaintiff's claim. The question in this case is whether a person who redeems land tax has any right of action in respect of the principal sum or the annual payment to which he is entitled under sections 123 and 125 of the Land Tax Redemption Act, 1802. In *Cousins* v. *Harris*, 12 Q. B. 726, it was held that there was no right of action in respect of the principal. If there is no right of action then the case does not come within the provisions of the Real Property Limitation Acts of 1833 or 1874. This is not a sum of money charged upon land within section 8 of the Act of 1874 because there is no right of action to recover the principal sum. The principal sum is really only the price fixed at which the owner of the land can redeem the annual sum. The owner cannot be compelled to redeem, and is not liable to have the land sold to pay off the principal sum. The owner of the charge can only realize the principal sum by selling and assigning his charge. Remedies are expressly given by section 125 of the Land Tax Redemption Act, 1802, in respect of the annual sum, but not in respect of the principal sum. Further, the annual sum payable under section 123 of that Act is not a "rent" within the meaning of section 1 of the Real Property Limitation Act, 1874. "Rent" means a separate incorporeal hereditament. In *Grant* v *Ellis*, 9 M. & W. 113, it was held that the word rent as used in the corresponding section of 3 & 4 Will. 4, c. 27, did not apply to rent service, but only to rents in the nature of realty. Section 1 of that Act excludes from the definition such a periodical sum as the one in question. The annual sum mentioned in section 123 of the Land Tax Redemption Act, 1802, is not in the nature of realty.

Warrington, K.C. (*Duke* with him), for respondent, was not called upon to argue.

COLLINS, M.R.—This was an action brought by the assignee of a person who had redeemed the land tax upon certain premises, of which he was lessee, to recover one year's payment of the yearly sum of money payable by way of interest upon the principal sum paid for redemption. The question is whether the plaintiff's claim is barred by any Statute of Limitations. The redemption of the land tax took place in 1874. In 1879 the plaintiff became the assignee of the person who redeemed, and from that time down to the present claim no payment or demand of payment has ever been made in respect of the amount paid for redemption of the land tax. The rights of a person on redeeming land tax are provided by sections 123 and 125 of the Land Tax Redemption Act, 1802. [The learned judge here read the sections.] This yearly sum, therefore, was recoverable by distress or action. The defendant filed the special defence that the claim was barred by a Statute of Limitations. The appellant's contention is that no such statute applies. For the defendant it was contended, on the other hand, that the claim is barred by either section 1 or section 8 of the Real Property Limitation Act, 1874. [The learned judge here read section 1.] There can be no doubt that if this yearly sum can be called "rent" within the meaning of section 1 the claim in respect of it is barred. The Divisional Court has held that it is "rent" within the meaning of that section, and it seems to me that, for the reasons given by Channell, J., in the court below, this yearly sum of money is a rent within the meaning of the section. The learned judge pointed out that by section 1 of 3 & 4 Will. 4, c. 27 (which is to be read together with the Act of 1874), "the word 'rent' shall extend

to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land." The word "rent" in that section has, no doubt, in *Grant* v. *Ellis* been held not to include rent payable under a lease, but for the reasons given by Channell, J., I think that this annual sum, which is not in the nature of rent service but is an annual sum charged on the land, is not excluded from that definition. Assuming, however, that that is a wrong view and this annual sum is not rent within the meaning of section 1 of the Real Property Limitation Act, 1874, then it seems to me that the case falls within section 8 of that Act. [The learned judge here read section 8.] Is money paid for the redemption of land tax under section 123 of the Land Tax Redemption Act, 1802, "charged upon or payable out of any land" within the meaning of section 8? If it is a charge upon land it comes within the express words of that section. It is admitted that it is a charge, but it is contended that it is not within section 8 because no action, suit, or other proceeding could be brought to recover it, in support of which contention *Cousins* v. *Harris* is cited, but when that case is properly looked into it will be seen that it does not bear out that contention because it does not deal with equitable rights and remedies at all. It appears to me that the charge on the premises is one which can be enforced in the ordinary way by proceedings in equity like any other charge, and that therefore section 8 applies. Therefore, in either view of the case, the claim is barred by the Real Property Limitation Act, 1874. For these reasons I think the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. If a person is the owner of an equitable charge on land, then, although there is no obligation upon anyone to pay the charge, the owner of the charge has a right to bring an action in a court of equity to have the amount of the charge realized by a sale of the land, and it has been so held and is settled law that such a charge is within section 8 of the Real Property Limitation Act, 1874, and that the period of limitation begins to run from the time of the last payment in respect of principal or interest. Turning to the present case we find that under the Land Tax Redemption Act, 1802, a person having an estate or interest, other than an estate of inheritance, in land charged with land tax may redeem the land tax and then has a charge upon the land. The land is charged with the amount of the moneys paid for the redemption and with the payment of a yearly sum by way of interest thereon. Then is there anything in the statute to take away the rights which would ordinarily follow from a charge of a principal sum and interest thereon on land? I can see nothing! It is true that it was decided in *Cousins* v. *Harris* that there is no personal remedy against the owner of the land; but it was also held in that case that the owner of the land would have a right to redeem the charge. I think this case is within section 8 of the Real Property Limitation Act, 1874, and the plaintiff's case is consequently barred. Suppose, however, that this is not a charge for principal and interest within section 8, then I think the case must be regarded as within section 1 of that Act. Therefore, in any case, the plaintiff's claim is barred and must fail. I agree, therefore, that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. I think that this was a charge upon land because the Land Tax Redemption Act, 1802, s. 123, says in terms that there shall be a charge upon the land in respect of the moneys paid for the redemption of the land tax as well as interest. I agree that the Real Property Limitation Act, 1874, applies, and that the plaintiff's claim is barred.

Appeal dismissed.

Solicitor for the appellant, *T. Parsons.*

Solicitors for the defendant, *Bayley, Adams, Hawker, & Noble.*

High Court of Justice.

Chan. Div. } May 13, 14.
Joyce, J. }

In re DUKE OF CLEVELAND'S SETTLED ESTATES AND *In re* THE SETTLED LAND ACTS, 1882-1890. (*a.*)

Settled land—Capital money—Investment—Powers of a tenant for life—Choice of brokers—Duties of trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-sections* 1, 10; *s.* 22, *sub-section* 2; *s.* 31 (vi.).

A tenant for life has no power under the Settled Land Acts to direct the trustees to employ a particular broker nominated by him. The choice of a broker lies with the trustees.

After a sale of settled estates a tenant for life entered into negotiations with a firm of brokers for the investment of the proceeds of sale. The trustees refused to employ the broker nominated by the tenant for life, and desired the transaction to be carried through by their bankers, who would employ their own brokers. The tenant for life then asked that the trustees might be directed to apply the capital moneys in their hands in the purchase, through the brokers nominated by the tenant for life, of such investments, authorized by the Act, as the tenant for life might direct.

Held, that the trustees, and not the tenant for life, were the proper persons to select and employ a broker, just as they were the proper persons to select and employ a solicitor or banker.

This was a summons under section 44 of the Settled Land Act, 1882, taken out by Captain Forrester, the tenant for life of certain estates settled by the will of the late Duke of Cleveland, against the trustees of the will, who were also trustees for the purposes of the Settled Land Acts, and section 42 of the Conveyancing Act, 1881, asking that the trustees might be directed to apply certain capital moneys in their hands in the purchase, through the brokers nominated by the tenant for life, or such other brokers of good credit and position as he might select, of such investments, authorized by the Acts, as the tenant for life might direct.

The capital moneys in the hands of the trustees consisted of two sums of £25,000 and £180,000, representing the proceeds of sale of the Battle Abbey estates.

The tenant for life had consulted a firm of brokers as to the investment of the proceeds of such sale and had selected certain investments, for the purchase of which he proposed to enter into a contract with the firm.

The trustees, however, desired that the investment should be made through their own bankers, who in the ordinary course of business would employ their own brokers.

This summons was accordingly taken out to decide whether the tenant for life or the trustees were the proper persons to select the brokers to be employed.

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

Younger, K.C., and *W. Brinton*, for the tenant for life.—The tenant for life has an absolute right to give directions as to the investments to be made (*In re Lord Coleridge's Settlement*, 44 W. R. 59, [1895] 2 Ch. 704), and he is entitled to have the costs of the exercise of his powers under the Act paid out of capital, under section 21, sub-section 10: *In re Llewellin*, 36 W. R. 347, 37 Ch. D 317, per Stirling, L.J., at p. 326. *In re Hotham, ante*, p. 150, [1901] 2 Ch. 790, is distinguishable and only applies to the investment of capital moneys on mortgage. Moreover, an appeal is pending in that case. We submit that the tenant for life is the proper person to control the trust estate, and that he has the right to order the trustees to employ the brokers chosen by him.

Hughes, K.C., and *E. Beaumont*, for the trustees, were not called upon.

JOYCE, J., said that, generally speaking, if not universally, trustees in the execution of their trusts were entitled to choose the solicitor, broker, or banker with whom they would deal, and there was a well-known case—*Foster* v. *Elsley*, 30 W. R. 596, 19 Ch. D. 518—in which Chitty, J., had held that trustees were not bound to regard even the direction of their testator as to the solicitor they should employ. If there were any question of the tenant for life or the trustees sharing in any brokerage to be earned upon an investment, of course neither one nor the other could be allowed, directly or indirectly, to participate in that. It was true that sub-section 2 of section 22 of the Settled Land Act provided that the investment of capital money arising under the Act should be made according to the direction of the tenant for life. That had been considered in various cases, and it has been held in *In re Lord Coleridge's Settlement* that the tenant for life was entitled to select a particular investment. But it had also been decided in *In re Hotham* that upon an investment on mortgage under the Settled Land Act, in accordance with a direction by the tenant for life, given under section 22, sub-section 2, it was the duty of the trustees to satisfy themselves as to value, title, and form of the particular mortgage, and that the same principle applied to other investments under the Act. That case was under appeal, but at present his lordship would follow it; and he was of opinion that sub-section 2 of section 22 had not the effect of entitling the tenant for life to select the broker, any more than the solicitor, to be employed by the trustees. His lordship then referred to section 31 of the Act, which, after giving the tenant for life power to enter into various contracts, provided that he might "in any other case enter into a contract to do any act for carrying into effect any of the purposes of this Act" and might vary or rescind the same. The meaning of that was that the tenant for life could contract to do such things as he was entitled by law to do, but he did not think that the tenant for life could contract that the trustees should do any particular act. The trustees were entitled to select their own solicitors and their own brokers. It had been said by Lord Romilly that trustees were liable for the default of their solicitors because they selected them. His lordship agreed with the decision in *In re Hotham*, and he accordingly refused the application of the tenant for life.

Solicitors for the applicant, *Jennings & Finch*.

Solicitors for the trustees, *Dawson, Bennett, Ryde, & Co.*

Chan. Div.
Swinfen Eady, J. } Feb. 14.

STEPHENS *v.* THE MYSORE REEFS (KANGUNDY) MINING CO. (LIMITED). (*a.*)

Company—Memorandum of association—Main object—Subsidiary objects—Ultra vires—*Injunction.*

The objects clause of a memorandum of association of a gold mining company consisted of a large number of paragraphs which embraced objects apparently remote from gold mining. One paragraph stated that these objects should in no wise be limited or restricted by reference to or reference from the terms of any other paragraph or the name of the company.

Held, that the paragraphs in the clause were to be construed as giving the company full and ample powers to do a number of things, but in a manner subsidiary and subordinate to the main business, and an injunction was granted restraining the company from carrying out a scheme which clearly did not come within the main business of the company.

This was a motion brought by Thomas Stephens, who was the registered holder of 6,454 preference and 2,788 ordinary shares in the Mysore Reefs (Kangundy) Mining Co., for a declaration that a scheme proposed to be carried out by the company was *ultra vires*, and that the company could not lawfully proceed to carry out the said scheme or give effect thereto, and for an injunction to restrain the company from carrying out the said scheme.

The Mysore Reefs (Kangundy) Mining Co. was registered as a limited company on the 1st of July, 1899, under the Companies Acts, 1862 to 1898.

Clause 3 of its memorandum of association set forth at length the objects of the company in a number of separate paragraphs.

The material paragraphs were:

1. To acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy) (Limited) (incorporated in 1887), and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect with or without modification the agreement referred to in clause 3 of the articles of association of this company.

2. To acquire gold mines, mining and other rights, land, auriferous, metalliferous, or otherwise, or any interests in the same respectively in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, rights, and land or interests therein respectively.

8. To purchase or otherwise acquire and undertake all or any part of the business, property, and liabilities of any person or company carrying on any business which the company is authorized to carry on, or possessed of property suitable for the purposes of the company.

11. To enter into partnership or into any arrangements for sharing profits, union of interest, joint adventure, reciprocal concessions, or co-operation with any person or company carrying on or engaged in, or about to carry on or engage in, any business or transaction which the company is authorized to carry on or engage in, or any business or transaction capable of being conducted, directly or indirectly, to benefit this company, and so take or otherwise acquire and hold shares or stock in or securities of, and to subsidize or otherwise assist any such company, and to sell, hold, re-issue with or without guarantee, or otherwise deal with such shares or securities.

12. Generally to purchase, take on lease or in exchange, hire, or otherwise acquire any real or

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

personal property, and any rights or privileges which the company may think necessary or convenient with reference to any of these objects or capable of being profitably dealt with in connection with any of the company's property or rights for the time being, and in particular any easements, ships, barges, rolling stock, and stock-in-trade.

15. To promote any company or companies for the purpose of acquiring all or any of the property, rights, and liabilities of this company, and for any other purpose which may seem, directly or indirectly, calculated to benefit this company, and to underwrite or subscribe for, or procure to be underwritten or subscribed for, all or any part of the share or debenture capital of any such company.

16. To invest and deal with the moneys of the company not immediately required in such manner as may from time to time be determined.

25. To do all such other things as are incidental or conducive to the attainment of the above objects and so that the word "company" in this clause shall be deemed to include any partnership or body of persons whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere, and so that the objects specified in each paragraph shall, except when otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or reference from the terms of any other paragraph or the name of the company.

Paragraphs 2, 8, 11, 12, 15, 16, of clause 3, it was maintained by the plaintiff, referred to objects subsidiary to or outside the main object of the undertaking, which was that of gold mining in or near Mysore.

Soon after its incorporation the company sent mining experts out to India, who reported unfavourably upon the property, and consequently mining operations were abandoned.

On the 23rd of January, 1902, the directors sent out a circular to the shareholders announcing that the directors were negotiating for the acquisition of a property on the British Gold Coast, West Africa.

The circular stated: "I am instructed by my directors to inform you that since the date of the last general meeting they have had before them several offers of mining properties, each of which has been carefully considered, and they have now entered into negotiations with a view to acquiring a property in the British Gold Coast, West Africa, on the following terms: It is proposed to obtain an option during the period of which the mine would be examined and reported on by a mining engineer selected by the board, and in the event of his report being satisfactory the same would be submitted to the shareholders for their approval. A subsidiary company would then be formed with a capital of £75,000; the purchase price to be £25,000 payable entirely in shares, leaving a working capital of £50,000, of which £30,000 would be subscribed by this company and 20,000 shares would be held in reserve.

Micklem, K.C., and *Dickinson*, for the plaintiff.—The main purpose of the company is stated in the first paragraph. The present proposal to carry on financial operations in West Africa, even if it could be brought within the scope of the other paragraphs, is outside the scope of the main proposal: *In re German Date Coffee Co.*, 30 W. R. 717, 20 Ch. D. 169; *In re Crown Bank*, 38 W. R. 666, 44 Ch. D. 634; *In re Amalgamated Syndicate*, 46 W. R. 75, [1897] 2 Ch. 600. Paragraph 25 cannot prevent the application of these cases.

Eve, K.C., and *Martelli*, for the company.—Here there are a number of independent objects, but no main object. If the scheme is unobjectionable, the memorandum should be so construed: *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622.

SWINFEN EADY, J.—In my opinion, on the correct construction of the memorandum of association the proposed scheme is not within the powers of the company. The first object described is, in my view, the principal and governing object—namely, to acquire and carry on the business of the former company. The remaining clauses are to be construed as giving the company full and ample powers to do a number of things, but in a manner subsidiary and subordinate to the main business. I find myself precluded from putting the construction on the memorandum contended for by the company not only on general principle, but by the weight of authority. In the case of *In re German Date Coffee Co.*, in dealing with a similar point, Lindley, L.J., said: "What is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association or any other memorandum of association in which there are general words care must be taken to construe those general words so as not to make them a trap for unwary people. General words, construed literally, may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are." Every line of that is applicable to the present case. Construing the memorandum, as I ought to, fairly and reasonably, I am of opinion that the proposed scheme was not authorized. I have had to take clause 25 into consideration, and it was said that, however the rule might be if that clause were not present, the effect of that clause was to make every preceding clause as if it defined a separate and independent object not governed or cut down by any other object. In my judgment that is not the true construction. Under these circumstances I must grant the injunction claimed by the plaintiff.

Solicitors for plaintiff, *C. W. Rawlinson.*

Solicitors for defendant, *Francis & Johnson.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — March 7.

MINISTER & CO. v. APPERLEY AND OTHERS. (a.)

Practice—Costs—Appeal—Official referee—Discretion as to costs — Leave to appeal — Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*R. S. C., ord.* 36, *r.* 55 (b); *ord.* 65, *r.* 1.

Where by an order of court the whole of an action is referred to an official referee, and such order contains no directions as to costs, there is no appeal, without leave, against the official referee's decision as to costs.

This was a motion, by way of appeal, as to costs, from the decision of an official referee in an action to recover damages for negligence.

The action was referred by an order of court to the referee with all the powers of certifying and amending of a judge of the High Court and with power to direct judgment to be entered, and otherwise deal with the whole action.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The referee awarded the plaintiffs damages and directed judgment to be entered for them for the amount awarded with costs up to a certain date after the action had been brought when the defendants had written a letter to the plaintiffs offering them a sum in satisfaction of their claim, and he directed that from and after that date the parties should pay their own costs. He refused to give leave to appeal from such order as to costs.

The plaintiffs now moved to set aside so much of the above order as deprived them of costs from and after the date of the letter on the ground that (1) no good cause was shown for so depriving them of their costs, and (2) that the referee had acted on a wrong principle in so doing.

Macaskie, K.C. (*Bremner* with him), for the defendants, raised the preliminary objection that no appeal lay against the official referee's decision as to costs, as he had not given leave to appeal. Section 49 of the Judicature Act, 1873, provides that "No order made by the High Court or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making such order." By ord. 36, r. 55 (*b*), of the Rules of the Supreme Court it is provided that "Where the whole of any cause or matter is referred to an official referee under an order of court, he may, subject to any directions in the order, exercise the same discretion as to costs as the court or a judge could have exercised." By ord. 65, r. 1, it is provided that " . . . the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge . . . provided . . . that where any action, cause, matter, or issue is tried with a jury the costs shall follow the event unless the judge . . . or the court shall for good cause otherwise order": *Arbib* v. *Henry*, 99 Law Times, 283; *Carr Brothers* v. *Dougherty*, 67 L. J. Q. B. 371, 46 W. R. Dig. 8; *Adlington* v. *Conyngham*, [1898] 2 Q. B. 492, 47 W. R. Dig. 152; *Bew* v. *Bew*, 48 W. R. 124, [1899] 2 Ch. 467.

A. T. Lawrence, K.C. (*Montague Lush* with him), for the plaintiffs.—The official referee's decision as to costs was wrong; he had no good cause for depriving the plaintiffs who were successful of any of their costs, and in doing so he had proceeded upon a wrong principle. There is an appeal against such an order on the ground that the official referee did not exercise a judicial discretion. By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15, sub-section 1, it is provided that "In all cases of reference to an official or special referee or arbitrator under an order of the court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by rules of court, and subject thereto as the court or a judge may direct." And sub-section 2 provides that "the report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury." When, after the verdict of a jury, an order as to costs is made, such order can be appealed against on the ground that it was made without good cause.

Lord ALVERSTONE, L.C.J.—I do not entertain any doubt upon the question raised by Mr. Macaskie. No doubt, in a case where costs have been given to a person who has no right to them, an appeal lies, but where costs are in the discretion of the person who has to award them, then there is no appeal except by leave. I think that the preliminary objection to this motion must succeed, and the motion be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Motion dismissed.

Solicitors for the plaintiffs, *Lewis & Newton.*

Solicitors for the defendants, *William Sharpe;* and *Mackrell, Maton, Godlee, & Quincey.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 24 25, 26, 27.

BAILEY & CO. v. CLARK, SON, & MORLAND (LIMITED). (*a*.)

Water — Watercourse — Artificial stream — Rights of riparian proprietors.

In determining the rights of riparian proprietors in an artificial watercourse the court will take into consideration, first, the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; thirdly, the methods of user.

The plaintiffs were owners of a mill on an artificial watercourse which had been in existence for more than 400 years. They had the right to regulate the flow of water into the channel, and the burden was cast upon them of keeping the channel clean and unincumbered. The evidence showed that in ancient times there had been another mill on the same channel, and that its water had also been used for the purposes of a tannery, on the site of which the defendants had erected a factory.

Held, that, on the evidence, it could not be inferred that the artificial watercourse in question had been created upon the conditions that the plaintiffs should be entitled to every drop of water flowing through it. Consequently the defendants were entitled to the ordinary rights of riparian owners, and could use the water for any purposes they desired so long as such user inflicted no sensible injury on the plaintiffs.

This was an appeal from a decision of Byrne, J.

The plaintiffs, A. Bailey & Co., owned a mill called Beckery Mill, near Glastonbury. The mill is situate on a cut or channel, alleged to be artificial, by which a portion of the water of the River Brue is carried down from a place known as Clyce Hole for a distance of a mile and a-half, ultimately rejoining the river. The water in this channel passes first the defendants' factory known as Northover Factory, in respect of which the claim in the present action was made; then, about 200 yards lower down, a factory of the plaintiffs' called the Beckery Factory, closely adjoining the mill. The inflow of water from the River Brue is regulated by means of an artificial structure with removable boards, which is, and always has been, under the control of the mill-owner, upon whom had fallen also the task of keeping the bed of the cut clean and clear.

The defendants, Clark, Son & Morland (Limited) carried on an extensive business at Northover Factory, which is on the site of an old tannery, as manufacturers of sheepskin and other rugs; for the purposes of this business the[illegible] water coming down the cut.

(*a*.) Reported by J. I. [illegible] ister-at-

The plaintiffs carried on at Beckery Factory another skin and rug manufacturing business.

The plaintiffs allege that the defendants in the course of their business polluted and fouled the stream flowing down the cut and abstracted water therefrom to such an extent as to seriously interfere with and diminish the flow thereof to the plaintiffs' mill and factory. The pollution was said to be caused by the washing, soaking, and scouring of sheep and other skins in the stream after they had been previously subjected to dyeing processes, and by returning into the stream the effluent liquid which had been used in the various processes of manufacture.

The present action was therefore brought to restrain the defendants from (1) polluting or fouling the stream in the cut; (2) diverting or abstracting the water; (3) obstructing or diminishing the flow of the stream.

The plaintiffs claimed, both as owners of Beckery Mill and of their factory, a right to the whole and unpolluted flow of the water of the stream as it entered the cut, as well for the use of the mill as for the use of their factory.

By reason of an action brought in 1877, and of certain subsequently executed deeds of arrangement, the defendants could not have as mill-owners acquired against the plaintiffs, by prescription or otherwise, any rights other than such, if any, as had been acquired in right of Northover prior to that year. It appeared that no waste from the plaintiffs' factory was returned into the cut above Beckery Mill.

At the trial a great deal of evidence was adduced as to the nature and extent of the alleged pollution and obstruction of water in the cut.

Byrne, J., granted a perpetual injunction restraining the defendants, their servants, and workmen from wrongfully fouling or polluting, and from diverting and abstracting the water of the mill-stream in question further or otherwise or to any greater extent than such water was formerly fouled or polluted, diverted or abstracted for the same process or processes (if any) as was or were formerly carried on at the old tannery on the site of the defendants' premises, and which had since been carried on by the defendants at Northover Factory and Glastonbury; but the operation of the injunction was suspended so as to give the defendants time to re-arrange their process as far as possible. And the defendants were ordered to pay the costs of the action.

The defendants appealed.

Levett, K.C., and *R. C. Glen*, for the appellants.

Rowden, K.C., and *Coldridge*, for the respondents.

The following cases were referred to in the course of the argument: *Miner* v. *Gilmour*, 7 W. R. 328, 12 Moo. P. C. 131; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Attorney-General* v. *Great Eastern Railway Co.*, 19 W. R. 788, L. R. 6 Ch. App. 572; *Swindon Waterworks Co. (Limited)* v. *Wilts and Berks Canal Navigation Co.*, 24 W. R. 284, L. R. 7 H. L. 697; *Wood* v. *Waud*, 3 Exch. 748; *Rameshur Pershad Narain Singh* v. *Koni Behari Pattuk*, 4 App. Cas. 121, 27 W. R. Dig. 228.

VAUGHAN WILLIAMS, L.J.—With regard to the pollution, I shall presently say what we consider to be the conditions under which this artificial watercourse was constructed. When it appears what those conditions were, it will be seen that, according to our view, there was unjustifiable pollution of this stream. Under those circumstances the injunction, so far as it relates to pollution, either will have to remain in its present form or will have to be renewed in the order that we propose making. But we have already heard from the defendants that they have acquired some five acres of land which will enable them so to treat the effluent as to prevent there being an obnoxious discharge into the stream, and we think it right to extend the time for the injunction coming into force, that is to suspend the injunction for such time as may be necessary to enable the defendants to do this. Then with regard to the prescriptive right, Byrne, J., has affirmed that right so far as the tannery is concerned. We do not think that in that respect there ought to be any alteration in the order, that is to say, we do not think any further prescriptive right has been established.

Then, coming to the main case, I want to say that this case has been argued on both sides upon the basis that the stream in question is an artificial watercourse, and as I propose to deal with it as being an artificial watercourse I wish to safeguard myself in what I say in this respect that it must not be taken as if I had myself decided that upon the evidence it is clear that this stream is within the meaning of the cases an artificial watercourse. I am not sure about that. When there is a stream of this sort that runs out of a river, and, after making a detour, comes back again into the river, it is quite plain *qua* the riparian proprietors on the river itself lower down than the point where the stream returns that they and the riparian proprietors on the backwater do stand in the relation to each other of upper and lower riparian proprietors; I should have thought that the obligations of the upper riparian proprietors, and to a certain extent their privileges, would as between themselves and the people lower down the river be the same as those in respect of a natural stream, and would be the same independently of any grant or any prescription. I have not, however, to decide this point; I only suggest that I am not sure that this might not be treated as a natural stream, at all events, for some purposes, and I have mentioned one of the purposes for which I think possibly it might be so treated. Really, I am not quite sure that it makes any difference to the conclusion that I have come to in this case whether you regard this watercourse as an artificial stream or a natural stream. That, however, does not matter. I am going to deal with it as being an artificial watercourse. If this were a natural watercourse each riparian proprietor would have had the rights which are so well stated by Lord Kingsdown in the case of *Miner* v. *Gilmour*, 12 Moo. P. C., at p. 156. [His lordship read the passage from "By the general law applicable to running" down to "inflicts upon them a sensible injury," and continued:] If, on the other hand, one deals with this as an artificial watercourse, any right to the flow of the water must have its basis on some grant, whether in the nature of an easement or otherwise. The basis of all rights must be really an agreement either expressed or presumed, with the owners of the land through which the artificial watercourse runs. That being so, it is plain that the circumstances might be such as to lead to a proper inference that the artificial watercourse was constructed on the terms that each of the riparian proprietors on the watercourse should have the same rights as the riparian proprietors upon a natural stream, and no more than those rights. As an authority for that proposition one may take the case of *Sutcliffe* v. *Booth*. As I said before, I am not sure that it would not be sufficient for the defendants if we were to hold that the rights of the riparian proprietors on this backwater were the rights of riparian proprietors on a natural stream and no more. But it is not necessary to discuss that, because, in my judgment, they are somewhat wider. In my judgment it is perfectly clear—at all events having regard to the evidence of

the prior user—that what has been done by the defendants in the way of obstruction of water has not not been a violation of the rights of the plaintiffs as riparian proprietors on this artificial stream. Looking at the evidence, it is quite plain to my mind that there has been a withdrawal of water from the stream in times gone past for purposes other than domestic purposes. It is plain that there was a withdrawal of water for the purpose of the old tannery. Although Byrne, J., has allowed the defendants to claim in respect of the tannery rights of abstracting water as prescriptive rights, it seems to me they may equally be supported as rights arising under the conditions under which it must be presumed that this artificial watercourse was originally constructed. I think also that it should be borne in mind what has been the user by the plaintiffs themselves, which I do not understand it was suggested was unlawful or inconsistent with the original conditions of the creation of the backwater. There is evidence as to the conditions under which this watercourse has been, in fact, used. We have also evidence that in addition to the Beckery Flour Mill there was another mill higher up the stream. Under these circumstances, I come to the conclusion that this backwater was originally constructed under such conditions that the water might be withdrawn for manufacturing purposes equally by all the riparian proprietors, provided the abstraction of water was reasonable. Of course, it is always a difficult thing to say what is the measure of what is reasonable in such a case. But speaking for myself, I think you must take into consideration, amongst other things, the size of the stream—that is the total quantity of water there—and all the other conditions which are present, the other mills and factories there are there, and also causes for waste and necessity for the user of the quantity proved to be used. The result is that in my judgment we ought to find that this artificial watercourse was constructed upon terms giving all the riparian proprietors equally a right personally to withdraw the water for manufacturing purposes, and that there is no evidence that the defendants have withdrawn a larger quantity of water than they were entitled to. I want at this point to mention that if one takes in the strictest way the words of the judgment of Lord Kingsdown in *Miner* v. *Gilmour*: "But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury," there is, in my opinion, no evidence upon which we can find that the defendants, by the water they took out of the stream and returned to the stream, less the amount which was naturally evaporated, did anything to interfere with the lawful use of the water by other proprietors or to inflict upon the plaintiffs a sensible injury. The suggested injury here was that the defendants had interfered with the working of the mill. In my judgment there is no evidence of that. There is, it is true, some vague evidence that the working of the mill was interfered with by the shortness of water; but there is nothing in that evidence which is inconsistent with that interference having been caused by the withdrawal of 25,000 gallons a day by the plaintiffs themselves, of which 25,000 gallons none went back into the stream above the mill, but the whole of it was discharged below the mill. Under the circumstances, my view is that the user by the defendants, or the abstraction by the defendants, of the quantity of water which they are proved to have abstracted and to a large extent returned was a reasonable user; and that that user, whether reasonable or otherwise, has not been proved to have caused any interference whatever with the plaintiffs' mill or any sensible injury to the plaintiffs as mill-owners. Now I want to deal with one other matter. It is said that it may be that the circumstances are such that they do give rise to an inference that by grants from or arrangements with the various riparian proprietors this artificial watercourse was originally constructed upon conditions either a little wider than, or, at least, equal to, the conditions under which the riparian proprietors on a natural stream take privileges and incur obligations. But it is said that all that may be subject to some special rights of these plaintiffs as mill-owners. It is suggested that the mill-stream backwater was originally made expressly for them, but, to my mind, the evidence about the fulling mill absolutely disposes of that suggestion. It is suggested that either by some such original grant, or by some prescription arising from user since the original grant, the plaintiffs have gained paramount rights larger than the other riparian proprietors, and that the other riparian proprietors must be taken to have their rights and privileges subject to this paramount right of the plaintiffs as mill-owners. I do not say that such a state of things is impossible, but in my judgment it is a state of things that we ought not to infer from the evidence before us. I do not think that I should be justified in occupying time by going into this question at length or attempting to define what evidence would justify the inference of grant or prescription giving such paramount rights to the owners of this mill, because I am sternly of opinion that no possible inferences from the facts could give the plaintiffs a right to every drop of the water that passed over the weir. I agree that if the plaintiffs could establish that, they would have established their case, but it seems to me impossible to suggest that there are any circumstances here from which we ought to draw such an inference. There is nothing in the facts to suggest that this was the only mill or that the stream was only made for the benefit of this mill, nor is there anything from which we ought to draw that inference. I do not think that we ought to have drawn it if the fact had been established, but the fact has been negatived. Then it is also said that we ought to draw that inference because there is never so much water in this stream as this mill could take and utilise. It seems to me that, assuming that to be true, one ought not to draw this inference. Speaking for myself, I most unhesitatingly say that I am of opinion that there is nothing to justify the inference that the plaintiffs had a grant entitling them to the whole of the water coming over this weir. The entire history of the user seems to me to negative their having any such grant. Then, if they had not the grant, what was the grant that they had? The grant may have been that they had this right to have the water flowing into this backwater course down to their mill without any interference with it by the exercise of the riparian rights of the people up the stream. If that is their right, in my judgment, on this evidence, as I have already stated once before, there is nothing to justify the conclusion that the defendants have in any way caused interference with or sensible injury to the rights of the plaintiffs as mill-owners. Really on the evidence it is tolerably plain that if there has been any material shortness of water at all it is attributable rather to acts of the plaintiffs themselves than to anybody else. Under these circumstances, in my judgment we ought to vary the order of Byrne, J., leaving this injunction against the pollution and negativing any larger prescriptive rights than those recognised by the order, but discharging absolutely so much of the order as relates to the abstraction of water. If that is the proper conclusion to come to the appellants have substantially

won on this appeal, and they ought to have the costs of the appeal. As to the costs in the court below, I think that the plaintiffs and the defendants came off about equally as to what they won. Under those circumstances, I think that the order ought to be, as regards the hearing in the court below, that each side pays its own costs.

STIRLING, L.J.—I am of the same opinion. The question relates to the relative rights of the plaintiffs and the defendants to the user of an artificial watercourse. It is a watercourse which is an ancient one, having been in existence for some 400 years at least. The plaintiffs are the owners of a flour-mill upon it and also owners of an adjoining factory, the mill having existed there for an unknown period, but the factory having been recently erected. Now the watercourse runs from a place called Clyce-Hole on the river Brue, which is a natural stream, and conveys water to the mill and the factory, passing by the land of the defendants, and after passing the plaintiffs' mill it goes on and again empties its water into the stream. Its whole length is about one mile and a half. There is no question that the plaintiffs and their predecessor in title have been entitled so far as can be discovered to the user during that period of the watercourse for the purposes of their flour-mill. It also appears that the miller had had, so far as it has been discovered, from time immemorial the control of the flow of the water. He has been able, therefore, so to deal with the water as to avail himself of it at such times as he pleased and as was beneficial for the purpose of working the mill It seems that he had also cast upon him the obligation of clearing the watercourse and repairing its banks. Now, it cannot be doubted that in that state of things the plaintiffs are entitled to the benefit of the flow of the stream and to a reasonable use of the water, at all events for the purposes of their mill, returning the water of such use to the natural stream in the River Brue. But the plaintiffs are not content with that, and they assert that they are entitled to the exclusive use for the purposes of the mill of the whole flow of water along this artificial watercourse. Now, in dealing with this, we have to enquire first of all on what principles those rights are to be ascertained.

The principle has been laid down in various cases, of which I may mention *Wood* v. *Waud*, *Sutcliffe* v. *Booth*, and the case in the Privy Council of *Rameshur Pershad Narain Singh* v. *Kooni Beharj Puttuck*. From those authorities, as it seems to me, you must take into account first of all the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; and, thirdly, the mode in which it has been actually used and enjoyed as a matter of fact. As regards this watercourse, it is obviously of a permanent character; and there is no question, therefore, that rights and easements may be acquired in it. As regards the circumstances under which it was created we know nothing. It has existed for hundreds of years, but we know nothing as to who, at the time of the creation of this watercourse, were the owners of the various properties which now belong to the plaintiffs and the defendants respectively, or in fact as to the ownership of any portion of land, along the watercourse. I have stated what we know, shortly, as regards the user by the mill-owner for the time being. I have said that he claims the exclusive right for the purposes of the mill to the whole of the water along this watercourse. That right was put as high as this, that the plaintiffs are entitled to the use of every pailful of water in the stream, and further it was said that the stream is of such a nature that every pailful is of importance to the owner of the mill. Let us consider what are the facts with regard to the rights which have been exercised by the other owners of property abutting on this watercourse. First of all, the owners of the properties which adjoin have, it is stated, used the water for the purpose of watering their cattle and the ordinary purposes for which riparian owners use the adjoining steam. Secondly, the defendants and their predecessors in title were owners of a tannery, and they used the water for the purposes of their business. Thirdly, the plaintiffs' predecessors in title sold their property with rights of water for the purposes of the erection of a manufactory, and the plaintiffs used the water for the purposes of a manufactory and not exclusively for the purposes of a mill. If their right be as they claim, that for the purposes of the mill they had the exclusive right to the use of every pailful then they are not entitled to use a single pailful, for the purpose of anything else. What conclusion are we to come to with regard to these acts of the owners? They ought, it seems to me, to be taken *primâ facie* to have been acts done in the exercise of a legal title rather than as acts which they had no right to do. I think, therefore, that it ought to be inferred that the owners abutting on the watercourse reserved to themselves at the time when the watercourse was created the right to a reasonable use of the water as it passed their lands. The plaintiffs are in like manner entitled to a similar right to the reasonable use of the water for all reasonable purposes, and not merely for the purposes of the mill. In substance, apart from the peculiar use of the water for the purposes of the mill, both the plaintiffs and the other adjoining owners are entitled to such rights as the owners of lands adjoining a natural stream would be entitled to *inter se*. Then, if this be the nature of the plaintiffs' title, have the plaintiffs' rights been infringed? Byrne, J., came to the conclusion upon the evidence that they had. He says: "I think that the evidence shows the loss of a substantial and material amount of water caused by the defendants' operation, which does sometimes interfere with the working of the mill in the summer and autumn. It must, of course, be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it were. If water is abstracted during working hours, and the effluent returned at night, for instance, at a time when the stream is very low, this may very well have a very appreciable result in the working of the mill which might not be noticeable if the reverse process were adopted." That being so, I have been desirous to see the evidence by which the conclusion is supported, and having heard and paid attention to all the passages that were referred to by the learned counsel for the plaintiffs, I am unable to arrive at the same conclusion as Byrne, J. The right of the defendants to use this water is limited by this they must not so use the water as to cause sensible injury to the plaintiffs. Therefore the plaintiffs coming here to complain of a user must prove sensible injury. Now there are two classes of evidence which have been adduced, as there are in all cases which involve questions of nuisance. There is, first of all, what has been termed direct evidence of injury; and secondly, the evidence of experts which is adduced also by persons who have not worked the mill or dealt with it, but have paid a visit to it and drawn conclusions from what they have seen there. To my mind the first is that which we have to regard, at any rate to begin with. I do not say expert evidence is to be excluded, because it is most valuable and useful if once you

arrive at the conclusion that what is properly termed direct evidence of injury is satisfactory in tracing the injury to the defendants' operations, and showing that it is due to them. But if the direct evidence of injury is unsatisfactory, then, to say the least, it wants a very strong case of expert evidence to prove a case for an injunction. It then substantially comes to a case of *quia timet*, and very strong evidence is wanted to induce the court to interfere. Now, the direct evidence is far from satisfying me that any sensible injury whatever is caused by the operation of the defendants' works. If there is any injury caused at all it is much more probably caused by the devotion of a large portion of the stream to the works carried on by the plaintiffs. I will not pass over altogether the expert evidence. Now, on that, as usual, there is great conflict. The defendants' witnesses admitted a certain amount of abstraction of water. They put it down, I think, at 1,500 gallons a day, which they say they do not return. The plaintiffs' witnesses put it much higher, and I will give them the benefit of their calulcation and little more. I will allow them to suppose that 8,000 gallons a day are taken by the defendants—that is to say, about one-third of what is taken for their own works. Now what does it come to? The quantity of 8,000 gallons a day is taken. The minimum flow is three million gallons a day, and that comes as near as may be to about a quarter per cent. of the stream. That is not sufficient abstraction, as it seems to me, to establish a case of *quia timet*. Again, the learned judge in his judgment suggests that there may be something due to the irregularity of the mode in which the water is abstracted and sent down. I am not prepared to say that to take a larger quantity of water out of the river at one time and to send it down at another would not be such an interference with the flow of the stream as to cause sensible injury to the plaintiffs. But I have not found any evidence of that in the present case. There is no direct evidence on that at all, but it is a mere suggestion of the experts, and they say it may cause injury to the stream. Upon these grounds I think that it is not made out the defendants have caused such a sensible injury to the plaintiffs as to call for the interference of the court. One matter more I should desire to call attention to. It was said frequently in argument by the counsel for the plaintiffs that a right was claimed and it was not necessary for them to prove any damage. I agree that if they claim a right to do a thing which the court thought was an assertion of title to a particular thing it would not be necessary for them to prove damage. There are assertions in the defendants' statement of defence of rights by prescription, but that has not been insisted upon at the bar. There is also a right claimed by the defendants to use the stream reasonably, and an assertion that the acts of the defendants have been consistent with the reasonable user of the stream. I think that when we are varying the judgment of the learned judge in the court below, it ought to be provided by our order that we negative any right by prescription or otherwise beyond holding that the defendants are entitled to use the water in this watercourse in a reasonable way, not causing any sensible injury to the plaintiffs.

COZENS-HARDY, L.J.—I entirely agree, and it is only out of respect to the learned judge in the court below from whose decision we are differing that I think it right to add a few words. I doubt whether this ought not to be treated as a natural stream having regard to its length, to the great and unknown antiquity of its construction, and to all the other circumstances. But I am content to treat it as an artificial watercourse, and that being so, it becomes necessary to consider and ascertain so far as possible what are the mutual rights which have been created in the artificial watercourse; or, to put the matter in more technical legal phraseology, what are the terms of the lost grant which from the nature of the case must be found to have existed in some shape or other? Now, the plaintiffs here contend that the presumption we ought to make is a grant of all the water coming over what I will call, the "intake" and going thence down to the mill, and that nobody else along the course of this artificial watercourse, which is considerably more than a mile in length, has a right to take a pailful of water out of it. That is the construction which upon the whole I think Byrne, J., has adopted. I cannot follow that. It seems to me to be absolutely inconsistent with all the evidence we have and with all we know about the origin and uses of this artificial cut for many years. On the other hand, the defendants raised a contention which I am equally unable to accept. It was very strenuously and ably argued that the implied grant did not extend to the whole of the water in the artificial channel, but only to so much as was necessary to work the mill. I am quite unable to follow that. It seems to me the subject-matter of the grant must be everything that comes into the artificial cut from the intake, and the only difficulty is to ascertain who were the grantees and what were the mutual rights which were conferred on the adjoining riparian owners and occupiers. Now, we know something, although not very much, but that something is very interesting, about this watercourse and this Beckery Mill. In a matter of this kind one of course is entitled to refer to a county history, and on referring to Collinson's History of Somerset I find there a *verbatim* extract from the terriers of Richard Bure, the last Abbot of Glastonbury but one. He was the Abbot of Glastonbury from 1497—1524, and I find this statement in the terrier, "There is another mill called Beckery Mill and new fulling mill lately erected by the said Lord Abbot." From that I think it is apparent that this artificial watercourse was used more than 400 years ago, and probably constructed many hundred years before that. It was certainly used more than 400 years ago, not merely for the purpose of the Beckery Mill, which is the plaintiffs' mill, but also for the purpose of a fulling mill on the bank of the cut, affording a clear proof of the user of this cut for manufacturing purposes. That is enough to negative entirely the foundation of the respondents' argument—namely, that the sole grantee, the only person entitled to the benefit of the lost grant, was the miller. In my judgment the true inference from all the facts is that the rights of the riparian owners and occupiers must be regarded in the same way as they would have been had this been a natural watercourse. But I think that the evidence shows that the riparian owners and occupiers are entitled to a reasonable use of the water whether for domestic or manufacturing purposes. That being so, I entirely agree with what my learned brothers have said, that although there is evidence which would have been material and would justify the finding of the learned judge in the court below if we had adopted his view as to the meaning and operation of the lost grant—namely, if it had been a grant of all the water, still I think that there is no evidence whatever to which any court ought to attach the slightest weight that there has been anything more than a reasonable user of the water by the defendants as against the millers and the riparian owners lower down. In saying "reasonable user" it must not be assumed that I am forgetting the pollution. To that extent the user was not reason-

able, but I mean that no more than a reasonable quantity has been taken out for manufacturing purposes by the defendants. For these reasons I think that the judgment of the learned judge in the court below cannot stand, and I entirely adopt the views which have been expressed by my learned brothers.

Order varied.

Solicitors, *Crowders, Vizard, & Oldham*, for *Bulleid & Nixon*, Glastonbury; *James, Mellor, & Coleman*, for *Hobbs & Brutton*, Portsmouth.

ERRATUM.—*Ante*, p. 509: The names of the solicitors, *Jennings & Finch*, should be given as the solicitors for the trustees, not as solicitors for the applicant.

From K. B. Div. (Vaughan Williams, Romer, and Mathew, L.JJ.) — May 2.

VAN GRUTTEN *v.* TREVENEN. (*a.*)

Landlord and tenant—Notice to quit—Tenancy from year to year—Service by registered letter—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 28, 33.

Section 28 *of the Agricultural Holdings (England) Act*, 1883, *by which a notice under the Act may be served by sending it through the post in a registered letter, applies to a notice to quit in the case of a tenancy from year to year, which by section* 33 *is required to be a year's instead of a half-year's notice.*

Application by the defendant for judgment or a new trial in an action tried before Channell, J., and a jury at Bodmin.

The action was brought to recover possession of a farm in Cornwall, of which the defendant was tenant to the plaintiff from year to year. In September, 1900, the plaintiff sent by registered letter addressed to the defendant at his residence on the farm a year's notice to quit on the 29th of September, 1901, the expiration of the year of the tenancy. The postman, who brought the letter, required the defendant to sign for it before delivering it to him, but the defendant refused to sign for it until it was given to him. In consequence the letter was not delivered.

On the 17th of October, 1901, the plaintiff brought this action to recover possession, and the jury found that the defendant knew or suspected, when he refused the letter, that it contained a notice to quit.

Channell, J., entered judgment for the plaintiff.

By section 28 of the Agricultural Holdings Act, 1883, "any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally, or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and, if so sent by post, it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and, in order to prove service by letter, it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served." By section 33, where a half-year's notice expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall be necessary and sufficient for the same.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

J. A. Foote, K.C., and *J. A. Hawke*, for the defendant.—A notice to quit is not such a notice as can be served by registered letter under section 28 of the Agricultural Holdings (England) Act, 1883. It is not a notice "under this Act" within the meaning of section 28. The instruments referred to in that section are those which are created by the Act, of which there are many kinds. A notice to quit exists independently of the Act, section 33 merely regulating its length and requiring it to be a year's instead of a half-year's notice. There is a difference of opinion among the text-books upon this point. If this contention is correct, then the notice to quit has not been properly served at common law.

VAUGHAN WILLIAMS, L.J.—We are all agreed that the notice to quit comes within the Act. That being so, there is no use in arguing the second point.

Lord Coleridge, K.C., and *Bodilly*, for the plaintiff, were not called upon.

THE COURT dismissed the application.

Solicitors for the plaintiff, *Collyer-Bristow, Hill, Curtis, & Dods.*

Solicitors for the defendant, *Robbings, Billing, & Co.*, for *Page & Grylls*, Redruth.

From P. D. & A. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — April 30.

BLACKETT *v.* BLACKETT AND FRAIL. (*a.*)

Practice — Divorce — Security for costs — Claim for damages—Bankrupt petitioner—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 33.

The court will not order security for costs to be given by a petitioner in a divorce action merely because he is an undischarged bankrupt, though he claims damages against the co-respondent.

Smith *v.* Smith, 31 *W. R.* 124, 7 *P. D.* 227, *overruled.*

This was an appeal from a decision of Jeune, P.

A petition for divorce was presented by the husband against his wife.

Damages were claimed against the co-respondent Frail.

The co-respondent asked that, as damages were claimed against him, the petitioner should give security for costs.

The registrar made an order directing the petitioner to give security for costs within fourteen days or withdraw his claim for damages against the co-respondent.

The petitioner took out a summons by way of appeal from this order.

Jeune, P., allowed the appeal and reversed the registrar's order.

The co-respondent appealed.

Inderwick, K.C., and *Murphy*, for the appeal.

Bargrave Deane, K.C., and *Barnard*, for the petitioner.

Inderwick, K.C., replied.

COLLINS, M.R.—This is an appeal from a decision of Jeune, P., in which, overruling the decision which the registrar had come to, he allowed the petitioner to prosecute his suit without giving security for costs. The petitioner is an undischarged bankrupt, and he claims damages against the co-respondent. Under

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

these circumstances the registrar ordered him to give security for costs, but the learned President has come to the conclusion that these circumstances in point of law afforded no sufficient ground on which security should be exacted. Now, the question before us is whether the President was right in the conclusion at which he has arrived. It is contended that there is a well-known practice of the Probate Court to the contrary, and it is said that this case is governed by a case decided so long ago as 1852, which must be taken to have regulated the practice ever since. I am not sure what would be sufficient to establish a practice with which we would not interfere, even if we were satisfied that it did not rest on a good basis. Cases of this sort, however, are very rare, and it is not as though they occurred every day and had been dealt with on a uniform system of practice. That being so, and it not being clear that the practice in the matter has, as a fact, been uniform, I think we are at liberty to look at the practice and see whether there is any principle which sustains it. First, I come to the foundation of the whole alleged practice, the case of *Smith* v. *Smith*, 31 W. R. 124, 7 P. D. 227. That case is very meagrely reported, and the judgment is simply in these terms: "The court granted the application unless the petitioner within a week withdrew the claim for damages." So far as this judgment rests on any statement of law it rests on Mr. Searle's argument, which is given in four lines: "Searle, for the co-respondent, applied for security for costs and a stay of proceedings until the security had been given. The proceedings, so far as damages are claimed, are in the nature of an action for *crim. con.*, to which the practice at common law is applicable." That is the whole argument, and the judgment is nothing more than an application of that argument, and does not give any other reasons. Therefore I venture to criticize the reasons given by Mr. Searle. He says that the effect of a claim for damages was to introduce the practice at common law. Now, what was the practice at common law? The practice at common law certainly was not to order security for costs to be given by a party to an action simply because he was a poor man. Poverty was no ground at common law for ordering security for costs. According to the common law practice, therefore, the petitioner ought to be allowed to bring his action, and the evidence as to the Probate Court practice is not sufficient to justify us in building on so weak a foundation. Then we come to later authorities. The first is the case of *Cowell* v. *Taylor*, 34 W. R. 24, 31 Ch. D. 34. The headnote to that case is this: "The court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even when he is in insolvent circumstances," and Bowen, L.J., in his judgment, cites with approval the following passage from the judgment of the late Lord Esher, then (Brett, J.) in *Sykes* v. *Sykes*, 17 W. R. 799, L. R. 4 4 C. P. 645, at p. 650: "Insolvency alone is not a ground for compelling security. But an exception has been engrafted on that rule, where the plaintiff is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action; as where he has assigned his interest in the debt to another. There is no authority, however, for extending that exception to the case of an executor or assignee of a bankrupt." The next case is *Rhodes* v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548. The second paragraph of the head-note to that case runs as follows: "A receiving order made under the Bankruptcy Act, 1883, does not divest the debtor of his property, and what he recovers as plaintiff in an action is his property, both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them. Therefore a debtor against whom a receiving order has been made ought not merely on that ground to give security for the costs of any action in which he may be the plaintiff." In his judgment in that case Lindley, L.J., says this: "The law upon this subject is well summed up in the last edition of Chitty's Archbold, vol. 1, part 5, c. 33, p. 398: 'The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a *qui tam* action. And this rule applies where the plaintiff is trustee of a bankrupt and is suing for the benefit of the estate, or where the plaintiff is suing as executor for the benefit of the testator's estate." There are other passages in the cases I have cited, but I do not think they add anything. But then it is said that there is a special circumstance in this case arising out of section 33 of the Matrimonial Causes Act, 1857. [His lordship read the section, and continued:] It is contended that, since that section gives the court power to direct in what manner such damages shall be applied, the bankrupt is not suing for himself, but is a mere conduit pipe through which the court allows a sum of money to get into the hands of the persons whom the court thinks ought to have it, and he ought, therefore, to be regarded as a person suing for the benefit of another person. I think that argument is met by the passage I have cited from the head-note to *Rhodes* v. *Dawson*, because there the receiving order did not divest the debtor of his property, but when he recovered it he was bound to hand it over to the receiver for the benefit of his creditors; but though he was in that position, he was not a person against whom security for costs was ordered. I think, therefore, this argument fails; while, if we are to follow the practice at common law, there can be no doubt that the judgment of the learned President was right, and that this appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion, and for the same reasons.

COZENS-HARDY, L.J.—I agree.

Solicitors, *Woodcock, Ryland, & Co.; Collyer-Bristow & Co.*

High Court of Justice.

Chan. Div. Farwell, J. — April 14, 15, 24.

RIMMER v. WEBSTER. (a.)

Trustee—Conflicting equities—Fraud of agent—Negligence—Apparent ownership—Estoppel—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 55.

R. transferred the legal title in a bond of the Tyne Commissioners to H., a stockbroker, for the purpose of enabling him to sell the bond on behalf of R. The transfer stated that H. had paid the consideration to R., but no money was in fact paid. H. executed a mortgage of the bond by deed to W. for £1,000, and W. gave notice of his mortgage to the Tyne Commissioners. H. applied the money to his own use and became a bankrupt.

Held, that whether the case was one of general authority, with no limit brought to the notice of W., the mortgagee, or was to be regarded as a case of estoppel, R. was not entitled to priority or to a vendor's lien as against W.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

This was an action by Rimmer against the defendants Hall and Webster, asking to have a bond issued by the Tyne Improvement Commissioners under powers created by private Acts of Parliament, retransferred to him free from a mortgage to the defendant Webster, or in the alternative for redemption.

The facts, as set out in the judgment of Farwell, J., were as follows: On the 17th of July, 1900, the plaintiff was appointed trustee of the will of one Charles Gerrard, who had died in 1893, and part of whose estate consisted of a bond of the Tyne Improvement Commissioners. This bond was duly transferred to the plaintiff on the 15th of August, 1900, and the transfer was duly registered by the commissioners on the 28th of August, 1900.

The defendant Hall was a stock and share broker at Darlington, and in September, 1900, he was instructed by the plaintiff to sell the bond, and on the 11th of September the bond was sent to him at his request, and Hall knew that the plaintiff held this bond as trustee of Charles Gerrard's estate.

On the 13th of December, 1900, Hall wrote to the plaintiff stating that he was arranging for the sale of the bond in two portions of £500 and £1,500, and enclosed two transfer deeds by which the security was transferred to himself, and such transfers were expressed to be made in consideration of £1,500 and £500 respectively paid to the plaintiff by Hall, although, of course, no money was in fact paid; and on the next day the plaintiff executed these transfers and returned them to Hall.

On the 4th of January, 1901, the plaintiff received the usual notice from the secretary of the Tyne Commissioners informing him that these transfers had been lodged for registration; the secretary afterwards pointed out that the transfers were not in proper form and suggested some alterations. The transfers as altered were sent to the plaintiff by Hall, and on the 28th of January, 1901, were returned by the plaintiff to Hall duly altered and initialled, and on the 4th of February, 1901, were duly registered by the Tyne Commissioners.

Unfortunately Hall was a rogue, and on the 17th of December, 1900, he obtained from the late defendant Webster a loan of £1,000 on the security of the bond and the transfers. He told Webster that he was the owner and asked for a temporary loan. Webster's evidence was taken on commission, and he has since died.

In the opinion of the learned judge there was nothing to suggest that Webster's conduct was in any way open to suspicion; he had known Hall for some time and had perfect faith in his honesty.

On the 22nd of December, 1900, Hall executed a mortgage by deed (dated the 17th of December) to Webster of the bond, and on the 28th of December, Webster sent the bond and the transfers to the secretary of the Tyne Commissioners for registration and gave them notice of his mortgage.

On the 18th of January, 1901, the secretary wrote to Webster that the commissioners would not take cognizance of his notice of mortgage, but that if he wished it he could have it registered as an absolute assignment, and on the 28th of January Webster wrote to the commissioners stating that he did not propose to have his mortgage registered at present.

Meanwhile the plaintiff had been pressing Hall to carry out the sale of the bond, and on the 11th of March, Hall went to London and wrote to Webster an account of his financial difficulties.

On the 14th of March the plaintiff's solicitors gave Webster notice of the plaintiff's title, and on the 18th of March, Webster sent his mortgage to the commissioners and requested them to register it, but before this was done the writ in this action was issued.

Hall became bankrupt, and is in prison.

Upjohn, K.C., and *G. F. Hart*, for the plaintiff.

Jenkins, K.C., and *W. Baker*, for the defendant.

FARWELL, J., after stating the facts, said: The question now arises which of the two innocent parties is to suffer for Hall's rascality. Now the question in this case is one of conflicting equities—the legal title is in Hall; Webster never obtained that registration which was essential under the Tyne Commissioners Act to obtain a legal title, nor had he, when he requested the commissioners to register his mortgage on the 18th of March, "a present absolute and unconditional right to registration": see *Nanney* v. *Morgan*, 36 W. R. 677, 37 Ch. D. 346; *Ireland* v. *Hart*, *ante*, p. 315, [1902] 1 Ch. 522.

The question for my determination, therefore, is whether the plaintiff has by any act or default of his own displaced the higher equitable right that is given him by the priority of his title in point of date.

It is contended that there is a broad general principle, perhaps most succinctly stated by Ashurst, J., in *Lickbarrow* v. *Mason*, 2 T. R. 63, that "wherever one of two innocent persons must suffer by the acts of a third he who has enabled such third person to occasion the loss must sustain it." But to adopt Lord Selborne's words in *Sewell* v. *Burdick*, 33 W. R. 461, 10 App. Cas. 74, at p. 81: "It is often dangerous to infer even from very strong words when used *diverso intuitu*, conclusions on other subjects which, if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified." It would serve no useful purpose if I were to attempt to go through and discuss the various common law cases that have been cited to me, especially as in the last, *Farquharson* v. *King*, 49 W. R. 673, [1901] 2 K. B. 697, there is a remarkable conflict of judicial opinion, but I desire to express my respectful concurrence with the observations of Vaughan Williams, L.J., in that case "that it is impossible in the face of the various authorities to say that in every case in which the act of one of two innocent persons has enabled a third person to occasion loss, the first-mentioned person must bear the loss." It is plain that a man may in many cases entrust another with all the *indicia* of ownership, including the legal title, and yet not deprive himself of his equitable rights. I am not concerned to consider the case at common law, as the case before me is one of equities only, and it is sufficient to refer to two authorities to illustrate my meaning. A man may transfer his shares in a company to a single trustee and entrust him with the certificate, and yet enforce his equitable title against a purchaser or mortgagee of the trustee who has not obtained the legal title: *Shropshire Union Railways and Canals Co.* v. *Reg.*, 23 W. R. 709, L. R. 7 H. L. 496. Again, he may cause land purchased by him to be conveyed to a trustee by a deed containing a statement that the trustee has paid the purchase-money, and may hand over the deed to him and yet enforce his equitable title in a similar way: *Carritt* v. *Real and Personal Advance Co.*, 37 W. R. 677, 42 Ch. D. 263. The principle upon which those cases are founded is stated by Lord Cairns, L. R. 7 H. L., at pp. 507 and 509 of *Shropshire Union Railways and Canals Co.* v. *Reg.* so far as relevant to the present case. On the other hand it is equally well settled that if a man hands over the *indicia* of title to a third person for the purpose of enabling that person to raise money either for his own benefit (*Perry Herrick* v. *Attwood*, 6 W. R. 204, 2 De G. & J. 21) or for the benefit of the owner (*Brocklesby* v. *Tem-*

perance Permanent Building Society, 43 W. R. 606, [1895] A. C. 173), but with a limit on the amount, the lender, being ignorant of the limit, is entitled to a charge for the whole amount advanced although it exceed the limit. It is sufficient to read one passage from Lord Macnaghten's judgment ([1895] A. C., at p. 184): "The principle underlying these cases is that the man possessed of the prior equity cannot be deprived of his title unless he has been guilty of some negligence. But the word negligence imports the neglect of some duty toward the person injured": *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175. A man is entitled to deposit his deeds with his solicitor or his banker, or to send his certificate to his broker, or to vest his property in the name of another person and hand him the title-deeds without thereby giving rise to any implication inconsistent with his own beneficial title, because his acts are in accordance with the common usage of mankind, and no other member of the community therefore is entitled to allege that such a course of action contains any invitation to him to act, from which a duty to him can be inferred. But the course of action above-mentioned is also consistent with an intention that the person to whom the *indicia* of title are entrusted should deal with the property. And if it is once proved or admitted that such was the intention, the case then falls to be decided in accordance with the principles governing the cases of authority given to an agent; and the owner comes under a duty to the persons whom he intends to act, on such authority, to give them notice of any limit that he places on the authority which he has by his own act made apparently co-extensive with absolute ownership. This disposes of Mr. Upjohn's contention that the cases of *Perry Herrick* v. *Attwood* and *Brocklesby* v. *Temperance, &c., Society* are confined to an excess of the limit of borrowing, and do not extend to a mortgage, when the authority is only to sell. The authority which the owner has given can only be limited by the *indicia* of property which he has given. The particular authority proved or admitted is necessary in order to make the case one to which the principles of agency apply at all. But when that is once proved, and the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case becomes one of actual authority, apparently equivalent to absolute ownership, and involving the right to deal with the property as owner; and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or the mortgagee. But then it is urged that Hall became a trustee for sale when the bond was transferred to him, and that a trust for sale does not authorize a mortgage. But it was the unnecessary transfer of the legal title to Hall that enabled him to deal with the bond as owner, and the principles which I have stated are equally applicable whether the dishonest vendor or mortgagor has the legal title as a trustee or not. The gist of the case is that the real owner has invested the dishonest vendor or mortgagor with all the *indicia* of title as absolute owner for the purpose of enabling him to deal with the property, but in a limited way only; whether the trust was to sell only or to mortgage only is immaterial, if the mortgagee or purchaser had no notice of the existence of any trust at all. Further, there is another class of cases distinct from the case of authority or agency which do fall under the general principle which I have cited from *Lickbarrow* v. *Mason*, and which are cases of pure estoppel. If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, by not merely transferring it to him, but also by acknowledging that the transferee has paid the consideration for it to himself, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith and for value. *Rice* v. *Rice*, 2 W. R. 139, 2 Dr. 73, is a good illustration. If a man acknowledges that he has received the whole of the purchase-money from the person to whom he transfers property he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every shadow of incumbrances or adverse equity (2 Dr., at p. 83), and he cannot be heard to say that he has not in fact received such purchase-money; it makes no difference, in my opinion, whether that acknowledgment is made before the Conveyancing Act, on a conveyance of land by the receipt clause in the body of the deed and the indorsed memorandum; or, since the Act, by the former only; or in a statutory transfer by the statement in the statutory form that the money has been paid. The statutory form is given in the schedule as the effectual mode of transfer, and the Act requires the true consideration to be stated; it would be disastrous now to hold that these forms which have been used for years are not fully effectual, but require to be supplemented by a conveyancer's receipt clause. There is nothing adverse to this in *Carritt* v. *Real and Personal Advance Co.* In that case the purchaser on completion took the conveyance of land to a trustee for himself; the purchaser's name did not appear on the conveyance, but the purchase-money was stated to have been paid by the trustee. Chitty, J., held that this statement did not involve any representation that the trustee had paid for the property out of his own money. But his decision does not extend to a case where the owner himself conveys in consideration of the payment of the purchase-money to himself by the transferee. The distinction is obvious; the mere statement that the purchase-money has been paid by the transferee is consistent with such payment having been made out of trust money in his hands belonging to third persons, but it is not consistent with absolute non-payment. There is no contradiction of the deed in saying, "True the purchase-money was paid by him, but out of some third person's money"; there is a direct contradiction in saying that it was never paid at all.

In this case the plaintiff transferred the whole legal title to Hall for the purpose of enabling him to sell, and he executed a transfer which stated that Hall had paid him the consideration; he was fully aware of this, and his letter of the 28th of February appears to point to an intention on his part that Hall should raise money on the bond, but I do not think it fair to lay much stress on that letter, as the plaintiff was not cross-examined.

But whether the case be regarded as one of general authority with no limit brought to the mortgagee's notice, or as one of estoppel, the plaintiff, in my opinion, fails to establish the priority that he claims; and his claim to a vendor's lien is also defeated on similar principles: see *Rice* v. *Rice* and *White* v. *Wakefield*, 7 Sim. 401.

There will be the usual judgment for redemption.

Solicitors, *H. W. Henniker Rance; Williamson, Hill, & Co.*

Chan. Div. Joyce, J. } May 13, 16.

SWEET v. BISHOP OF ELY. (a.)

Ecclesiastical law—Vicar—Judicial separation from wife—Persistent cruelty—Vicar deprived of his preferment by bishop—Validity of bishop's declaration—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 4—*Clergy Discipline Act,* 1892 (55 & 56 *Vict. c.* 32), *s.* 1, *sub-section* 1 (d) (e)—*Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *s.* 12—*Interpretation Act,* 1889 (52 & 53 *Vict. c.* 63), *s.* 38.

A separation order under the Summary Jurisdiction (Married Women) Act, 1895, *was made against the vicar of C. by justices at petty sessions upon the ground of his persistent cruelty to his wife. Upon the order becoming conclusive, the bishop of the diocese declared the living of C. vacant, purporting to act under section* 1 *of the Clergy Discipline Act,* 1892.

Held, that the bishop's declaration was invalid.

A clergyman cannot be deprived of his living by reason only of a separation order, based upon persistent cruelty, being made against him.

Interpretation Act, 1889, *s.* 38, *considered.*

Motion by the Vicar of Cowlinge, Suffolk, to restrain the Bishop of Ely and a churchwarden of the parish of Cowlinge from interfering with the plaintiff's enjoyment of the preferment of Cowlinge, and from instituting any other person into the preferment, or from treating as valid, or acting upon, a declaration made by the bishop that the said preferment was vacant. The patrons of the living, the Fellows and Scholars of Trinity Hall, Cambridge, were also joined as defendants, but the plaintiff's claim was substantially against the bishop, who had made a declaration under the Clergy Discipline Act, 1892, that the living was vacant, and against the churchwarden, who, acting on the bishop's declaration, had given the plaintiff notice to quit the vicarage.

It appeared that the plaintiff was married in the year 1880, and became Vicar of Cowlinge in the month of February, 1891.

On the 28th of January, 1902, a separation order under the Summary Jurisdiction (Married Women) Act, 1895, was made against the plaintiff by the Newmarket justices at petty sessions upon the application of the plaintiff's wife upon the ground of his persistent cruelty to her.

The plaintiff made no appeal against the order, which had since become "conclusive."

In consequence of these proceedings on the 7th of March, 1902, the Bishop of Ely, acting, or purporting to act, under section 1 of the Clergy Discipline Act, 1892, declared the living of Cowlinge vacant, and the churchwarden accordingly took possession of the church, and prevented the plaintiff from having access thereto, and gave the plaintiff notice to quit the vicarage. The plaintiff thereupon commenced these proceedings, alleging that the declaration made by the bishop was invalid and unauthorized by statute. The question of the validity of the declaration made by the bishop turned upon the construction of several statutes, which are shortly as follows:

Section 4 of the Matrimonial Causes Act, 1878, enacts that "if a husband shall be convicted summarily or otherwise of an aggravated assault, within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may order that the wife shall be no longer bound to cohabit with her husband, and such order shall have the force and effect in all respects of a decree for judicial separation on the ground of cruelty.

Section 1 of the Clergy Discipline Act, 1892, enacts that "if either . . . (*d*) an order for judicial separation is made against a clergyman in a divorce or matrimonial cause, or (*e*) a separation order is made under the Matrimonial Causes Act, 1878, then, after the date at which the order becomes conclusive, the preferment (if any) held by him shall within twenty-one days, without further trial, be declared by the bishop to be vacant as from the said date."

By section 12 of the Summary Jurisdiction (Married Women) Act, 1895, section 4 of the Matrimonial Causes Act, 1878, is repealed, but section 4 of the Act of 1895 re-enacts the provisions of the Act of 1878, and further provides that any married woman whose husband shall have been guilty of persistent cruelty to her, and shall by such cruelty have caused her to leave and live separately and apart from him, may apply to a court of summary jurisdiction for an order under the Act; and section 5 provides that the court of summary jurisdiction to which any application under the Act is made may make an order containing (*inter alia*) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree for judicial separation on the ground of cruelty).

Section 38 of the Interpretation Act, 1889, provides that where any Act repeals and re-enacts with or without modifications any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

E. Clayton, for the plaintiff.—Although section 1, sub-section 1, of the Clergy Discipline Act, 1892, gives the bishop power to declare a living vacant in certain cases, the bishop can only do so under sub-section 1 (*e*) (which refers to the Matrimonial Causes Act, 1878) in cases where the clergyman has been convicted of a crime. Here the plaintiff has not been convicted of any crime. The bishop must state the grounds upon which he makes the declaration (*cf.* rule 25, and Form 35, Clergy Discipline Act, 1892), and he has stated that he acted under sub-section 1 (*e*) of section 1. Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, is not a re-enactment "with or without modification" of section 4 of the Matrimonial Causes Act, 1878, because "persistent cruelty" is not mentioned in the latter Act, and therefore section 38 of the Interpretation Act, 1889, does not apply here. The declaration made by the bishop is invalid.

Dibdin, K.C., and *G. J. Talbot,* for the defendants.—The Act of 1895 is a re-enactment with modifications of the Act of 1878, and the Interpretation Act is therefore applicable, and the declaration is valid. Moreover, it is not necessary to declare the ground on which the bishop acts in making the declaration: *cf.* rule 25 of Clergy Discipline Act, 1892. A separation order granted under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, is an order for a judicial separation in a divorce or matrimonial cause. The Act of 1895 merely provides cheaper machinery for getting a separation than proceeding under the Divorce Act: *cf. Lane* v. *Lane,* [1896] P. 133, at pp. 135, 137, 44 W. R. Dig. 54. The bishop made the declaration under sub-section 1 (*d*) of section 1 of the Clergy Discipline Act, 1892, and the declaration is therefore valid.

Clayton, in reply.—The bishop cannot now change his ground for making the declaration. He purported to act under sub-section 1 (*e*), and he can not now fall back

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

on sub-section 1 (*d*) of the Act of 1892. But even if he came within sub-section 1 (*d*), Form 35 gives a special form of notice, which is not the form of notice used here. The rules and forms embodied in the Act must be used in proceedings under the Act: *cf.* section 9 and rule 96 of the Clergy Discipline Act, 1892. Moreover, this is not a judicial separation made in a divorce or matrimonial cause. If it were so, sub-section 1 (*e*) would be unnecessary and of no effect. The statute must be construed strictly. A similar point arises under the Bankruptcy Act, 1883, s. 4, sub-section 1 (*g*), where "a final judgment" is referred to, and it has been held that this phrase must be strictly construed: *Ex parte Chinnery*, 32 W. R. 469, 12 Q. B. D. 342; *In re Binstead*, 41 W. R. 452, [1893] 1 Q. B. 199, per Kay, L.J.

JOYCE, J., after stating the facts: It should be observed that the Act of 1878 does not authorize a separation order to be made upon the additional or alternative grounds of persistent cruelty, which was introduced by the Act of 1895, but only upon the ground of a conviction for an aggravated assault. Section 4 of the Act of 1878 was repealed by the Act of 1895, under which the separation order now in question was made. [His lordship then read section 38 of the Interpretation Act, 1889, and continued:] The bishop was accordingly advised that, by virtue of section 38 of the Interpretation Act, the reference in the Clergy Discipline Act, 1892, to the Matrimonial Causes Act, 1878, must now be construed and treated as a reference to the Summary Jurisdiction (Married Women) Act, 1895, so as to require the bishop, for the purposes of the Clergy Discipline Act, 1892, to treat the separation order in the present case just as if it had been a separation order under the Matrimonial Causes Act, 1878. Accordingly the bishop proceeded to declare the preferment of the plaintiff—that is, the Vicarage of Cowlinge—to be vacant. In my opinion the view of the law which the bishop and his advisers have adopted and acted upon cannot be maintained. Indeed, it was not very strongly supported by the counsel for the defendants.

I cannot regard the provision in the Act of 1895, which authorizes the making of a separation order on the ground of persistent cruelty, as a re-enactment or part of a re-enactment with modifications of the provision in section 4 of the Act of 1878, enabling a separation order to be made upon the ground of conviction for an aggravated assault. The chief contention of the defendant's counsel was that the separation order in this case was an order for judicial separation against a clergyman in a divorce or matrimonial cause, within section 1, sub-section 1 (*d*), of the Clergy Discipline Act, 1892. Now it is quite true that by section 5 of the Summary Jurisdiction (Married Women) Act, 1895, it is enacted that the provision, in a separation order under that Act, that the applicant be no longer bound to cohabit with her husband shall, while in force, have the effect of a decree of judicial separation on the ground of cruelty. Still it is not an order for judicial separation, and at all events such an order by justices—even if a "cause" at all—is not, in my opinion, an order for judicial separation made in a divorce or matrimonial cause, the jurisdiction in which is now vested in one of the Divisions of the High Court. If the separation order here is correctly described as an order for judicial separation, in a matrimonial cause, it is quite clear that a separation order under section 4 of the Act of 1878 must also be an order for judicial separation in a matrimonial cause. But if that were the view of the Legislature, then sub-section 1 (*e*) of section 1 of the Act of 1892 would be wholly unnecessary. These statutory enactments, which require a bishop to declare the preferment of any clergyman, however disreputable, to be vacant, must be strictly construed, and under the circumstances I find myself compelled to hold that the declaration made by the bishop was unauthorized and invalid. The plaintiff is entitled to an injunction, but I shall stay its operation for three weeks in order that there may be no interference with the services of the church, and in case the defendants shall be advised to appeal. As regards the costs, the bishop made a very pardonable mistake, if it be a mistake, so both parties must pay their own costs.

Solicitors, *Ruston, Clarke, & Ruston*, for *A. H. & R. Ruston*, Newmarket; *Lea, Bolton, & Lea; Cole & Jackson*, for *Francis, Francis, & Collin*, Cambridge.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.)

March 25; April 15.

HORNSEY URBAN DISTRICT COUNCIL (*Appellants*) *v.* HENNELL (*Respondent*). (*a*)

Local government—Sewering and paving streets—Apportionment of expenses amongst frontagers—Exemption—Volunteer headquarters—Premises owned and occupied by servants of the Crown for Crown purposes—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 327.

The respondent purchased the fee simple of certain land for the purpose of it being transferred to and used by a volunteer corps, and pursuant to the provisions of the Military Lands Act, 1892, *he mortgaged the premises to the Public Works Loan Commissioners for a sum of money which was applied in repaying the respondent the purchase price of the premises and in fitting them up for the use of the corps. The respondent had no use or occupation of the premises otherwise than as commanding officer of the corps.*

Held, that there was an ownership and an occupation of the premises on behalf of the Crown for Crown purposes, and, therefore, that the respondent was not liable under section 150 *of the Public Health Act*, 1875, *to contribute towards the expense of sewering and paving the street on which the premises fronted.*

The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property, unless the Crown is expressly named or unless by necessary implication the Crown has agreed to be bound, was applicable in this case.

Case stated by justices of the peace of the county of Middlesex.

The appellants were the Urban District Council of Hornsey.

The respondent was a colonel in his Majesty's army, and was until March, 1901, the commanding officer of the 1st Volunteer Battalion Middlesex Regiment.

By an indenture made the 15th of June, 1896, between the Suburban Buildings Land Co (Limited) and the respondent certain premises called the "Elms" were granted and conveyed unto and to the use of the respondent, his heirs and assigns, for the sum of £1,910.

The premises were acquired by the respondent for the purpose of transferring them to and in the meantime allowing them to be used by the said volunteer battalion.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In December, 1896, certain portions of the premises, comprising an armoury and a magazine, were duly appointed by the respondent as commanding officer, and approved by the Secretary of State for War, as a storehouse for arms, ammunition, and stores in pursuance of section 26 of the Volunteer Act, 1863, section 6 of the Regulation of the Forces Act, 1871, and an Order in Council made under the last-mentioned section. Since that time these portions of the premises were used solely as such storehouse.

In February, 1897, the Secretary of State for War, on the application of the respondent, in pursuance of section 5, sub-section 1, of the Military Lands Act, 1892, duly approved of the sum of £2,200, repayable in thirty-five years, being borrowed by the battalion for the purpose of acquiring the freehold of the premises.

By an indenture of mortgage, made the 1st of April, 1897, between the respondent and Robert Philpot, the Secretary of the Public Works Loan Commissioners, the respondent granted the premises, and the grants made and to be made to the battalion out of moneys provided by Parliament, unto the said Robert Philpot, as such secretary as aforesaid, and his successors, secretaries as aforesaid, and his and their assigns, by way of mortgage for securing the said sum of £2,200 and interest, and agreed that the premises should, subject to such mortgage, be held by him as such commanding officer and his successors under and by virtue of the terms of the said Volunteer Act, 1863.

The said sum of £2,200 was advanced in pursuance of the mortgage by the Public Works Loan Commissioners through the Commissioners for the Reduction of the National Debt, and was, together with the sum of about £500 which had been raised by means of voluntary subscriptions, applied by the respondent in repaying himself the purchase-money price of £1,910 of the premises and in altering and fitting up the same for the use of the battalion. The respondent thereupon ceased to have any interest in the premises otherwise than as commanding officer.

The premises since their acquisition by the respondent were used as the headquarters of and for the purposes of the battalion and for no other purpose. No rent or money was ever charged or received by the battalion or its commanding officer for the use of the premises or any part thereof.

The funds of the battalion consisted of grants made and of moneys provided by Parliament, subscriptions from the officers, and some voluntary subscriptions subscribed by other persons for specific purposes. The upkeep of the premises was paid for entirely out of the said Parliamentary grants.

The premises abutted on the east side of a street known as Nightingale-lane. This street was, at the date of the notices hereinafter mentioned, a street (not being a highway repairable by the inhabitants at large) within the meaning of section 150 of the Public Health Act, 1875.

In December, 1899, the appellants duly resolved that notices should be served upon the respective owners and occupiers of the premises fronting, adjoining, or abutting on the said street, under section 150, requiring them to sewer, level, pave, metal, flag, channel, and make good the street, and on the 24th of January, 1900, notice under the said section was duly served on (amongst others) the respondent.

The notices were not complied with, and the appellants executed the work therein mentioned themselves and completed the same on or before the 15th of October, 1900.

The expenses incurred by the appellants in executing the works were thereupon apportioned by their surveyor, and the sum of £409 10s. 9d. was so apportioned on the respondent in respect of the said premises, and notice of such apportionment was duly served upon him and he did not within the space of three months dispute the same.

On the 20th of February, 1901, notice demanding payment of the said sum of £409 10s. 9d. by the respondent was duly served upon him, but he refused to pay the same, and the appellants commenced summary proceedings for the recovery of the sum, with interest thereon at the rate of £5 per cent. per annum, from the 20th of February, 1901, which came before the justices for hearing at Highgate on the 16th of October, 1901.

On behalf of the appellants it was contended that the respondent was the owner of the premises at the time when the works were completed, and that he was liable accordingly to pay to the appellants the share apportioned in respect of the frontage of the premises to Nightingale-lane of the expenses of executing such works.

On behalf of the respondent it was contended that the premises were owned and occupied by servants of the Crown for the purposes of the Crown, and consequently that he was exempt from liability to pay any of the expenses so apportioned.

The justices were of opinion that the respondent was not liable to pay the expenses so apportioned, and dismissed the summons.

The question for the opinion of the court was whether the respondent was liable to pay the share of the said expenses apportioned upon him as aforesaid in respect of the frontage to Nightingale-lane of the said premises.

Section 327 of the Public Health Act, 1875, enacts that "Nothing in this Act shall be construed to authorize any local authority . . . (2) to disturb or interfere with any lands or other property vested in . . . her Majesty's Principal Secretary of State for the War Department for the time being . . . without the consent in every case of such . . . Secretary of State . . ."

Bray, K.C. (*Alexander Glen* with him), for the appellants.

Sir R. B. Finlay, A.G. (*H. Sutton* and *G. S. Robertson* with him), for the respondent.

The arguments of counsel sufficiently appear in the following judgment.

Cur. adv. vult.

April 15.—Lord ALVERSTONE, L.C.J., read the following judgment of the court:

This was an appeal by the Hornsey Urban District Council against a decision of the justices of Middlesex sitting at the Highgate Petty Sessions, dismissing a complaint made by the appellants against the respondent to recover the sum of £409 10s. 9d., being the apportioned amount of expenses incurred by the appellants in sewering, levelling, and paving a certain street called Nightingale-lane under the provisions of section 150 of the Public Health Act, 1875. The ground of the decision was that under the circumstances of the case the respondent, who had acquired the premises in question as colonel of a volunteer corps, was not liable to pay the amount of the apportionment. In order to appreciate the point which arises upon this appeal it is, in our opinion, necessary to state accurately the facts upon which the question arises.

The respondent was, up to March, 1901, the commanding officer of the First Battalion Middlesex Rifle Volunteers. In the year 1896 the respondent purchased the fee simple of certain lands at Hornsey for the sum of £1,910. The land was purchased by him

for the purpose of it being transferred to and used by the volunteer battalion. In 1899 the premises so acquired were, pursuant to the provisions of the Military Lands Act, 1892, mortgaged to the Public Works Loan Commissioners for the sum of £2 200. The money so received was applied to repay the amount paid by the respondent in purchasing the premises and in fitting them up for the use of the volunteer battalion. The premises abut on Nightingale-lane. In December, 1899, the appellants duly served notices for the sewering, paving, &c., of Nightingale-lane under the provisions of section 150 of the Public Health Act. The work was subsequently executed by them. The amount apportioned, a sum of £409 10s. 9d., is agreed to be the amount due from the respondent as the legal owner of the premises if he is not exempt from payment. The lands in question were acquired under and by virtue of sections 24, 25, and 26 of the Volunteer Act, 1863, and the mortgage, as already stated, was under the provisions of the Military Lands Act, 1892

It was contended by Mr. Bray, on behalf of the appellants, that, inasmuch as by virtue of section 3 of the Military Lands Act, 1892. the land could be let in any manner consistent with the use thereof for military purposes, and that it would not vest in the Secretary of State until after the disbandment of the corps, the respondent, as the legal owner, was liable to pay the apportionment, and that the case of the *Westminster Vestry* v. *Hoskins*, [1899] 2 Q. B. 474, 48 W. R. Dig. 124, was an authority in his favour binding upon us.

It was contended on behalf of the Attorney-General that the land being in fact purchased, owned, and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied for Crown purposes, and that, therefore, the amount of the apportionment could not be recovered, as section 150 was not binding upon the Crown. We are of opinion that the contention of the Crown is right, and that the appeal should be dismissed. The liability to pay the apportionment depends upon the provisions of the Public Health Act, 1875. Section 150, as has been frequently pointed out, contemplates a notice being given to the owners or occupiers to carry out the work specified, and, upon their failure to carry it out, empowers the authority to execute the works and recover the expense from the various owners. Section 213 provides that the expense may be treated as private improvement expenses and recovered by private improvement rates spread over a series of years. Section 257 provides for the recovery of the apportioned amount either at once or by instalments. Section 327, which was relied on by Mr. Bray, contains certain protective clauses with reference to lands vested in the Admiralty or War Office.

In our opinion, for the reasons given by Lawrance, J., and Collins, L.J., in the case of *Pearson* v. *Assessment Committee of Holborn Union*, [1893] 1 Q B. 389, at pp. 395 and 397, 41 W. R. Dig. 165, these lands were being held for military purposes, and the respondent had no use or occupation of the premises otherwise than as colonel commanding the corps, and in discharge of his duties as such, and is in fact a mere trustee for the corps, having no personal beneficial interest. This is, in our opinion, an ownership and an occupation for and on behalf of the Crown, and the appellants must show some words which impose upon the Crown an obligation to do the work or pay the expense of it. The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is, in our opinion, still applicable to such a case. No doubt the insertion in many Acts of Parliament of clauses to protect the Crown or save Crown rights has given rise to the impression that this rule has to some extent been trenched upon, and we are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown, even though the Crown may not be specially named.

But in our opinion the intention that the Crown shall be bound, or has agreed to be bound, must clearly appear either from the language used, or from the nature of the enactments, and there is, in our opinion, nothing of the kind in the provisions of the Public Health Act applicable to this case which gives rise to any such presumption. Nothing would be gained by considering in detail the various authorities which were cited in support of this view, but we would call attention to the judgment of Lord Tenterden in *Smithett* v. *Blythe*, 1 B. & Ad. 509, in the year 1830, in which there was an express exemption of King's ships of war from light dues. Other vessels of the Crown were held not to be liable, although they were not mentioned in the express exemption, or, in other words, that the general doctrine of the immunity of the Crown applied notwithstanding the insertion of an express exempting clause as to certain matters. Similarly in the case of the *Mayor of Weymouth* v. *Nugent*, 13 W. R. 338, 6 B. & S 22, stone brought for the use of her Majesty's navy was held exempt from wharfage duties created by statute upon the same principle, notwithstanding the insertion of special exemptions in favour of certain Crown property, and it was pointed out by Cockburn, C.J., that these exemptions were merely inserted *ex majore cautela*, and the case of *Coomber* v. *Justices of Berks* in 1883, 32 W. R. 525, 9 App. Cas. 61, which was a case of income tax, is strongly illustrative of the principle. It is, moreover, right to observe that in the case of the *Lord Advocate* v. *Barber*, reported in 5 Ct. Sess. Cas. 3rd series, 84, Crown property was held exempt from an exactly similar burden.

Having regard to the above authorities we cannot accept the argument that the limited exemption of certain Government lands in section 327 of the Public Health Act is sufficient to show that all other interests of the Crown were intended to be affected by the provisions of the Act. The limited language of the exceptions in section 327 appears to us to support the view that they were inserted *ex abundante cautela*, and we believe that if careful search is made there are many similar Acts in which no clauses protecting Crown rights have been inserted. There is, in our opinion, no such general practice as to lead to the view that the original doctrine of Crown exemption has ceased to exist or has been infringed upon, or that the insertion of a particular protecting clause is intended to show that only that class of Crown property was intended to be exempt. With reference to the case of the *Vestry of Westminster* v. *Hoskins*, relied upon by Mr. Bray, it is certainly not an authority upon the point now raised before us, but after the argument which was addressed to us in this case we are not prepared to say that we should have come to the same conclusion. The case of *Rayner* v. *Drewitt*, 82 L. T. Rep. 718, 48 W. R. Dig. 105, does not apply, as in that case the premises were not used solely for Crown purposes.

For the above reasons we are of opinion that the appeal should be dismissed.

Appeal dismissed with costs; leave to appeal.

Solicitors for the appellants, *Lennard J. Tatham.*

Solicitor for the respondent, *Solicitor to the Treasury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 15.

ELLIOTT v. ZIGGINS. (a.)

Master and servant—Agreement as to compensation—Right to sue for wages while receiving compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37).

Where a workman has by agreement received weekly compensation during incapacity for injuries, he cannot afterwards sue for wages during the period of incapacity, even though he still remains during that period in the employment of his master.

Appeal from Judge Ingham, of the Coventry County Court.

This was an appeal by the defendant Ziggins, the employer of the plaintiff Elliott, against a judgment for £22 15s., being the balance of wages alleged to be due to the plaintiff under the following circumstances.

The plaintiff Elliott had been in the employ of the appellant at a salary of 35s. a week, and was in the course of his employment partially incapacitated by an accident which occurred on the 2nd of July, 1901.

He served the usual statutory notice on the appellant, and on the 13th of August he was awarded (by agreement) 17s. 6d. per week during incapacity.

The plaintiff, however, still remained in the employ of the appellant. Disputes arose between the appellant and the plaintiff over an invention of the latter's, which he alleged was not being properly worked by the appellant, and on the 2nd of November, 1901, he was given a week's notice by the appellant. Elliott (the workman) then sued for (*inter alia*) £15 3s. 4d., being the balance of wages at the rate of 35s. a week between the 11th of July and the 2nd of November.

The county court judge gave judgment in favour of the plaintiff on the ground that he was entitled to his full wages till notice was given.

Parfitt, for the appellant, the defendant—The agreement of the 13th of August was clearly in substitution for the contract of service. It could not be contended that the plaintiff should do no work and yet be able to claim full wages.

Newson, for the plaintiff.—Until notice is given the plaintiff is entitled to his wages, and the fact that he has received compensation under the Act does not take away any of his other rights. In *Cuckson* v. *Stones*, 7 W. R. 134, 1 E. & E. 248, it was decided that a workman who is incapacitated by illness is entitled to full wages during illness, even though he has not done any work.

Lord ALVERSTONE, L.C.J.—I wish to repeat what I said in a case a few days ago, that the Workmen's Compensation Act was not intended to be a complete code in which you would find provision for every case which might arise. In the present case I doubt whether it would be to the advantage of the workman that his contention should prevail, as it would lead in very many cases to notice of dismissal to the workman being given. Section 1, sub-section 2 (*b*) of the Workmen's Compensation Act provides that the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the Act; and by section 1, sub-section 3 it is provided that employers and workmen may agree as to the compensation to be paid. Then with respect to the amount of compensation, by sub-section (*b*) of the first schedule it is provided that where partial incapacity results from the injury a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

In the present case the workman received by agreement half his wages. This agreement is, in my opinion, inconsistent with the view that he was still entitled to his agreed wages. If they were still to be paid, paragraph 2 of the first schedule—which provides that in fixing the amount to be paid weekly, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity—would be quite useless. If effect is given to the plaintiff's contention you would have to say that the employer must in every case, to get rid of the claim for wages, give a notice of dismissal. In my judgment a workman who has received compensation in respect of an injury, duly assessed under the Act, cannot afterwards turn round and say, I want wages also. This judgment, therefore, cannot stand.

DARLING, J.—I agree. In my opinion a workman who makes a claim under this Act and receives compensation under the Act receives it in lieu of wages. If that be not so he would be entitled to full wages as well as compensation, even though he had not done any work and could not earn them. Mr. Newson admitted that his argument must amount to that. I cannot think that the Legislature intended any such consequence. I do not think that our judgment, even though it goes against this particular workman, is against workmen as a class, for if this judgment were to stand it would lead to employers discharging their workmen directly an accident happened.

CHANNELL, J.—I agree. I think that a workman getting compensation under this Act is estopped from saying that wages are still due to him.

Appeal allowed.

Solicitors for the appellant, *Crowders, Vizard, & Oldham*, for *Browetts*, Coventry.

Solicitors for the respondent, *Maddocks & Colson*, for *Henry Maddocks*, Coventry.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) March 19.

ANDREW v. GROVE. (a.)

County court—Practice—Costs—Power to make successful defendant pay plaintiff's costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 113.

A county court judge has no jurisdiction to order a successful defendant to pay the costs of the plaintiff.

This was an appeal by the defendant from the judgment of the county court judge of Plymouth and East Stonehouse so far as it related to an order adjudging him to pay the costs of the plaintiff, who was unsuccessful.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The action, which was commenced in the High Court and remitted to the county court, was brought against the defendant, a commission agent, to recover £90, being the amount of a debt. The defendant set up the defence (1) that the transaction was a betting transaction within the Gaming Act, 1845, and (2) that the bookmaker did not lay the odds on the ground that it was too late.

At the trial the plaintiff called the defendant as her own witness, and he denied that the bet had been accepted or made. The learned judge said that as she had done so she was bound by his statements, and he gave judgment for the defendant, but ordered him to pay the plaintiff's costs, as he, the learned judge, considered his statements a tissue of lies and thought that he had perpetrated a swindle.

The defendant now appealed against the order as to costs.

Colam, for the appellant.—The county court judge had no power to make this order. A judge even of the High Court has no power to make a successful defendant pay the plaintiff's costs: *Dicks* v. *Yates*, 18 Ch. D. 76 29 W. R. Dig. 57; *Foster* v. *Great Western Railway*, 30 W. R. 398, 8 Q. B. D. 515; *In re Mills*, 35 W. R. 65, 34 Ch. D. 24. By section 113 of the County Courts Act, 1888, which provides that "all the costs of any action or matter in the court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court," power as to costs is given to county court judges; but that power is no wider than the power given by the Judicature Acts and rules to judges of the High Court. The discretion given by section 113 must be a discretion within the Act and rules. By section 116 it is provided that with respect to an action founded on contract brought in the High Court which could have been commenced in a county court, if the plaintiff shall recover a sum less than £20 he shall not be entitled to any costs of the action. In this case, which could have been commenced in the county court, the plaintiff did not recover anything, and she is therefore clearly not entitled to costs: *Solomon* v. *Mulliner*, 49 W. R. 364, [1901] 1 K. B. 76; see also County Court Rules, 1889, ord. 50A, r. 17.

Ashton Cross, for the respondent.—Section 5 of the Judicature Act, 1890 (53 & 54 Vict. c. 44), which Act was passed subsequent to the date of the first three cases cited on behalf of the appellant, provides that "the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Section 113 of the County Courts Act, 1888, gives to the county court judge the same power as to costs as section 5 of the Judicature Act, 1890, gives to the judges of the High Court. Section 5 was enacted in order to confer greater power as to costs upon the judges of the High Court: *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 53, 450. In the present case the conduct of the defendant was sufficient "good cause" for the learned judge ordering him to pay the plaintiff's costs. The plaintiff was entitled to bring the action, though it was open to the defendant to plead in defence the Gaming Act.

Colam, in reply.—The plaintiff had no right to bring the action, as it was in respect of a betting transaction within the Gaming Act, 1845, s. 18. [Lord ALVERSTONE, L.C.J.—I think the words in that section, "no suit shall be brought or maintained," &c., refer to a right to succeed in an action, not a right to issue a writ.]

Lord ALVERSTONE, L.C.J.—The proposition put forward on behalf of the respondent is a startling one, because, subject to the Act of 1890, which is not in question here, the High Court had not until then any such power as is now claimed for the judge of a county court. Section 113 of the County Courts Act, 1888, enables the county court judge to award costs in the exercise of a judicial discretion, but, in order that he should have power to exercise a judicial discretion, a right of action or a right of defence must have been established to enable him to exercise discretion. In *Dicks* v. *Yates* the objection was taken that there was no appeal because it was a matter of costs only, but the Court of Appeal expressed the view that, as there was no right to make a successful defendant pay the plaintiff's costs, it was an appeal on the merits and and not as to costs. The same principle was recognized in *Foster* v. *Great Western Railway* and in *In re Mills*. It seems to me that we ought not to put the construction on section 113 of the County Courts Act, 1888, that the judge has this power in the county court, unless the language of the section forces us to do so. I do not think that section 116 is conclusive against the right of the plaintiff to maintain this order, simply on the ground of the words "which could not have been commenced in the county court," but I come to the conclusion that this power, now claimed for the first time, does not exist in the county court, and that where the defendant is successful there is no jurisdiction in the county court to order him to pay the plaintiff's costs.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am also of the same opinion. I may add, however, that the county court judge has, of course, power, where the defendant has been guilty of misconduct, to order him, although successful, to pay such part of the plaintiff's costs as has been caused by his misconduct.

Appeal allowed.

Solicitors for the appellant, *Taylor, Willcocks, & Lemon*, for *J. G. Jackson*, Plymouth.

Solicitors for the respondent, *Riddell & Co.*, for *T. H. Geake*, Plymouth.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — Feb. 26.

HOLLAND (*Appellant*) v. HALL (*Respondent*). (*a.*)

Hawker—Taking round sewing machines—Offer for sale to persons who had not previously requested agent to call—Hawkers Act, 1888 (51 & 52 *Vict. c.* 33), *ss.* 2, 6.

A person who carries about from place to place, or to other men's houses, by means of a horse and cart, unsold goods and offers them on approval for the purpose of sale is a hawker within the meaning of section 2 of the Hawkers Act, 1888, *and the fact that the goods had been shown only to persons of whom it had been ascertained by means of a canvasser that they would like to see them, and would probably be purchasers, does not prevent the person showing them from being a hawker within the meaning of the statute.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Case stated.

This was a special case stated by the justices of the peace for the West Riding of the county of York.

At a petty sessions at Otley, on the 16th of August, 1901, an information was preferred by the appellant, Joseph Holland, an Inland Revenue officer, against William Hall and Fred Poppleston, for recovery of the penalty imposed by section 6 of the Hawkers Act, 1888 (51 & 52 Vict. c. 33). The information charged that Hall and Poppleston traded as hawkers on the 19th of April, 1901, in the parish of Ilkley, without having in force a proper licence as required by the statute.

The summons appeared not to have been served upon Poppleston, and the information was heard as against Hall alone.

The facts found by the special case were as follows: The Hawkers Act, 1888, imposes a duty upon an Excise licence to be taken out by every hawker in the United Kingdom, subject to certain exemptions, none of which applied to the present case. Section 2 of the Act defines a hawker as follows: "'Hawker' means any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandize, or exposing samples or patterns of any goods, wares, or merchandize to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandize in or at any house, shop, room, booth, stall, or other place whatever hired or used by him for that purpose."

It was proved that on the 19th of April, 1901, the respondent and Poppleston were in the employment of the Singer Manufacturing Co., who are makers of sewing machines. They started from Shipley on that day with a horse drawing a covered van, in which were five sewing machines. They were first seen at Ilkley, and about an hour later at Ben Rhydding. Shipley, Ilkley, and Ben Rhydding are all separate and distinct places. At Ben Rhydding they were seen to go with the van to two houses known as "Redgarth" and "Fieldhurst." At "Redgarth" they saw a servant, and asked her if any order had been given at that house for a sewing machine. Upon receiving a reply in the negative they asked her to buy a machine, and remained for two or three minutes trying to persuade her to do so, and offered to fetch a machine from the van, but she refused to buy one. At "Fieldhurst" they saw two servants. James Bailey, a canvasser employed by the Singer Manufacturing Co., had on the 17th of April called at this house and had seen these two servants, and had asked them to buy a sewing machine. He had no machines with him on that day, and upon offering to send a machine on approval was told he might to do so. Bailey did not mention any particular kind of machine nor any price, and there was no agreement made by either of the two servants with him to purchase a machine. When the respondent and Poppleston went to "Fieldhurst" the two servants refused to buy a machine, and then Poppleston asked if he might leave one there till evening. He left one, and it was called for on the 22nd of April by one of the company's agents.

It was also proved that when the respondent and Poppleston started on their rounds on the 19th of April, with the five machines they had instructions to call at eight different houses to show machines on approval. These houses included "Fieldhurst," but did not include "Redgarth." None of the persons in these eight houses had agreed to buy a machine, but they had previously expressed to a canvasser of the Singer Manufacturing Co. a desire to see a machine in order to decide whether they would make a purchase. The five machines in the van were taken out to show to the people at these eight houses. Three of the machines were taken back to Shipley at the close of the day; one had been left at "Fieldhurst" as above mentioned, but no evidence was given as to what had become of the fifth machine. It was stated by the respondent, in giving evidence on his own behalf, that the machines were shown on approval, and, if satisfactory, they would be sold.

On behalf of the appellant it was contended that the respondent travelled with a horse drawing a burden, that he went from place to place, and to other men's houses, and that the machines were carried for sale. In support of this contention the case of *O'Dea* v. *Crowhurst*, 80 L. T. Rep. 491, 47 W. R. Dig. 66, was cited.

On behalf of the respondent it was contended that the Act did not apply to a large firm paying rates and taxes, but was intended to be a protection to the public against dishonest persons; that the machines were merely sent out to be taken to houses at which a canvasser had previously called; that they had been previously ordered and were not carried for sale.

The following cases were cited: *Rex* v. *Little*, 1 Burr. 609; *Rex* v. *Buckle*, 4 East, 346; and *Johnson and Others* v. *Hudson*, 11 East, 181.

The justices found as a fact that none of the five sewing machines had been sold when the respondent left Shipley with the van, but upon the evidence given they were of opinion that the machines were not carried for sale within the meaning of the Act inasmuch as it was intended to offer them only to persons already visited by a canvasser, and they accordingly dismissed the information.

The question for the opinion of the court was whether upon the facts above mentioned the justices were right in point of law in holding as aforesaid that the machines had not been carried for sale.

S. A. T. Rowlatt (*Sir E. Carson, S.G.*, with him), for the appellant.—A hawker is defined in section 2 of the Hawkers Act, 1888. The respondent comes within that definition; he travelled with a horse drawing a burden, and he went from place to place, or other men's houses, carrying the sewing machines to sell them. He is therefore a hawker within the meaning of the Act. *O'Dea* v. *Crowhurst* supports this contention.

Rufus Isaacs, K.C. (*T. J. Bullen* with him), for the respondent.—The whole question here is whether in carrying these sewing machines, which were to be shown to persons in houses at which a canvasser of the company had previously called, there was a "carrying to sell" within the meaning of the Act, and the person so carrying becomes a hawker and requires a licence. Upon the evidence before the justices there was no case against the respondent. To leave a machine on approval is not to sell it. This was only a case of goods sent on sale or return. They were being carried about with a view to be shown on approval. That is not a carrying for sale within the meaning of the Act. Even if one of the machines had been sold at a house at which a canvasser had not previously called, still that would not have been a carrying for sale and an offence within the section, as the agent did not start with the intention of so selling. *O'Dea* v. *Crowhurst* is quite a different case from the present and is no authority in favour of the contention on behalf of the appellant.

S. A. T. Rowlatt replied.

Cur. adv. vult.

Lord ALVERSTONE, L.C.J.—In this case I have felt very great difficulty, and I confess my mind has fluctuated more than once during the argument. If the finding of the magistrates had amounted to a finding that the machines were only taken to be offered for approval, or were only sent on approval in pursuance of a previous request made to the canvasser, I should have thought we could not interfere; but, after carefully considering the finding of the magistrates, it seems to me that they have not found that or intended to find it. Their finding is expressed in these words: "We were of opinion that the machines were not carried for sale within the meaning of the Act, inasmuch as it was intended to offer them only to persons already visited by a canvasser, and we accordingly dismissed the information." I understand that finding to be this: not that they find that they were not offered for sale, but that they were only offered for sale to persons who had been previously canvassed. Now I think, if that is so, the magistrates were wrong in holding that this man was not going about travelling "with a horse or other beast bearing or drawing burden," and going "from place to place"; in fact, wrong in holding that he was not a hawker. I think the line of division may be fairly clearly ascertained. If there is merely the sending of articles in order that people may inspect them and see them that would not make a man who takes them a hawker, even although ultimately at some future time a sale might result. On the other hand, it does not seem to me to be the less an offering for sale because the persons who are likely to be purchasers have been ascertained before the hawker visits the house. Now in this case I think there was abundant evidence on which the magisirates could find, and I think they ought to have found, that these machines were taken about for sale although they were *primâ facie* intended only to be offered on this occasion to persons whose names had been sent in to the head place of business by the canvasser; and I think certainly with regard to what happened on this occasion that it was quite clear there was evidence that they were offered for sale to persons who names had not been sent in by the canvasser. Possibly that would not be a sufficient ground in one sense, because it is only what I may call an exception, and not the general case that it was supposed was being dealt with by the magistrates. I come to the conclusion that on these facts the magistrates must be taken to have found that the machines were being offered for sale, and that the only reason that they thought the man was not within the section was that they were offered for sale to persons whose names had been previously mentioned. I think that that distinction is not sufficient, and therefore the appeal ought to be allowed.

DARLING, J.—In my view of this case the magistrates have definitely decided that a person who carries about from place to place, by means of a horse and cart, unsold goods, and then leaves them on approval—so that they are by those means sold—does not carry them to sell within the meaning of the Hawkers Act, 1888, s. 2. As a reason for this opinion they rely entirely on the fact that the persons who purchased them had previously expressed to a canvasser a desire to see the goods in order to decide whether to purchase them or not. I cannot see that it makes any difference whether this desire was expressed to the person who carried the goods or to another, his associate. If this did alter the case, then an ordinary pedlar would require no licence if he left his goods at an inn, himself went round and canvassed people and then took his goods to those who had expressed a wish to see them. It appears to me that the fact on which the magistrates rely is really immaterial to the decision of the question. I think that the respondent is shown, on the evidence in this case, to have gone from place to place, from house to house, carrying goods to sell and exposing them for sale; and the fact that the goods were shown only to those of whom it had been ascertained that they would like to see them does not, in my opinion, prevent the exhibitor from being a hawker within the meaning of the statute. Therefore I think the magistrates came to a wrong conclusion.

CHANNELL, J.—I agree. I think there is abundant evidence stated in the case to justify a conviction of the respondent for trading as a hawker. The only difficulty arises as to the finding of the magistrates on that evidence. If the respondent, and the man with him, were taking the sewing machines in the van from place to place in order to sell the goods, they were hawking within the meaning of the statute. If they had been delivering goods in pursuance of previous contracts of sale, of course they would not have been hawking, and equally if they were delivering goods on approval in pursuance of previous orders to send goods on approval they would not be hawking. But if they were taking goods about in order to find customers for them they would not escape being hawkers by having sent a person beforehand, whether an hour or so before, or whether a day or two before, to ascertain what persons would be likely to be customers and be willing to look at their goods, and then only calling with the cart at places ascertained to be favourable for business.

Now we have to see whether the magistrates who have refused to convict have found facts which show that the respondent was not hawking. They have found that "it was intended to offer the machines only to persons already visited by the canvasser." If that means that the goods were only sent out for delivery on approval to particular persons who had requested goods to be delivered to them on approval, it would not be hawking; but that is not expressly found, and the facts as to the number of machines and the number of houses seem to negative that view of the case. It seems to me that the finding of the magistrates only comes to this, that the respondent was carrying the goods from place to place to sell them, but he was only intending to try to sell them at certain houses where it had been ascertained that there were likely customers. I think that is hawking within the statute, and on that view of the facts the case of *O'Dea* v. *Crowhurst* appears to cover this case. I think the appeal must be allowed.

Appeal allowed, with costs. Case remitted with direction to convict.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitor for the respondent, *G. D. Wansbrough.*

Court of Appeal.

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — April 19, 21, 22, 23, 24.

MOFFATT & PAIGE (LIMITED) v. GILL & SONS (LIMITED) AND MARSHALL. (a.)

Copyright—Common sources of information—Infringement—Injunction.

An author may avail himself of common sources of information on a subject, but he is not entitled to save himself pains and labour by adopting a predecessor's work with but colourable variations, even though such predecessor's work is based on materials which are common property. Thus an author is not at liberty to avail himself of the taste and judgment of a predecessor in illustrating his work by quotations, nor can he justify taking such quotations on the ground that he has simply followed the references given by his predecessor and copied the quotations from the original works.

Decision of Kekewich, J. (49 *W. R.* 438), *reversed.*

This was an appeal from a decision of Kekewich, J. (reported 49 W. R. 438).

In the year 1893 the plaintiff company published an annotated edition of Shakespeare's "As You Like It" by Thomas Page.

In 1898 the defendant company published a similar work edited by the defendant Marshall.

An action was brought by the plaintiff company against the defendant company on the ground that the last mentioned work was an infringement of their copyright.

This action was not contested by the defendant company, but on their agreeing to pay a sum by way of damages and to destroy all copies of the book the proceedings were stayed. The defendant Marshall was not a party to these proceedings.

In March, 1900, the defendant company published what purported to be a second edition of their work. This edition the plaintiff company declared to be a colourable imitation of their work and an infringement of their copyright. In particular they claimed that the general arrangement, the sketches of character, the literary notes and glossary, and the illustrative quotations were largely copied from their book, and were not the result of independent research.

They claimed damages, an injunction to restrain the infringement of their copyright, and the delivery up of all copies of the book which were in the defendants' possession.

The claim was restricted to the second edition, two paragraphs which dealt with the first edition having been struck out as tending to prejudice the fair trial of the action.

By his defence the defendant Marshall denied that he had done more than make a legitimate use of the plaintiffs' book in common with the works of other commentators, but admitted that, for the sake of convenience, he had copied out of the plaintiffs' book a quotation from another writer.

Kekewich, J., dismissed the action.

The plaintiffs appealed.

Scrutton, K.C., Warrington, K.C., Lynn, and *Goffin,* for the plaintiff company.

J. A. Hamilton, K.C., and *Lincoln Reed,* for the defendant Marshall.

P. O. Lawrence, K.C., and *Wheeler,* for the defendant company.

Scrutton, K.C., replied.

The arguments used appear sufficiently from the judgments.

COLLINS, M.R., discussed the character and objects of the books in question, and continued: Kekewich, J. after a long hearing, came to the conclusion—upon grounds which I shall have to comment upon in a moment—as the result of the proceedings before him that he could not interfere to restrain the defendants from publishing the incriminated work. But when I say that of Kekewich, J., I think that in all other respects I have his authority for the opinion which I have myself formed in this case, for I am about to show that but for one particular circumstance Kekewich, J., would have been of opinion, and in fact was of opinion, that the present edition of the defendants' work was an infringement of the plaintiffs' copyright. Now in order to show that, I propose to read a passage from Kekewich, J.'s judgment, to show—first, what his real opinion is, and secondly, for what reason he has not given it effect. [His lordship read from the judgment of Kekewich, J., "The history of preparation of the first edition . . . to which such infringement would entitle them in this court," and continued:] Therefore we have a clear opinion by the learned judge that but for a particular reason which he thought insuperable his own opinion was, on the admitted facts of the genesis of the second edition, as demonstrated from the lips of the author himself, that the second edition was just in the same sense as the first an infringement of the plaintiffs' copyright. Now that was his opinion if he had been at liberty to look at all the facts. You have had the first edition, which, as the learned judge says, the defendant himself could hardly deny was nothing short of a copy, and a servile copy in many important parts, of the plaintiffs' work. And you have as the result of cross-examinations the exact process of evolution described—how the defendant used the first in the preparation of the second, and when we come to examine it we have had it stated before us again. It seems to me that the learned judge was perfectly right in that view. The first edition was demonstrably an infringement, and this was admitted by the publisher certainly, though not in the first proceedings by the author because he was not a party to them, but as a result of the examinations in this case we have a practical admission by the author himself that the first edition cannot be defended.

What is the process that the defendant has adopted and by which his second edition has been developed? He has in his possession the proofs of the first edition; he carefully re-reads those proofs and he put marks which, though they do not efface them from his view, do mark the fact that certain particular passages are such that he thinks, having regard to what happened in the first trial, cannot stand. He marks those passages, but they are so marked as to be still obvious to the eye and capable of being read, although they do bear a mark that they are not to appear as they are in the new edition. Having that before his eye—his own work no doubt, but in fact, so far as the matters in this case are concerned, practically the work of the plaintiff, because it is a copy of the plaintiff's garbled to a certain extent, but nothing better than a copy—he makes certain marks indicating what passages cannot stand, and for which, therefore, substitution must be found. Having that before him, we see as the result in the second edition the changes of expression he has made while conveying the same thing in substance—the alteration of the order of quotations while leaving the quotations there themselves, the retention of the string of quotations used and the purpose to which

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

they were applied; and further, the same general system of analogies of character which had been originally in the plaintiffs' work and had been reproduced by the defendant in the first edition of his own. That broadly (I am not pretending to deal with it with exactitude of detail) is the process by which the second edition was reproduced, and as Kekewich, J., says, but for the particular barrier (which I have not endeavoured to deal with), if he were at liberty to take the first and second together he would have had no hesitation in holding that the second edition was an infringement of the plaintiffs' copyright. That being so, what was the reason why he did not give effect to that view and restrain so far as was necessary the publication of the obnoxious parts. This was the reason, and when one examines it (with the greatest possible respect to the learned judge) it seems to me that he must have really misunderstood what actually had happened in the matter. The plaintiff in this action did what plaintiffs are very often disposed to do, he introduced a little colouring into the statement of claim by setting out facts as to the earlier infringement by the first edition. Now this action is not brought for that first infringement; it is brought for the infringement of the second edition, and it was a little ornamental rhetorical character which led him to introduce into the narrative of and genesis of the second edition what was in the first. It did not affect the publication of the second issue, and it may have been thought to prejudice the production of the particular issue, and for that reason, and for that reason only, it was struck out, but that did not alter or wipe out of history the fact that the defendant was the author of a work which pirated the plaintiffs' work. It did not undo that; that remained exactly where it was before, and just as the defendants, the publishers, and indirectly the defendant, had to submit to the destruction of all the copies of the first edition, so he would have been debarred from reissuing again the same work in the same language. He would have been debarred from doing that, and being debarred from doing that he is equally debarred from doing anything that is a mere colourable imitation.

So we are entitled to look at the first edition, and see how far in the process of evolution the first edition is the father of the second, and when we examine it, in the language of the learned judge we find how the second was evolved from the first and how the defendant had practically debarred himself from writing a work which was an original work and was not a mere reflex of examination and memory of the first edition. The defendant himself, as we have heard, has been signally successful in passing this class of examination, and no doubt if that experience develops anything, it develops the memory, and he has shown, if we accept his own explanation of how these things are done, that he does possess a most singularly retentive memory, because demonstrably pages from the work of the plaintiffs have been reproduced practically verbatim in the defendant's work. Of course I give the defendant credit for the most absolute veracity. I do not know whether the learned judge has—it is pressed upon us that he did, but I have looked carefully through the notes and I cannot say that it appears that the learned judge did place the most absolute confidence in him, certainly he did not compliment him on his veracity, and told him frankly without circumvention to tell the truth, the whole truth, and nothing but the truth. Giving him all credit for telling the truth, it is certainly demonstrated that he had a most remarkable memory, and he does not do himself justice, being gifted with such a memory and being able to reproduce whole passages of the book without looking at it, if he has saturated his mind with that work and then produced another work on the same lines himself. He has handicapped himself by doing that and attempted a thing which is beyond his capacity, because the work is to a very large degree, standing by itself on its own merits, an infringement of the plaintiffs' work.

I do not propose to go into a minute comparison of, or detail the passages of which the one is the author and the original of the other. I think that is proved by some of the passages that have been referred to in detail by the learned counsel. I do not propose to deal in detail with those matters because I am content to take the learned judge's own view from the passages which I have read, and when I have displaced the only reasons, as I think I have done, why the learned judge felt himself fettered in giving full effect to his strong conclusion of fact—when I have removed that, it seems to me I have removed the only bar from differing from the learned judge's actual judgment and giving effect to that which was really his true opinion. Now, how does the matter stand in point of law? The defendant here does not really deny that the plaintiffs' work is the subject-matter of copyright. He has addressed arguments to us as far as is possible for him which, in my view, are only relevant to that issue, but when pressed with that he said, No, he did not go so far as to contend that the plaintiffs' work was not the subject-matter of copyright, though the arguments he addressed to us upon the matter were more relevant to that than to the question whether he was infringing or not. So that I start with the admission that the plaintiffs' work is the subject-matter of copyright, and I have not the slightest doubt that it is. As I have already said, though perhaps it does not rank in the higher scale of literature, it has shown a very considerable amount of skill, and certainly the adaptation of means to ends, but whatever we think of the end, the means seem so admirably adapted to the attempt that it has been paid the highest compliment one man can pay to another — namely, the compliment of imitation. Now, how does it stand in law? The sources from which these works were drawn were common; it was open to anybody to compile an edition of "As You Like It," and open to him to go to all the sources of criticism and to make selections from them. It was open to him to cull quotations from the book and to put them together as he has done, but clearly that was subject-matter of copyright for him. He has shown skill and industry and many higher qualities. I have read the work through, and it seems to me, for a work of its kind, to be a very scholarly work, done in a terse and businesslike manner which leaves something to be admired, or, at all events, something that the defendant did not quite succeed in achieving himself. If I may choose between the two, I prefer the directness and brevity of the plaintiffs' work to that of the defendant. Therefore there is no doubt whatever, as it seems to me, that the plaintiffs' work was one which was subject-matter of copyright, but, as I have said, the materials were open to the world.

Now, there is some authority on this matter. The question has arisen before, and I only propose to refer to one or two passages from authorities which are binding upon the matter. I refer first of all to the case of *Jarrold* v. *Houlston*, 3 K. & J. 708, 6 W. R. Ch. Dig. 19. That is a case where there was a question between two publications, one called The Guide to Science, and the other called The Reason Why. I do not propose to read the whole of the head-note out, there are one or two propositions which are material: "But another person may

another work in the same general form provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it. In determining whether an injunction should be ordered, the question, where the matter of the plaintiff's work is not original, is, How far an unfair or undue use has been made of the work. Instances of unfair or undue use and the contrary in works of this description. If, instead of searching into the common sources and obtaining your subject-matter from thence, you avail yourself of the labour of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use." And on p. 716 there is this passage: "The question I really have to try is whether the use that in this case has been made of the plaintiff's book has gone beyond a fair use. Now, for trying that question, several tests have been laid down. One which was originally expressed, I think, by a common law judge, and adopted by Lord Langdale in *Lewis* v. *Fullarton*, 2 Beav. 6, is, whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour. I take the illegitimate use as opposed to the legitimate use of another man's work on subject-matters of this description to be this: If knowing that a person whose work is protected by copyright has with considerable labour compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources and obtaining your subject-matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed; that I take to be an illegitimate use." That seems to me to cover substantially what the defendant has done in this case. There are only one or two more passages that I desire to refer to. The next is in the case of *Spiers* v. *Brown*, 6 W. R. 352. It is a case of the compiler of Spiers' Dictionary against a man named Brown. What I refer to it for, is a passage in the judgment of Page Wood, V.C., in which he mentions this: "In the instance mentioned by Sir Samuel Romilly a work consisting of a selection from various authors two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." That anticipates the very question which was put in the course of the argument in this case, as to whether you could have copyright in quotation, selected to emphasise or illustrate some particular idea, and that is evidently an expression of the Vice-Chancellor's opinion that that would the subject-matter of a copyright. He put it as an obvious instance of something that would be the subject-matter of copyright. But it does not stand there because it is a quotation from the judgment of Lord Eldon in which he refers to a passage quoted by Sir Samuel Romilly in argument, and refers to it in a way which shows that he assents to it. It is in the case of *Longman* v. *Winchester*, 16 Ves. 269, at p. 271, referring first of all to Paterson's Road Book, Lord Eldon says: "It is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world. So in the instance mentioned by Sir Samuel Romilly a work consisting of a selection, &c."

Then there is also the authority of the gentleman who was well-known in the courts before he went to India, and who afterwards became a distinguished Indian judge, Sir Arthur Wilson, in which the very point is raised and decided in the case of *Macmillan* v. *Suresh Chunder Deb*, 17 Ind. Law Rep., Calcutta Series, 951. In that case the matter in question was the well-known series called the Golden Treasury, which is a series of quotations put together by Mr. Palgrave, and the defendant had practically reproduced his work superadding notes of his own, and the learned judge upheld or sustained the claim for infringement. [His lordship read the judgment from "I think it unnecessary to refer in detail" to "he offends against the principle," and continued:] It seems to me that is precisely what Mr. Marshall did in this case, and if we required demonstration of what on a general view was sufficiently obvious before, I think that particular instance which Mr. Scrutton culled for us on the use of the word "inconster," and the verification of the quotation, demonstrates in that particular respect the process that had been suggested he went through in many other cases. That is to say, he took absolutely what is there written down from the work of another person—that is, the plaintiff. I think that is clear to demonstration and we are entitled to look upon it as throwing a light upon the method by which the other matters were arranged. It is said in the second edition that he eliminated some of the most obnoxious passages, which were chiefly the passages descriptive of what the quotation afterwards annexed were going to illustrate, little connecting links printed between the extracts. No doubt those are altered, but it seems to me the substance of them is preserved, although the order of the quotation is altered. It was put to him "How about the quotations themselves?" It is very clear now from the evidence, and I have certainly formed that opinion myself, when one studies the steps by which the second edition came into existence, that he annexed those quotations just as they were. No doubt he says, "I am a very well-informed man; I have given in fact the great part of my attention to these works, and I have no doubt I could have evolved the whole of these quotations from researches which I could have made: I know not only where those quotations come from, but I know the authors who have named them as appropriate to the particular matters, and I could tell you who they are." But unfortunately he did not go through that process himself; he has adopted the work of another man who may or may not have gone through it, but whether he did or did not, the defendant did not. He simply took what another man had done, and it seems to me quite obvious, once admitting that the choice of quotations illustrative of particular traits and particular character and chosen for the purpose, involves high qualities of mind more or less high, according to the area over which those quotations extend, but still none the less existing, even although the area may be a narrow one, that the fact of getting limits from other people, whether he arrived at them by his own reading or not I do not know, but it has been done by the plaintiff in the first instance, and does not confer upon the defendant the right to annex the results of that operation.

I think it is a misconception on the part of the learned counsel—perhaps I ought not to use the expression "misconception," because possibly it was his business to put the argument before the court, and I am not at liberty to form an opinion at all as to his own view of it—but he justified annexing another man's quotations on the ground that you may follow an indication

given in another book where you will find authorities that you have the right to consult, and that all the defendant does is that he is directed by a reference to a particular quotation to go and look at the author and see whether the quotation corresponds with the text, and if so, the text being common property, he is at liberty to annex that quotation. I cannot admit that for a moment. He rather suggested that it was justified by the directory cases, which say that, though you cannot where another man has compiled a directory simply take his sheets and reprint them as your own, you are entitled, taking the sheets with you, to go and see whether the existing facts coincide with the description in the sheets, and if you do that you may publish it as your own. Certainly; but are you at liberty to apply the same principle to a series of quotations—to take the references given by one author although he quotes such and such a passage as illustrating a particular matter, and to say: "I will just go and see if that is correctly copied or not, and if it is correctly copied I propose to introduce it with any other which illustrates the particular passage and I propose to adopt that as my own work"? That leaves out the whole merit; the felicity of the quotation: its adaptability to a particular end: its illustration of a particular characteristic—all those things enter into the choice of one quotation as apart from another. If you obey a certain direction to go to a certain place it does not entitle you to annex the skill and judgment and taste which has dictated the selection. It does appear to have been the defendant's view of his rights, as his counsel put it forward for him, that if he once knew where to find the quotation then he had a right to annex it, and that if he once knew where to look and find the quotation, and it corresponded with what the author had written, he had a right to take it. I cannot accede to that for a moment, and it seems to me that the law is clearly such as to entitle the plaintiff to complain if quotations selected and arranged by him are imitated and adopted by the defendant. I think it has been abundantly shown that in the second edition not only have the quotations in substance been taken, but the letterpress connecting them has also been taken in substance in a great many instances, and particularly in the character sketches. That has been done to such an extent as to put it entirely outside those trivial and casual imitations which do not amount to a breach of copyright. There has been a real annexation by the defendant of the work and labour and skill and taste of the plaintiff, and therefore it seems to me that this appeal must be allowed, and I think that in allowing it I am giving effect to what was the true opinion of Kekewich, J., himself.

STIRLING, L J.—I am of the same opinion. I think that the question which arises in this case is one of fact—namely, whether or not the defendant, Mr. Marshall, has or has not made an illegitimate use of the plaintiffs' work within the meaning of the definition which has been already read by my lord from *Jarrold* v. *Houlston*.

Now it is said that the defendant Marshall is a scholar, is a practised teacher, and has for many years taught this very subject of Shakespeare, one of whose plays forms the subject of this book, that he has a wide knowledge of Shakesperian English, and that he was able to write the book which he has written without reference to the plaintiffs' book at all. I am quite ready to assume all that, but the question is, has he done it? I am not going to go in detail through the passages which have been so much referred to and commen[illegible] two books. I only say that, taking t[illegible] alind alone, it seems to me impos[illegible] plaintiffs' account of her character and compare it with that written in the first edition by the defendant without arriving at the conclusion that the one was borrowed from the other, and that an illegitimate use was made of the plaintiffs' book for that purpose, and that the conclusion which I should arrive at on a mere comparison of the two books appears to me to be amply supported by the admissions which were made by Mr. Marshall in cross-examination before the learned judge. I arrive, therefore, at the conclusion, as I have already said, that in this portion of the book an illegitimate use was made of the plaintiffs' work by the defendant.

Then the question is, Is it altered by what he did with reference to the second edition? I think not. He has told us in his cross-examination what he did; he had the proofs of his first edition before him; he read them and he read the plaintiffs' book and carefully compared them, and he proceeded to strike out from those proofs so much of the plaintiffs' work—such passages as he thought were objectionable, having regard to the book of the plaintiff; and then a fortnight afterwards he proceeded, with these materials before him (that is, with the proofs altered before him as I have said), to rewrite his text, preserving the quotations and also a portion of the text. It seems to me, having regard to the extraordinary memory that this gentleman possesses, that he was not in a position to use in a way that would be free from objection those materials that he had. He availed himself, on his own admission, of a very considerable portion of that which appears to me he did derive from the plaintiffs' book and he turned them to use in the second edition. On those grounds I consider that with regard to the second edition also he has infringed, and I agree with the judgment of my lord.

COZENS-HARDY, L J.—I so entirely agree with all that has fallen from my learned brethren that I do not think it necessary to add anything.

Solicitors, *Harvey Clifton; T. L. Yates; J. Woodhouse*, for *C. H. Marshall*, Huddersfield.

From K. B. Div.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 2.

WIGHTWICK v. POPE AND OTHERS. (*a*.)

Practice—Appeal—Security for costs—Motion for new trial—Ord. 58, *r.* 15—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.

The Court will now order security for the costs of a motion for a new trial in the same circumstances as security for the costs of any other appeal will be ordered; and the rule of practice laid down in Heckscher *v.* Crosley, 39 *W. R.* 211 [1891] 1 *Q. B.* 224, *not to order security for costs in such a case will be no longer followed.*

Application by the plaintiff for security for the costs of the defendants' motion for a new trial. The action was tried before Lord Alverstone, L.C.J., and a jury.

McKinnon, for the plaintiff.

G. A. Scott, for the defendants

Heckscher v. *Crosley*, 39 W. R. 211, [1891] 1 Q. B. 224; *Walklin* v. *Johns*, 7 Times L. R. 181; *In re Harwood & Abrahams*, [1901] 2 K. B. 304, 49 W. R. Dig. 141, were referred to.

Cur. adv. vult.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

June 2.—COLLINS, M.R., read the judgment of the Court as follows: This was an application made by the respondents in a motion set down in the new trial paper for security for the costs of the motion. The case raised no point of any difficulty, and we were all of opinion that in the ordinary discretion of the court security should have been ordered, had it been technically a final appeal; but having regard to the general rule of practice laid down in *Heckscher* v. *Crosley*, and since acted upon, not to grant security for costs in the case of new trial motions, we took time to consult the other members of the court as to whether the time has not come when that practice should be altered. It has more than once been treated as anomalous (see *In re Harwood & Abrahams*); and when analyzed it does not seem to rest on any logical basis. In former days judgment was never given by the judge at *Nisi Prius*, who has been described as the mere instrument of the court to try the issues (see *Wells* v. *Abrahams*, 20 W. R. 659, L. R. 7 Q. B. 554); and when leave to move was reserved the matter was suspended till the rule *nisi* could be moved for. Nowadays the judge has complete control of the cause and can enter judgment as he thinks right. Hence there is now, unless the learned judge has declined to give judgment, a collateral or alternative application in every motion for a new trial, asking the court to deal with the judgment accordingly. There seems, therefore, no reason in principle why the court should refuse to exercise its discretion in this class of appeals rather than in others, and now that this court has equal jurisdiction in all, it appears undesirable to act upon a hard and fast rule applicable to one class only, and laid down when this jurisdiction was first assumed. The forming of separate lists is a matter of convenience only, and the rights of the parties to security for costs ought not to depend upon the list the case appears in. All the Lords Justices concur in thinking that we ought not any longer to treat ourselves as bound by the rule laid down in *Heckscher's case*. Security to the extent of £25 must be given within a fortnight.

Application granted.

Solicitors for the plaintiff, *Nicol, Son, & Jones.*

Solicitors for the defendants, *Wontner & Sons.*

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — May 9, 10.

In re PUCKETT & SMITH'S CONTRACT. (*a.*)

Vendor and purchaser—Land sold for building purposes—Underground culvert for water unknown to both parties—Misdescription—Defect in title.

A builder and contractor entered into a contract with the trustees of a will for the purchase of a property described as possessing an important frontage with a valuable prospective building element. A condition in the contract provided that, the property being open for inspection, the purchaser should be deemed to buy with full knowledge of its actual quantities and condition, and that any error in the particulars should not annul the sale nor be the subject of compensation. The purchaser inspected the property but did not discover then or till after the completion of the contract that there was a culvert for the passage of water under it, the existence of which was not shown on the plans, and was in fact unknown to the vendors.

Held, on the evidence, that the purchaser could not have discovered it by any reasonable care, and that in view of the fact that the land was sold to the knowledge of both parties for building purposes, the existence of the culvert involved such a misdescription affecting the subject-matter of the contract in a material and substantial point as to bring the case within the rule laid down in Flight v. Booth, 1 *Bing. N. C.* 370, *and that a good title had not been shown.*

In re Brewer & Hankin's Contract, 80 *L. T. Rep.* 227, 47 *W. R. Dig.* 203, *distinguished.*

Decision of Kekewich, J., *affirmed.*

This was an appeal from a decision of Kekewich, J., on a vendor and purchaser summons.

The facts were as follows:

The appellants, who were the trustees and executors of a will, put up for sale by auction, in July, 1899, a freehold property known as The Grange, West Molesey.

It was described in the conditions of sale as possessing "an important frontage to Walton-road, with a valuable prospective building element."

The property was not sold at the auction, but shortly afterwards the respondent, who was a builder and contractor, entered into negotiations to purchase it, and on the 5th of August, 1899, the agent of the appellant wrote him the following letter:

"In reply to your letter of yesterday, the old-fashioned residence of 13½ acres advertised for sale near Hampton Court suitable for development is known as the 'Grange,' West Molesey, one mile from Hampton Court Station. We enclose the small plan for your guidance. The price is £5 000, or we would submit an offer of not less than £4,500. There are no restrictions as to the class of houses to be erected, and it is admirably adapted for the erection of cottages, which are in great demand in the neighbourhood, being quite close to the works of the London water companies, where thousands of mechanics are permanently employed at high wages. We enclose an order to view."

The respondent then went over the property, accompanied by his surveyor, and eventually, on the 30th of October, 1899, entered into a contract to purchase it.

The conditions of sale printed for use at the auction were (with the exception hereinafter mentioned) made to constitute the terms of the contract, which was entered into on the back of them.

Condition 6 was as follows: "Should any question arise as to the identity of the premises described in the particulars with those described in the document abstracted the purchaser thereof shall be furnished at his own expense with a statutory declaration by one of the vendors, or some other person, that the premises have been held in conformity with the title deduced for twenty years last past, and thereon the requisition in respect of identity shall be considered as satisfied. The property is believed and shall be taken to be correctly described, and being open to inspection the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

The following had also been one of the conditions of sale, but was struck out of the contract: "The property is sold subject to such chief, quit, or other rents, rights of way, water drainage, and other easement, restrictions, and liabilities as are mentioned in the particulars, or as may be ascertained to be charged thereon or to affect the same, and to any subsisting liability under covenant or otherwise to repair fences and roads."

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

After the contract had been entered into the purchaser discovered that there was an underground culvert for the passage of water running right across the middle of the property a short distance under the surface.

Two plans had been supplied to him, one accompanying the above-mentioned letter of the 5th of August, 1899, and the other attached to the conditions of sale. The former plan showed no ditch or culvert whatever or any sort of indication of any possible flow of water near the property; the latter plan gave an indication of something which might be a ditch leaving the property at a certain point, and which in fact appeared to be a dry ditch when the purchaser inspected the property.

The existence, however, of the culvert underneath the property, of which the apparent ditch was in truth the continuation, was unknown to both vendors and purchaser till discovered by the purchaser as above stated.

The purchaser then required the vendors either to divert the culvert so as to make the land possible for such building as was contemplated by the parties (which the evidence showed would have cost £500), or to make compensation by an abatement of purchase-money.

The vendors, relying on condition 6, declined to comply with this requisition, and took out the summons under the Vendor and Purchaser Act, 1874; and on the hearing of the summons Kekewich, J., held that the purchaser's objections to title and requisitions had not been sufficiently answered by the vendors, and that they had not shown a good title in accordance with the contract.

The vendors appealed.

A. T. Murray, for the appellant.—This is no defect of title; it is not an easement or anything relating to one, and the sixth condition precludes the purchaser from taking the objection. The existence of the culvert was unknown to the vendor and was not discovered by the purchaser after every opportunity for investigation and inspection. The principle *caveat emptor* applies.

He referred to Sugden on Vendors and Purchasers, p. 1; *Hart* v. *Windsor*, 12 M. & W. 68; *Lucas* v. *James*, 7 Hare 410, at p. 418; and *In re Brewer & Hankin*, 80 L. T. Rep. 127, 47 W. R. Dig. 203.

Buckmaster, K.C., and *Davenport*, for the purchaser.—The purchaser inspected the property and took all reasonable care. This clearly was a latent, not a patent, defect in title, and he is accordingly entitled to refuse to complete: *Ashburner* v. *Sewell*, 40 W. R. 169, [1891] 3 Ch. 405. The property was sold as suited for building purposes and possessing a valuable prospective building element. This culvert makes it unsuited for the purpose, and there was thus a material misdescription. *In re Brewer & Hankin* was a perfectly different kind of case.

COLLINS, M.R., stated the facts, and held on the evidence that both parties entered into the contract on the basis that the land was reasonably capable of being made fit for building purposes; that the plans gave no fair indication of the existence of the culvert, and that the purchaser could not have found out its existence by any reasonable care. His lordship also regarded the omission from the contract of the condition of sale secondly above mentioned, as significant. He then continued: Now is that such a substantial defect as within the authorities to alter the nature of the thing intended to be bought, and to oblige the purchaser to take, if he does intend to take it, a thing essentially different from that which he agreed to take? Upon that I think the law is clear, and is well stated in *Flight* v. *Booth*. There had been there an actual description of the property, and it was suggested that the description in the contract did not accord with the actual facts as ascertained. Here we have not got the actual evidence, but we have the equivalent in the fact that this property was sold for the purpose of being used as a building estate, so that it is as if that was written out in the contract. Tindal, C.J., says, in giving the judgment of the court, that where the misdescription, although not proceeding from fraud, "in a material and substantial point so far affects the subject-matter of the contract as that it may reasonably be supposed that but for such description the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." Here the misdescription is in the representation that this land has a valuable prospective building element, coupled with the description given in the vendors' agent's letter. That is the description of the land, but the fact is that under that land lies a covered culvert which might take the flood water from the ditch which was dry when the purchaser saw it, and which, of course, everyone knows may be a most substantial drawback to a building estate. In fact the evidence is that it would cost £500 to deal with this property in such a way as to make the land possible for such building as was contemplated by the parties. Under these circumstances I think Kekewich, J., was perfectly right in holding that the purchaser is not bound to complete, and the appeal must be dismissed with costs.

STIRLING, L.J.—I agree. I think that condition 6 does not avail the vendors. It only applies to such matters as might be discovered by an inspection of the property with reasonable care, and the inspection referred to is an inspection of the property itself, and does not impose on the purchaser the duty of going on adjoining properties, or even of walking up neighbouring roads from which the property might be visible. I think, therefore, that the question is not really one of title at all, but whether the case falls within the rule laid down by Tindal, C.J., in *Flight* v. *Booth*. Seeing that the property plainly was sold to the present purchaser for building purposes, I think the case does fall within that rule. My own decision, and that of the Court of Appeal, in *In re Brewer & Hankin* were based on the facts of that case, which did not fall within the rule; one material difference being that there the property clearly was not offered for building purposes at all.

COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitor for the appellants, *T. Durant*.

Solicitors for the respondent, *Hare & Co.*, for *March, Clayton, & Pearson*, Manchester.

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) April 23; May 7.

In re ALFRED KINGDON AND HENRY WILSON, SOLICITORS. (*a.*)

Practice—Costs—Solicitor and client—Taxation—Disbursement—Estate duty—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

A payment for estate duty made by a solicitor on behalf of his client is not a "disbursement" within the meaning

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

of section 37 *of the Solicitors Act*, 1843, *and ought not to be included in his bill of costs*

In re Lamb, 37 *W. R.* 306, 23 *Q. B. D* 5, *overruled.*

This was an appeal from a decision of Byrne, J., which raised the question whether estate duty paid by a solicitor ought to be included in his bill of costs as a "disbursement" or to be entered as a cash payment.

The facts are fully stated in the judgment of the court.

Byrne, J., following *In re Lamb*, 37 W. R. 506, 665, 23 Q. B. D. 5, 477, held that they ought to be entered as disbursements.

The executors of the client appealed.

Levett, K.C., and *Hon. T. H. Watson*, for the appellants.—There is a distinction between a tax like probate duty or estate duty and disbursements proper such as counsel's fees. The rule is laid down in *In re Remnant*, 11 Beav. 603, that only payments made by the solicitor in pursuance of professional duty can be allowed as disbursements. Byrne, J., considered that he was bound by *In re Lamb*, but it is submitted that that case is inconsistent with the rule laid down in *In re Remnant*. But even if that is not so, *In re Lamb* was a case of probate duty which had to be paid before a will could be proved. Under the Finance Act, 1894, the executor is not under any personal obligation to pay the whole of the estate duty: see sections 6 (2) and 9 (1) of that Act. The payment of estate duty by the solicitor is nothing more than a cash payment by him as agent for his client.

They also referred to *In re Bedson*, 9 Beav. 5; *In re Haigh*, 12 Beav. 307; *In re Metcalfe*, 30 Beav. 406, 11 W. R. Ch. Dig. 108.

Norton, K.C., and *Poley, contra.*—Whatever the solicitor has to pay in order to get a document which he is bound to get is a proper disbursement. Payments made by a solicitor for probate duty have always been included in his disbursements, and we submit that the practice is right, because the duty has to be paid by the solicitor in order that he may carry out the instructions given him by his client. The practice ought not to be varied, because this is a case of estate duty and not of probate duty. *In re Remnant* is really in our favour.

They also referred to *In re Taylor, Stileman, & Underwood*, 39 W. R. 417, [1891] 1 Ch. 590; and to the Finance Act, 1894, s. 6 (1) (2); Phillimore's Guide to Costs (1879 ed.), p. 558; Scott's Guide to Costs (10th ed.), p. 732.

Levett, K.C., replied.

Cur. adv. vult.

May 7.—The judgment of the COURT was delivered by

STIRLING, L.J., as follows: The question on this appeal is whether the costs of taxation of a bill of costs under the common statutory order are to be paid by the clients or by the solicitors. That depends on whether one-sixth of the amount of the bill has or has not been taxed off. The bill is for the costs of obtaining the probate of a will on behalf of the executors, who were the clients. In the course of obtaining the probate the solicitors paid the estate duty, amounting to £117, out of a sum of £130 paid by the clients to the solicitors on general account. In the bill as delivered the professional charges, amounting to £101, are first entered; to this is added the estate duty, making a total sum of £218; then there is deducted the £130 paid on account, leaving a balance due to the solicitors of £88. From this bill there has been taxed off an amount of £24 17s. 10d. If the estate duty is properly included in the bill less than one-sixth has been taxed off; but if the estate duty ought (as is contended on behalf of the clients) to have been entered in the solicitors' cash account, and not in the bill, more than one-sixth has been taxed off. Byrne, J., has decided, on the authority of *In re Lamb*, that the estate duty was properly included in the bill of costs. We think that the learned judge was bound by *In re Lamb*, which was decided by a Divisional Court, consisting of Baron Pollock and Manisty, J., who affirmed Mathew, J., at chambers. The real question is whether the rule established in that case ought to be upheld in the Court of Appeal, before which it is now brought for the first time. This subject was carefully inquired into by Lord Langdale in *In re Remnant*, 11 Beav. 603, at p. 613, decided in 1849, and the following rule was laid down: "That those payments only which are made in pursuance of the professional duty undertaken by a solicitor, and which he is bound to perform, or which are sanctioned as professional payments by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs." The case of *In re Lamb* was intended to be decided in accordance with this rule, and it was evidently believed by both the learned judges who constituted the Divisional Court that it was the settled practice to include sums paid for probate duty in bills of costs. It was strongly pressed upon us in argument that, if *In re Lamb* be upheld, it will be practically impossible in a large number of cases for a client to obtain the costs of the taxation to which a bill may have been justly subjected, and we think that such is the case. We have consulted one of the taxing-masters of Chancery Division, and are informed by him that, from the time of the decision in *In re Remnant* down to that in *In re Lamb* it was the settled practice not to include sums paid for probate duty in bills of costs; that the taxing-masters of the Chancery Division consider that the decision in *In re Lamb* was based on imperfect or inaccurate information; that the effect of it is to discourage the taxation of bills which ought to be taxed; and that the adherence to it has, in their opinion, operated unfairly to clients in the past, and (regard being had to the increased duty now payable) is likely still more so to operate in the future. We are informed that, although the taxing-masters have followed the decision in *In re Lamb* when the point has been taken before them, yet that many eminent solicitors still adhere to the practice as it existed before the decision in *In re Lamb*, and do not include payments for probate duty in their bills. We have also consulted one of the registrars of the Probate Division, who is conversant with the taxation of costs in that division, and are informed by him that, although the practice there, so long as he has known it, has been regulated by *In re Lamb*, he is also of opinion that in many cases it leads to injustice being done. In these circumstances we think that *In re Lamb* ought to be overruled, and that payments for estate duty ought not to be included in bills of costs. In what precedes it has been assumed that estate duty stands on the same footing as probate duty. It is, however, to be observed that estate duty is not, like the original probate duty, merely a stamp duty, but is one for which the executor is personally accountable: see the Finance Act, 1894, ss. 6 (2), 22 (1) (*d*). Although we do not base our decision on this distinction, we consider it favourable to the adoption of the course which we regard as the proper one. The appeal will therefore be allowed, with costs here and below, and an order made substantially in accordance with the notice of appeal.

Solicitors, *Collyer-Bristow; Kingdon, Wilson, & Webb.*

From Chan. Div.
(Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) April 29.

BATH v. BATH. (a.)

Practice—Payment out—Fund in court—Stop order—Agreement vesting "all property" of a bankrupt in trustees—Existence of fund not known at date of agreement—Vesting order.

"All the property" of a bankrupt was by an agreement, confirmed by an order of the court, vested in a company and the bankruptcy annulled. The agreement contained a list of the bankrupt's properties, which did not, however, include a fund in court, to which the bankrupt, unknown to any of the parties to the agreement or their solicitors, was then absolutely entitled. The late bankrupt subsequently obtained an order of the court for payment out to him of the fund upon affidavits that he had not incumbered. No stop order was ever obtained against the fund.

Held, that the agreement operated as a complete cessio bonorum *of the bankrupt, and that he was liable to pay the amount of the fund to the company.*

Decision of Kekewich, J. (49 *W. R.* 341, [1901] 1 *Ch.* 460), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported 49 W. R. 341, [1901] 1 Ch. 460)

By an agreement dated the 20th of April, 1893, and made between J. S. Bath, then a bankrupt, and the Creditors' Assets Co. (Limited), it was agreed that, in the event of an order of the court being obtained confirming a scheme of arrangement of J. S. Bath's affairs set out in Schedule I. thereto, and as soon as the property of J. S. Bath set out in Schedule II. thereto should have been vested in the company by an order of the court, the company should manage and dispose of the property described in Schedule II. as therein set out.

Schedule I. provided that upon payment into court by the company of a sum sufficient to pay all J. S. Bath's debts in full, together with all costs, an order of the court should be made vesting all his property in the company.

By an order of the court, dated the 11th of July, 1893, the scheme was approved, and it was ordered that the adjudication of bankruptcy against J. S. Bath should be annulled, and that "all the property" of J. S. Bath should thenceforth become vested in the company.

At this time, unknown to any of the parties to the arrangement, there was in court a fund belonging to J. S. Bath, to which he had become absolutely entitled at the time of his bankruptcy. This fund did not appear in Schedule II. of the agreement, and no stop order on it was ever obtained.

J. S. Bath was informed subsequently to the order of the 11th of July of the existence of the fund. Upon application by him, supported by affidavits that he was absolutely entitled to and had not incumbered the fund, an order was made on the 29th of February, 1896, for payment out of the fund to him and it was so paid. The same solicitor acted for J. S. Bath in both the matters. The Creditors' Assets Co. presented a petition to which J. S. Bath, his solicitor, the Paymaster-General, and the Treasury Commissioners were respondents, praying that the order for payment out might be discharged, that the Treasury might be ordered to replace the fund in court, and that the petitioners were entitled to payment out thereof, and for such order as to J. S. Bath and his solicitor as the court might think fit.

Kekewich, J., held that the vesting order and the agreement vested the fund in the company, and declared that J. S. Bath and his solicitor were each liable to pay to the company the amount of the fund paid out to J. S. Bath with interest. He dismissed the petition as against the Paymaster-General and the Treasury Commissioners.

J. S. Bath appealed against so much of the order as concerned him.

There was no appeal against the decision so far as regarded the Paymaster-General and the Treasury Commissioners.

Warrington, K.C., and *Muir Mackenzie*, for the appellant.

Renshaw, K.C., and *Pollard*, for the Creditors' Assets Co. (Limited).

Harman, for the solicitor.

COLLINS, M.R.—I am of opinion that the decision of the learned judge was clearly right. The appellant had got into difficulties and was desirous of annulling his bankruptcy. He was entitled to property, and the respondents were willing to take over and realize this property. Accordingly, by the agreement of the 20th of April, 1893, it was provided that they should pay down sufficient to satisfy the appellant's creditors, and then deal with his property in the manner therein prescribed. Now, taking that document alone, it seems to me obvious that the appellant intended, and did in fact contract, to hand over all his property to the respondents, they being under an obligation to pay all his debts in full, and holding the property with a lien to reimburse themselves for all payments they had to make in his affairs. That being so, it seems to me that they took over the particular property involved in these proceedings. That property was a sum of money which at that time was in court. None of the parties to the agreement were aware of the existence of this sum, but subsequently after the bankruptcy had been annulled the appellant became aware of its existence and had it paid out to him. Then, on these proceedings being brought, Kekewich, J., held that the respondents, who by the agreement undertook to find the money to settle with the appellant's creditors and took over all his property, were the persons entitled to this money. Now the appellant says here that, though you have here a scheme which *primâ facie* embraces this fund in court, still, when you look at the precise terms of the agreement by which the parties intended to be governed in dealing with the property, you find this item is excluded, as no trust is declared as to it in the deed; consequently, the persons to whom the appellant's property was assigned are bare trustees as to this particular fund. It seems to me that that proposition cannot be sustained. You have here a general *cessio bonorum* for certain purposes. Under that the appellant's property passed to the respondents, not as bare trustees, but as trustees for those particular purposes. Then how is the scheme narrowed so as to exclude one particular part of the property? It is true that this particular fund is not dealt with by the schedule to the agreement, but that is not enough to take it out of the clear *cessio bonorum* made by the agreement, or the purposes for which such *cessio bonorum* was made—that is to say, the purpose of reimbursing the respondents all sums paid by them in liquidating the estate. It seems to me, therefore, that there is nothing in the language of the agreement to take out of the *cessio bonorum* that which was *primâ facie* included in it. For these reasons I think this appeal must fail.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I also agree.

Solicitors, *Ranger, Burton, & Frost; Payne, Shaw, Mackenzie, & Lake; Armitage & Strouts.*

From Chan. Div.
(Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) April 23.

In re THE LONDON AND NORTHERN BANK. HADDOCK'S CASE. (*a.*)

Company—Winding up—Solicitor—Terms on which a solicitor may appear for a witness—Private examination—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 115.

On the examination of a witness under section 115 *of the Companies Act,* 1862, *the Registrar of Joint-Stock Companies is entitled to require from the witness's solicitor, as a condition of his being allowed to be present at the examination, an undertaking to use any knowledge he may acquire from the examination only for the purposes of re-examination, and not to communicate the same to any other person.*

Decision of Byrne, J. (ante, *p.* 386), *affirmed.*

This was an appeal from a decision of Byrne, J. (reported *ante*, p. 386.)

The London and Northern Bank (Limited) was in voluntary liquidation.

An action by the bank against Sir George Newnes (Limited) for libel was pending.

The liquidator in the voluntary winding-up obtained an order for the private examination under section 115 of the Companies Act, 1862, of (*inter alios*) Mr. Haddock, for some time secretary to the bank, and Mr. Hoyle, solicitor to Sir George Newnes (Limited).

Mr. Hoyle also appeared for Mr. Haddock at the private examination.

At Haddock's examination counsel on behalf of the liquidator applied that Mr. Hoyle, being himself a witness, should withdraw.

Mr. Hoyle withdrew accordingly, but his managing clerk, an admitted solicitor, remained to act for Mr. Haddock.

Counsel for the liquidator then asked that the managing clerk should also withdraw; to this counsel for the witness objected, and the registrar ruled that Mr. Hoyle's clerk could only remain on giving an undertaking to treat the whole matter as private, to use the information obtained from the witness's answers for the purposes of re-examination only, and to communicate such information to no other person or persons whatsoever except his counsel.

Haddock's counsel objected to any such limitation being imposed, and advised Haddock to refuse to answer any question in the absence of his solicitor.

The matter was adjourned to Byrne, J., who affirmed the registrar.

Haddock appealed.

Lush, K.C., and *Muir Mackenzie.*—The witness is entitled to be protected by the presence of his solicitor, and he is also entitled to select the solicitor who can best protect him. The court has power to allow this examination to be public, and this course should be adopted if it is necessary for the proper protection of the witness.

They referred to *Heiron's case*, 15 Ch. D. 139, 29 W. R. Dig. 45.

Tindal Atkinson, K.C., and *Stewart Smith, K.C.*, for the liquidator, were not called upon to argue.

COLLINS, M.R.—This is an appeal from a decision of Byrne, J., affirming the course taken by the Registrar of Joint-Stock Companies upon an examination under section 115 of the Companies Act, 1862. A certain witness was directed to be examined under the section that I have just referred to. The witness attended, being accompanied by a solicitor and his managing clerk, and objection was taken by counsel for the liquidator (at whose instance the examination was taking place) to the solicitor being present. That seems to have been upon the ground that the solicitor himself was a person who was going to be examined under the same procedure. That left the witness and the managing clerk present. A question was raised as to the right of the managing clerk to be present, and the registrar imposed certain conditions upon the managing clerk as the terms upon which alone he should be allowed to be present. They were to this effect—I am reading from Byrne, J.'s, judgment—"His managing clerk was left as representing the witness and as instructing counsel. Thereupon the learned registrar, in accordance with what he informs me has been his invariable practice in similar cases, asked to have an undertaking that the matter was to be treated as entirely private, and that the information got from questions put to the witness was only to be used for the purposes of re-examination, and that no part of the information got was to be communicated to any other person or persons except his counsel." That was objected to, and the result was that the examination was suspended, and the matter was adjourned to Byrne, J., to decide whether or not that was a proper condition to impose upon the managing clerk on his being allowed to be present during the examination of the witness. Accordingly the matter came before Byrne, J., and Byrne, J., ordered that George Hardman Hoyle—that was the solicitor himself—was not to be allowed to be present at such further examination; and that on any such further examination the registrar might require the managing or other clerk of George Hardman Hoyle either to withdraw from such examination or to give his undertaking to the registrar to use any information he might acquire at such examination for the purpose only of the re-examination of the said John Daniel Haddock—that was the witness—and not to disclose or allow to be disclosed to anyone without the leave of the court any information he might so acquire and at the close of such examination to forthwith destroy all notes taken by him at such examination; but that the managing or other clerk of George Hardman Hoyle was to be at liberty to disclose such information to George Hardman Hoyle—that is to say, to his principal—upon George Hardman Hoyle first giving a similar undertaking to the registrar. The ground of appeal is that that is a stipulation that ought not to be enforced upon the managing clerk. It is said that it is impossible for the witness to be adequately protected by anybody but this particular solicitor, who is the solicitor acting for Sir George Newnes (Limited) in the litigation between the liquidator and them; that it is practically impossible for any other solicitor to be so conversant with all the facts necessary to protect this witness from the examination; and that therefore, if the witness is to be protected at all, he ought to be protected by the solicitor acting for Sir George Newnes (Limited), and not by a totally independent solicitor. On the other hand, no objection was ever made to the witness being protected and advised by a totally independent solicitor. No doubt it does place this particular solicitor and his

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

managing clerk in a difficulty if they are to carry on at the same time the litigation of Sir George Newnes (Limited) and to protect this witness without allowing what they have heard in the one capacity to affect their conduct in the other. However, the right of the witness to be protected on this inquiry has absolutely no relation to the rights of Sir George Newnes (Limited) in this litigation, and if the two cannot be conciliated when the one solicitor is the chosen representative of the witness, why then the witness must dispense with the assistance of that solicitor. That is the net result of it. This proceeding is a private proceeding which the court sanctions in order that the liquidator may obtain the necessary information to enable him to take his course. It is all under the sanction of the court; it is a private examination. For many reasons it is obviously most undesirable, and quite out of the question, that the opposing party in the litigation contemplated by the liquidator—and to assist him in determining his course as to which litigation this machinery is devised—should be allowed to be present at proceedings which are essentially proceedings for the purpose of informing the officer of the court, and the court, of what steps ought to be taken. It is not as though it were absolutely and finally a sealed book to which the opposing litigant can never get access, because there is machinery whereby the court can allow the result of this examination, if in its discretion it thinks it ought so to do, to be disclosed so far as it deems it necessary that it should be. That is to be found in the rule which is called the Companies (Winding-up) Rule of November, 1895, and this is the effect of it. Notwithstanding anything contained in the Companies (Winding-up) Rule, the notes of the depositions of a person examined under section 115 of the Companies Act, 1862, or under any order of the court before the court or before any officer of the court or person appointed to take such examination (other than the notes of the depositions of a person examined at a public examination, &c.), shall not be placed on the file of the proceedings or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the court shall so direct, and the court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom. So that it is not as if Sir George Newnes (Limited) in this case are necessarily for ever shut out from learning anything that they can show might be really material to their litigation, and that they have a right to see. If they can establish those two propositions there is machinery there by which in a proper case they could get at what was disclosed in this examination. The broad question before us here is whether in the circumstances of this case Sir George Newnes (Limited)—because that is really the matter—have any reason whatever to intervene or complain that the registrar has exacted as a condition of the witness being represented by this particular solicitor that the solicitor should undertake to safeguard what is essential to this process, this machinery—namely, the privacy of this examination. As I have already said, it is not a public examination, and it is not intended to be a public examination, and the whole purpose of it might be defeated if the public—in this case an opposing litigant—were allowed to be present. As I have pointed out, there is machinery which lies in the discretion of the court and which is capable of being used to prevent any unfair advantage being taken by information being disclosed to the liquidator which might be very material to the litigant against whom he contemplates, or is actually engaging in, litigation. That difficulty is provided for by the rule that I have referred to. In the proper circumstances, under proper conditions, and with proper safeguards, there is no doubt that access may be had in the words that I have just read. The point here is whether in the proceeding under the 115th section, to which I have referred, the solicitor who attends to protect a witness is entitled, *ipso facto*, to be present and to disclose to anyone the information which is obtained in a private room at a private hearing before the officer of the court. It seems to me that the order of the registrar affirmed by Byrne, J., was perfectly right, and that we should not be justified in disturbing it. The order itself, which I have just read, meets any difficulty which might arise in the matter, because it says that the managing clerk must give an undertaking to the registrar to use any information that he may acquire at such examination for the purpose only of the re-examination of Haddock, and not to disclose or allow to be disclosed to anyone without the leave of the court any information he may so acquire. So the court retains a discretion over the result of the examination, and if a proper case were made, I have no doubt that the court would see its way to assist the party who had a right to know what took place at an examination. For these reasons I think that this appeal must be dismissed with costs.

STIRLING, L.J.—I am of the same opinion. The Legislature, by section 115 of the Companies Act, 1862, has conferred on the court the power of summoning persons before it who can give information concerning "the trade, dealings, estate, or effects of the company." It was established very many years ago that upon such occasions it was right that the person summoned before the court should have the assistance of counsel and solicitor if he desired it. The examinations which take place under this section have for a long period—in fact, so far as I know, from the very passing of the Act of 1862—been always treated as private in the first place. Of course, a private examination is open to abuse, and the procedure under the section ought to be carefully watched to see that the process is not abused. To ensure that this shall be done before an order is made the sanction of the registrar is required. The liquidator must disclose to the registrar what object he has in seeking this information, and the registrar upon that exercises his discretion whether it is right and proper that an order for such an examination should be made. In the present case, so far as I can see, the registrar has properly exercised his discretion with reference to this examination. There has been nothing produced to show that he has acted in any way improperly or on any improper grounds, and he has satisfied himself that it is desirable that Mr. Haddock should be examined with reference to the trade, dealings, estate, or effects of the company—what in particular we do not know. Mr. Haddock was a former officer of the company, and presumably he knows something about certain of the matters which are referred to in the section. Upon appearing before the registrar Mr. Haddock was represented by counsel and solicitors who happened to be the counsel and solicitors of the company, Sir George Newnes (Limited), who are at the present moment in litigation with the liquidator. Doubtless one may infer from what has taken place that the object of the examination is in some way connected with that litigation. Here, again, the registrar knows all the facts of the case, and he was of opinion, evidently, that this was a matter as to which it would not be right that Sir George Newnes (Limited) should be parties. They would have no right, according to the rule, to be present, and it

might defeat the object of the examination if they were present. Then he is met by this difficulty, that the counsel and solicitors who appear for the witness are the counsel and solicitors of Sir George Newnes (Limited), and that they may disclose the proceedings in the examination to Sir George Newnes (Limited)—that is, they may for the purpose of the litigation use the information which is extracted in the course of the examination. To prevent that, which would bring about exactly the same result as if Sir George Newnes (Limited) were themselves parties in person, he has imposed certain undertakings upon the solicitors and counsel, and the question is whether he is justified in so doing. It seems to me in the present state of our information that he was entirely justified, for the reasons given by Byrne, J., and that we ought not to disturb the order. At the same time I think that it would be the duty of the registrar in further prosecuting this examination to take great care that it is not abused. The abuse which has been suggested is this: It appears that there is a great controversy going on between the liquidator and Sir George Newnes (Limited) with reference to the production of documents, and it is said that many documents have been withheld by the liquidator from discovery in the action which is now going on between the company in winding up and Sir George Newnes (Limited). I should be sorry to suppose that there was any foundation for that on the part of an officer of the court who is conducting this litigation. But no doubt there is the possibility that some difficulty may have occurred. Now it is said on behalf of Sir George Newnes (Limited) that they ought to be enabled, if a document is produced or made use of in this examination, to show that in the future proceedings for discovery, so that in case a document is produced which is not embraced in any affidavit which has hitherto been made, they may be able to make use of it for the purpose of getting a further and better affidavit of documents. If such a thing is possible on the part of the liquidator, I should be willing enough to help them. But are they shut out from that? I cannot see that they are. At the present time we know nothing of what is going to happen in this examination of Mr. Haddock—not a single question has been asked of him, and we do not know to what precisely it is to be directed. The registrar will in the ordinary course takes full notes of the evidence, and that deposition will be preserved. And if it occurs to Sir George Newnes (Limited) or their advisers that they may properly ask for the disclosure of any part of it, or may desire to know what documents were produced or the contents of any documents produced in the course of it for any proper or legitimate purpose, it seems to me that it is open to them, either under the leave reserved by the order itself to the solicitors, or under the jurisdiction conferred by the Winding-up Rule of November, 1895, to make an application to the court for the disclosure of part or the whole, as they may think fit, of this deposition. Upon any such application the court will be far better able to judge of the propriety of acceding to the application than it can be at the present stage. Under these circumstances it seems to me that the order of Byrne, J., ought not to be disturbed.

COZENS-HARDY, L.J.—I agree. It must be recognized that the Legislature has put the liquidator, after a company has been wound up, in a position in some respects more favourable than that of any other litigant. The court has given him power—not an absolute power, but subject to the control of the court itself—to summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem to be capable of giving information concerning the trade, dealings, estate, or effects of the company. That is a power which is not an absolute power in the liquidator. An order of the court has first to be obtained, and the examination takes place before the registrar, who himself is an officer of the court. By the rules of 1892 (the 3rd rule) it is expressly enacted that these examinations of persons summoned before the High Court under section 115 shall, unless the judge of the High Court shall otherwise direct, be held before the registrar in chambers; that is to say, they shall be held in a place to which the public have no right of access. Such an examination may be held, not merely with a view to future litigation, but with a view to assisting the liquidator in litigation which has been already commenced. When that is once admitted it seems to me that it would be impossible that the court could allow the very end and object of the order which it has made for the examination of a witness to be defeated by allowing the opposite party to the litigation to be present. This information is information of a confidential nature: it is not to be put on the file, and it is not open to any member of the public, or even to the witness himself, without some order of the court since the rules of 1895. Regarding this application as I do, as in substance an application by Sir George Newnes (Limited), the defendants to the libel action, to be present at the examination of this witness, I think the application is wholly wrong; and that the view taken by the registrar and by Byrne, J., is quite correct.

Appeal dismissed.

Solicitors, *G. H. Hoyle; Helder, Roberts, Walton, & Thomas*, for *Simpson & Simpson*, Leeds.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — March 13.

HULTHEN v. STEWART & CO. (a.)

Ship — Demurrage — Cargo to be discharged with customary dispatch as fast as steamer can deliver— According to the custom of the port.

A steamer was chartered to load a cargo of timber and to proceed to London and deliver the same, "the cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." The charter-party contained an exception in the case of strikes or lock-outs. The steamer arrived in the port of London on the 12th of October, and was ordered to the Surrey Commercial Docks to discharge. Owing to the crowded state of the docks she could not enter the docks until the 18th of October, when there was further delay owing to her being unable to get a berth at a quay. The discharge was completed on the 29th of October. There was no other place than the Surrey Commercial Docks where the steamer could have been discharged any sooner. The shipowners claimed demurrage from the 19th of October, contending that the time for commencing the discharge ran from the date of the steamer's arrival in the port of London, that she was bound to discharge "as fast as she could deliver," namely, in six days from that date, and

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that the charter-party must be read as if the time for discharge was fixed therein at six days.

Held, that the charter-party had not fixed a certain number of days for the discharge, and that, as the charterers had done all they reasonably could to discharge the steamer as soon as possible in the circumstances prevailing at the port, they were not liable for demurrage.

Decision of Phillimore, J. (6 *Com. Cas.* 65), *affirmed.*

Appeal from the judgment of Phillimore, J. (reported in 6 Com. Cas. 65).

The action was brought to recover demurrage in respect of the plaintiff's steamship *Anton* at the port of London.

The defendants were sued as indorsees of the bills of lading which incorporated the terms of a charter-party.

By the charter-party (which was in the form of the Chamber of Shipping White Sea Wood Charter to the United Kingdom, 1899) the plaintiff's steamship *Anton* was to proceed to Keret (White Sea), and there load a full and complete cargo of mill-sawn deals and/or battens and/or boards and/or ends, and being so loaded should proceed to London and deliver the same. By clause 3, "the cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at thirty pounds per day, and *pro rata* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary. . . ." By clause 5: "If the cargo cannot be loaded and/or discharged by reason of a strike or lock-out of any class of workmen essential to the loading and/or discharge of the cargo, or by reason of epidemics, the time for loading and/or discharging shall not count during the continuance of such strike or lock-out or epidemic. . . ."

The vessel arrived at Gravesend, which is within the port of London, on the 12th of October. The defendants gave the master notice to discharge at the Surrey Commercial Docks. Owing to the crowded state of the docks the vessel could not enter until the 18th of October, and she remained at Gravesend waiting her turn to enter. When she did enter the docks there was a further delay before she could get a berth at a quay. The actual discharge occupied six days and was completed on the 29th of October. The plaintiff gave evidence to show that six days was sufficient for the discharge of the vessel, and that, allowing six days from the 12th of October, when the vessel arrived within the port of London, the vessel came on demurrage on the 19th of October.

Phillimore, J., held that the vessel was not an "arrived vessel" when it reached Gravesend, because it was not usual to discharge vessels there; and he came to the conclusion upon the evidence that owing to the crowded state of the docks and the impossibility of obtaining lighters owing to a strike of lightermen there was no other place than the Surrey Commercial Docks (where 98 per cent. of timber ships were discharged) where she could have been discharged any sooner, and that according to the custom of the port of London timber ships were discharged either on to the quay or into lighters; and he held that, as owing to no fault or delay on the part of the defendants, there was no quay space and no lighters available until the date when the discharge in fact commenced, the defendants were not liable for demurrage.

The plaintiff appealed.

J. A. Hamilton, K.C., and *D. C. Leck*, for the plaintiff.—When the vessel arrived at Gravesend the defendants were bound to discharge her as fast as she could deliver—that is, within six days. The risk of getting to a berth lay on the defendants. The reference in the charter-party to the custom of the port as to the discharge refers to the mode of and not the time for discharging: *Postlethwaite* v. *Freeland*, 28 W. R. 833, 5 App. Cas. 599. Later cases tend to relieve the ship from liability, but they are all cases where there is some appliance of the port by means of which according to the custom of the port the ship must be discharged and which is beyond the control of the charterer: *Good* v. *Isaacs*, 40 W. R. 629, [1892] 2 Q. B. 555; *Lyle Shipping Co.* v. *Cardiff Corporation*, 49 W. R. 85, [1900] 2 Q. B. 638. That leaves the line of decisions, such as *Porteous* v. *Watney*, 27 W. R. 30, 3 Q. B. D. 534, untouched. In *Hick* v. *Raymond*, 41 W. R. 384, at p. 386, [1893] A. C. 22, at p. 30, Lord Herschell did not agree with Lord Blackburn's view in *Postlethwaite* v. *Freeland*, that a stipulation to discharge the cargo with all dispatch according to the custom of the port is necessarily the same as the implied obligation to discharge within a reasonable time. Where the parties have expressly dealt with the question of discharge they have defined the obligation either by reference to custom or by reference to time. If a charterer has contracted to discharge within a certain time, it is no answer for him to say that he tried to do it but could not. The consignees here had to provide the lighters for the discharge, and there was no customary appliance of the port by means of which the discharge had to be effected. The obligation of the shipowner was not to go to a named berth, or to a berth as ordered, as in *Tharsis Sulphur and Copper Co.* v. *Morel*, 40 W. R. 58, [1891] 2 Q. B. 647, but to the port of London. When the ship arrived at Gravesend she was ready to do her part of the discharge. *Pyman* v. *Dreyfus*, 38 W. R. 447, 24 Q. B. D. 152, is in point. The lay-days therefore commenced to run when she arrived at Gravesend, in the port of London. The authorities draw a clear distinction between an obligation to go to a berth and an obligation to go to a port. That being so, the obligation was to discharge as fast as the steamer could deliver from the date of her arrival at Gravesend. "As fast as the steamer can deliver" is six days, and therefore the charter-party must be read as if a specific time of six days were allowed for discharging. *Maclay* v. *Spillers*, 6 Com. Cas. 217, is an authority tending to support this proposition. It would be to contradict the charter-party to allow the defendants to relieve themselves from their obligation by showing that they used all reasonable diligence to discharge the ship. The fact that there is an express exception in the charter-party with regard to strikes shows that no other exception to the obligation to discharge as fast as the steamer can deliver is to be allowed. Demurrage therefore became payable from the 19th of October.

Lochnis (*W. S. Robson, K.C.*, with him), for the defendants.—The words "as fast as the steamer can deliver," whether in conjunction with "as customary" or "according to the custom of the port," mean as fast as she can deliver considering the circumstances existing at the port at the time of discharge, and if the charterers do all they reasonably can to discharge the cargo they have fulfilled their obligation. But if, on the other hand, a fixed number of days is named in the charter-party for discharging, the obligation to discharge within that

number of days is absolute. That is the result of the decisions from *Postlethwaite* v. *Freeland* onwards, and parties have been contracting upon that basis ever since. The insertion of the strike clause cannot alter the settled construction of the charter-party. No doubt upon the above construction the strike clause is unnecessary, because even without it a strike would have to be taken into consideration as one of the circumstances existing at the port at the time of discharge. A charter-party containing the same or similar words has been construed by different judges in the way now contended for—namely, by Barnes, J., in *The Jaederen*, [1892] P. 351, 41 W. R. Dig. 224; by Mathew, J., in *Rodenacker* v. *May*, 6 Com. Cas. 37; by Kennedy, J., in *Reid* v. *Lee*, 17 Times L. R. 771; and by Bigham, J., in *Wallenberg* v. *Payne* (not reported). Those decisions and the decision in *Lyle Shipping Co.* v. *Cardiff Corporation* are in point in favour of the defendants. Next, with reference to the question whether the ship was an arrived ship when she reached Gravesend. The true view is that she was not an arrived ship until she reached a place where she could discharge. She had not completed her voyage until then. The obligation of the ship was not only to go to London, but also to deliver the cargo.

He referred to *Nielsen* v. *Wait*, 34 W. R. 33, 16 Q. B. D. 67.

Leck replied.

COLLINS, M.R.—This is an appeal from the judgment of Phillimore, J., upon a claim for demurrage, and the question turns upon the construction of one clause in a charter-party. By that clause the cargo was to be loaded and discharged with customary steamship dispatch, as fast as the steamer could receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, and demurrage was to be payable at the rate of £30 per day if the steamer was detained beyond the time stipulated as above for loading or discharging. The ship arrived in the port of London, and, though she remained at Gravesend as a convenient place to lie at until she could enter the docks, it must be assumed for the purposes of this case that she had arrived at the dock gates and was waiting to enter. The state of business in the Surrey Commercial Docks made it impossible for the ship to get into the docks, and when she did get in she had a difficulty in getting a berth and unloading her cargo owing to the congested state of the shipping in the docks. She might have got water space in another dock, but there would have been a difficulty in getting lighters into which to discharge the cargo, and the learned judge has found as a fact that if she had gone into another dock she could not have discharged her cargo any sooner because lighters could not have been procured by the exercise of any reasonable diligence on the defendants' part. That is a finding that the defendants did all they reasonably could to discharge the ship. The question of law is whether in these circumstances the defendants are liable to pay demurrage. The point made for the plaintiff is that, as the steamer could discharge in six days, the charter-party must be read as if a fixed period of six days was allowed for discharging. There can be no doubt that if a given number of days for discharging must be read into this charter-party, then there is an absolute obligation on the charterers to discharge in that time. The question is whether this charter-party upon its true construction has fixed a certain number of days for discharging the cargo. In my opinion it has not, and there is clear authority to that effect. It has been so laid down in a number of cases. In *Hick* v. *Raymond* it was held that where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo, his obligation is to discharge within a reasonable time; and that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him. That case merely followed *Postlethwaite* v. *Freeland*, the words in the charter-party in that case being "the cargo to be discharged with all dispatch according to the custom of the port." It was held that those words were not equivalent to a fixed number of days being named for discharging, and evidence was admitted to show that the charterer had done all he could reasonably do to discharge the cargo. Rightly or wrongly the court there held that the particular conditions existing at the port fettered the power of the charterer to take delivery. The facts which went to show that the charterer was fettered in the discharge are not material here because they must differ in each case, but the principle of the decision is that the above clause is not equivalent to a number of days being fixed for the discharge, and that therefore another standard must be applied—namely, whether the charterer did all he reasonably could to take delivery. Then I come to the later cases of *Lyle Shipping Co.* v. *Cardiff Corporation*, where the words of the charter-party were, the vessel "to be discharged with all dispatch as customary," and *Good* v. *Isaacs*, where the words were, "the vessel to be discharged at usual fruit berth as fast as steamer can deliver as customary." In both those cases it was held that the charterers, having done all they reasonably could in the circumstances to effect the discharge, were not liable for the delay. Evidence was admitted to show that the charterers had done all they reasonably could. Naturally the conditions in each particular case vary, but the principle remains, and the learned judge in the present case has found that the defendants used all reasonable means to discharge the ship as quickly as possible. The evidence clearly justified that finding. It is because the defendants were not tied down to a fixed number of days for unloading, that all the circumstances existing at the time must be taken into account. That being so, the defendants are not liable for the delay. Similar clauses have come before various judges in the cases referred to by the learned counsel for the defendants, and they have all taken the same view as we do as to the construction of the clause. It was said, however, that the insertion of the strike clause, making an express exception in the case of a strike, showed that no other exception was intended to be introduced into the charter-party as to the obligation to discharge as fast as the steamer could deliver. In my opinion, once we have arrived at the clear meaning of the prior clause, the insertion of a subsequent clause intended to meet a particular state of affairs cannot affect the construction of that clause. It is true that upon the defendants' construction the strike clause is unnecessary. I do not think, however, that that clause can reasonably be read as throwing a light back with the view of ascertaining the intention of the parties when they framed the earlier clause. In my opinion, therefore, the judgment was right and the appeal should be dismissed.

ROMER, L.J.—I am of the same opinion. The question turns upon the true construction of clause 3 of the charter-party. In my opinion the material words in that clause cannot be distinguished from the corresponding words in the charter-party in the case of *Lyle Shipping Co.* v. *Cardiff Corporation*. All the authorities were considered in that case, and having

heard those authorities discussed again, I adhere to what I have said upon them. That being so, this case is governed by *Lyle Shipping Co.* v. *Cardiff Corporation*, and the only other point relates to clause 5, the strike clause. No doubt, on our construction of clause 3, the strike clause becomes unnecessary. But it would be wrong for us to say that in this charter-party clause 5 must be held to be a necessary clause, with the result of giving a different construction to clause 3. Such a process of reasoning ought to be avoided in construing a charter-party. It is well known that clauses are at different times added to charter-parties to meet particular circumstances as they arise, and they are added without relation to their effect upon the other clauses of the charter-party. It would be very rash to say that every clause in a charter-party must be taken to be necessary, and starting from that hypothesis to inquire what effect each clause has upon the other clauses in the charter-party. Such a process would lead to some astonishing results. I prefer to hold that the strike clause was introduced for a particular purpose, and that clause, upon the construction we are now giving to the charter-party, turns out to be unnecessary. Phillimore, J., has found that the discharge was effected with all reasonable dispatch, and we cannot differ from that finding of fact. The appeal must therefore be dismissed.

MATHEW, L.J.—I am the same opinion. I should have thought that by this time the parties would have inserted plain language in the charter-party. But they have not done so. It is said that the words "with customary dispatch, as fast as the steamer can deliver," are equivalent to a period of six days, and that therefore we should read that number of days into the charter-party as the period allowed for unloading. I cannot read the charter-party thus. It must be assumed that the ship had arrived at the dock gates. What is the meaning of the words, "with customary dispatch, as fast as the steamer can deliver, according to the custom of the port"? Light is thrown upon those words by *Postlethwaite* v. *Freeland*, *Good* v. *Isaacs*, and *Lyle Shipping Co.* v. *Cardiff Corporation*, before this court, and *The Jaederen*, before Barnes, J., *Reid* v. *Lee*, before Kennedy, J., and *Wallenberg* v. *Payne*, before Bigham, J.; and all place the same construction on these or similar words as we are giving to this charter-party. We should be running contrary to that series of decisions if we adopted the contention put forward on behalf of the shipowner. There was a further argument. There was a strike clause in the charter-party, and it is said that the express inclusion of that clause negatives an exception in other cases being implied, and that therefore the insertion of the strike clause alters the construction of the earlier clause. It is impossible to read a charter-party in that way. The fact that express provision is made in the charter-party as to strikes cannot affect the construction of the other clauses.

Appeal dismissed.

Solicitors for the plaintiff, *Stokes & Stokes.*

Solicitors for the defendants, *Trinder, Capron, & Co.*

High Court of Justice.

Chan. Div. }
Buckley, J. } May 28; June 3.

In re THE NATIONAL BANK OF WALES. (*a.*)

Company—Winding up—Costs—Taxation—Costs of drawing bill of costs and of copy.

The N. Bank was in voluntary liquidation. The M. Bank bought the assets of the N. Bank and agreed to pay the costs, &c., of the liquidators of the N. Bank in the winding up. The liquidators' solicitor prepared bills of costs which were duly paid by the M. Bank. On taxation of the bill of costs presented by the solicitor to the liquidators of the N. Bank, (a) *the costs of preparing and copying the bill of costs for payment by the M. Bank and* (b) *for preparing and copying the bill of costs taxed were disallowed.*

On the 21st of February, 1901, an order was obtained by the liquidators in the voluntary winding up of the National Bank of Wales (Limited) for the taxation of the several bills of costs of their solicitor as between solicitor and client.

In 1893 the National Bank had sold its assets to the Metropolitan, Birmingham, and South Wales Bank as on the 31st of December, 1892, and by one of the clauses of one of the agreements for sale it was agreed that the Metropolitan Bank should pay all the charges, costs, disbursements, and expenses of the National Bank and its liquidators of or incidental to its winding up and dissolution and the sale.

The Metropolitan Bank paid the National Bank costs, amounting to £3,754 10s.

The scale fees for drawing these bills of costs and for a copy of them amounted to £301 3s. 3d., and these charges the taxing-master disallowed. The taxing-master also disallowed a sum of £73 11s. for drawing and making copies of the bills of costs taxed.

This was a summons to review the taxation with regard to these two sums.

Christopher James, for the liquidator, referred to the general order of November, 1862, r. 71, and to R. S. C., ord. 65, r. 27 (38).

June 3.—BUCKLEY, J., said that in this case the liquidators, in recovering assets, had incurred costs amounting to £3,754 10s., which were claimed against the Metropolitan Bank and paid by them on the delivery of particulars. The Metropolitan Bank did not pay, and so far as he knew were not asked to pay, the sum of £301 3s. 3d., the scale fees for drawing these bills of costs and for a copy of them. If there had been no sale the expense of drawing these bills would have been borne by the solicitor, and this was not disputed; in his opinion, the fact that there had been a sale made no difference. Further, if payable by anyone else, this sum should have been paid by the Metropolitan Bank and not by the liquidators of the National Bank.

The sum of £73 11s., and also the sum of £301 3s. 3d., should, according to the liquidators' contention, have been allowed by the taxing-master. The costs of drawing a bill are allowed where there has been litigation or *quasi*-litigation. The order in this case was merely one for taxation between solicitor and client, and there was nothing in a case like this of the taxation of bills of costs not delivered in the course of litigation to make the order and rules referred to by counsel applicable. The taxing-master was right in both cases.

(*a.*) Reported by L. W. BYRNE, Esq., Barrister-at-Law.

As to costs, he must add that he was startled to find that the liquidators who had to pay the bill were there to contend that the amount of the bill ought to be increased, and appeared not by a separate solicitor to attack the bill, but by the solicitor whose bill was being taxed. He was told that this was the practice, and that the taxing-master is the only person who is there to reduce the bill. The applicant was really the solicitor and not the liquidators, and this being so, he could not allow the costs in the liquidation.

Solicitors, *Everett & Hodgkinson*, for *A. T. Williams*, Neath.

Chan. Div. Joyce, J. } May 8, 9, 13.

RIDD v. THORNE. (a.)

Solicitor—Lien—"Property recovered or preserved"—Charging order—Priority—Notice of solicitor's right to lien—Purchaser for value without notice—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

Property recovered or preserved in an action by a solicitor employed in that action is in the nature of salvage, and he is entitled to be paid for his services on that basis; and he is also entitled to a charge, not only on the property of a particular client, but also, if property of other persons is recovered or preserved in the action, upon their property or interest, for his costs, charges, and expenses, and his charge takes priority over all rights except those of a bonâ fide *purchaser for value without notice.*

An action was commenced by R. against T. for dissolution of partnership, and a receiver was appointed, and by the action certain of the assets of the partnership were recovered. Whilst the action was proceeding, certain creditors brought actions against the partners, and obtained charging orders or orders following the order made in Kewney *v.* Attrill, 35 *W. R.* 191, 34 *Ch. D.* 345. *The solicitor for the plaintiff R. claimed that his charge or lien for costs, charges, and expenses in the action took priority over the charging orders obtained by the creditors.*

Held, following Cole *v.* Eley, 42 *W. R.* 505, 561, [1894] 2 *Q. B.* 180, 350, *that the creditors, being aware of the existence of the partnership action, must also be taken to have notice of the solicitor's right to a lien on the property recovered, and that consequently they were not purchasers for value without notice, and that the solicitor's lien had priority over the charging orders.*

Solicitors Act, 1860, *s.* 28, *considered.*

Adjourned summons.

This summons was taken out by Mr. Harry Watkins, a solicitor, asking for a declaration that his lien or charge upon the assets of R. Bristowe & Sons for his taxed costs and expenses incurred as solicitor to the plaintiff in an action entitled *Ridd* v. *Thorne*, [1901] R. No. 203, took priority over certain charging orders obtained by creditors against the assets of R. Bristowe & Sons.

It appeared that the plaintiff and defendant in the action of *Ridd* v. *Thorne* formerly carried on the business of builders and contractors in partnership under the name or style of R. Bristowe & Sons.

In the month of January, 1901, the said action was commenced for dissolution of the partnership, and Mr. Watkins was employed as solicitor to the plaintiff, and it appeared that, as a result of such action, certain assets of the partnership had been recovered, and the proceeds of those assets were partly in the hands of a receiver and partly in court.

Whilst the action was proceeding certain creditors of the partnership firm commenced proceedings against the partners and obtained judgments, and as a result of such proceedings, on the 24th of June, 1901, Messrs. Sandell & Sons and Mr. John Philip Ridd obtained from the master in chambers orders charging the assets of the partnership firm with the payment of their respective judgment debts, and on the 7th of February, 1902, Fergusson Brothers & Co. obtained a similar order.

The applicant claimed that his lien or charge took priority over the three charging orders.

Younger, K.C., and *T. Douglas*, for the applicant.—Only a *bonâ fide* purchaser without notice has priority over a solicitor's lien (*cf.* section 28 of the Solicitors Act, 1860), but the solicitor must prove that the lien is with reference to property recovered or preserved. The assets would have been lost if this action had not been brought. The court has jurisdiction under section 28 to make an order against the creditors, subject, however, to two conditions—namely, (*a*) the solicitor must show that there is no other source from which he can get his costs, and (*b*), one at least of the creditors must be present at the hearing and the case be argued on behalf of the creditors: *Jackson* v. *Smith*, 53 L. J. Ch. 972, 32 W. R. Dig. 196. In present case both these conditions were fulfilled. *Kewney* v. *Attrill*, 33 W. R. 191, 34 Ch. D. 345, shews that a charging order can be made. A solicitor's lien is in the nature of salvage: *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545; *Scholey* v. *Peck*, 41 W. R. 508, [1893] 1 Ch. 709.

C. E. Bovill, for Henry Sandell & Sons.—The jurisdiction of the court under section 28 of the Solicitors Act is discretionary—*Re Humphreys*, 46 W. R. 322, [1898] 1 Q. B. 520, at p. 526—and the court ought not to exercise it in this case. If Sandell had levied execution before the receiver was appointed, he would have obtained priority over the solicitor's lien: *Kewney* v. *Attrill*; *Fowler* v. *Roberts*, 2 Giff. 226. The charging order made here is the same as the order in *Kewney* v. *Attrill*, and has a stronger effect than an ordinary charging order: *Jackson* v. *Smith*.

Clayton, for other creditors.—My clients say that the solicitor did not recover the property, and that they could have done so themselves by putting in a bailiff. *Jackson* v. *Smith* is distinguishable.

He also referred to *Emden* v. *Carte*, 30 W. R. 17, 19 Ch. D. 311.

JOYCE, J.—In this case there was a dispute between two partners and an action was commenced by one partner against the other. The action was going on with vigour when certain creditors of the partnership commenced actions against the partners, and having got judgment, they obtained in chambers from the master, orders which have been called charging orders, but which are not technically charging orders at all, but orders following the case of *Kewney* v. *Attrill*, and by those orders the applicants undertook to deal with the charge hereinafter mentioned according to the order of the court, and it was ordered that the assets of the firm should stand charged with the payment of such judgment debts. Now at that time, certainly at the date of the last order, various assets had been got in and the proceeds of those assets were either in the hands of the receiver or in court. Now my opinion is that the effect of that order, so far as the assets were concerned, was to give a charge,

(a.) Reported by C. B. CAMM, Esq., Barrister-at-Law.

or rather not to give a charge otherwise than subject to any existing lien or existing prior charge. For myself I very much doubt if Kay, J., ever intended in the original case of *Kewney* v. *Attrill*, or whether it has ever been intended when such orders as these have since been made, to give any charge except as amongst the creditors of the partnership themselves or as against the separate partners of the firm. Then the statute gives the court power to charge property recovered or preserved with the payment of the costs, charges, and expenses of that preservation, and all conveyances and acts done to defeat, or which shall operate to defeat such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charging right. Now it is quite settled, and it has been said over and over again that this section must receive a liberal construction, and I think the decision of Romer, L.J., in *Scholey* v. *Peck*, is really in accordance with the general line of authorities. In that case Romer, L.J., said: "I have considered the cases cited in the course of the arguments, and others bearing on charging orders obtained under the Solicitors Act, 1860. These authorities show that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services had been rendered. The 28th section of the Act is very general in its terms. It authorizes a charge not on the mere interest of the plaintiff, but on all the property recovered in the action, whether for the plaintiff only or for him in connection with others. It is not necessary that the property charged should belong to the same person as employed the solicitor; but it must be by reason of the employment that the property is preserved. . . . In my judgment the case is governed by the principle of *Greer* v. *Young*. I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the plaintiff, but also against the mortgagee, who is taking the benefit of the action, and over whose mortgage they must have priority. The charge will include their taxed costs, charges, and expenses properly incurred in preserving the property."

As I say, and as it appears there, it is quite settled that this a charge which may be imposed not only on the property of the particular client, but, if the property of other persons be preserved or recovered, it is imposed upon their property or interest.

That it may be made as against creditors of a partnership appears clear from the case of *Jackson* v. *Smith*. What the statute says is that all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void, and so on. Now, it may reasonably be doubted whether judgment creditors are purchasers or not; certainly they were not before the orders, and if they are purchasers at all, it is only by virtue of the orders. But they are not purchasers without notice, because the action was in existence, and in the case of *Cole* v. *Eley*, 42 W. R. 505, [1894] 2 Q. B. 180, which was confirmed in the Court of Appeal, 42 W. R. 561, [1894] 2 Q. B. 350, it was held that the provision of section 28 of the Solicitors Act, 1860, avoiding conveyances to defeat a charging order unless made to a *bonâ fide* purchaser for value without notice, means without notice of the solicitor's right to a lien, and not without notice of the existence of a charging order, and that an assignee of a judgment creditor, being aware of the existence of an action in which the solicitor had acted for the plaintiff, must be taken to have notice of the solicitor's right to a lien on the property recovered, and therefore was not a purchaser for value without notice. I hold most distinctly, therefore, that the persons who had these orders were not purchasers for value without notice, and that the right of the solicitor takes priority over all the creditors, and he must take a common order.

Solicitors, *Harry Watkins; Smith & Hodgson; Ward, Perks, & McKay.*

IN BANKRUPTCY.

K. B. Div. (Wright, J.) — May 5.

In re DRUCKER.

Ex parte THE TRUSTEE *v.* THE BIRMINGHAM AND DISTRICT BANKING CO. (*a.*)

Bankruptcy—Property of bankrupt—Money paid to settle bankruptcy petition—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

The debtor gave his solicitors a charge to secure inter alia *a sum to be paid by them in settlement of a bankruptcy petition presented by the respondents. The solicitors paid that sum to the respondents, who withdrew their petition. The debtor was subsequently made bankrupt upon a petition presented within three months of the act of bankruptcy, of which the respondents had notice.*

Held, that the trustee in the bankruptcy was not entitled to recover from the respondents the sum paid to them in settlement of their petition, as it never was the debtor's money.

In re Snyder, Ex parte Pixley, 8 *Morr.* 127, *distinguished.*

Motion by the trustee in the bankruptcy of Drucker for a declaration that the sum of £300 paid to the respondents, the Birmingham and District Banking Co., upon the 15th of February, 1901, formed part of the property of the bankrupt and was received by the respondents with notice of an available act of bankruptcy; and for an order requiring the respondents to pay the said sum of £300 to the trustee.

Upon the 24th of January, 1901, the respondents presented a petition against Drucker, the amount of the debt being £1,000, and the act of bankruptcy alleged therein being noncompliance with a bankruptcy notice which had been issued by another creditor. The petition was ordered to be heard upon the 15th of February.

Upon the 14th of February Messrs. Beyfus & Beyfus, solicitors to Drucker, proposed to the solicitors to the bank that if £300 were paid the petition should be withdrawn.

Messrs. Beyfus & Beyfus told the solicitors to the bank that the debtor had wealthy relatives but no money of his own, and added that they themselves would have to find the money.

The solicitors to the bank accepted the offer, believing that the £300 to be provided was not the debtor's money.

Upon the same day Drucker, who already owed Messrs. Beyfus & Beyfus £328, gave them a charge upon certain property to secure the sum of £628, with the understanding that the additional sum of £300 so secured was to be used in settling the bank's petition.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Accordingly, on the 15th of February, Messrs. Beyfus & Beyfus gave the bank their own cheque for £300, and the petition was withdrawn.

A receiving order was subsequently made against Drucker upon a petition presented within three months of the act of bankruptcy of which the bank had notice.

He was adjudged bankrupt, and a trustee was appointed, who launched the present motion.

Reed, K.C., and *A. H. Carrington*, for the trustees, relied upon *In re Snyder, Ex parte Pixley*, 8 Morr. 127.

Muir Mackenzie and *J. G. Joseph*, for the respondents, contended that the money in question never formed part of the property of the bankrupt, and that the decision in *In re Snyder* had been questioned in *In re Rogers, Ex parte Holland*, 8 Morr. 243.

WRIGHT, J.—I have not to consider to-day whether the charge which Mr. Drucker gave to Messrs. Beyfus can be sustained or whether that might not be attacked by the trustee. All that I have to consider is whether this money which was paid to the respondents, the Birmingham bank, was the money of Drucker or not. Now it is not a very easy matter, either in point of law or in point of fact, to decide, but if the £300 over became Mr. Drucker's money, it is plain that Mr. Drucker might have spent it or done whatever he pleased with it; as Mr. Mackenzie points out, he might have speculated with it or done what he liked with it. But what I find is, that it never came into Mr. Drucker's hands at all, and I am clearly of opinion that it was never intended to come into Mr. Drucker's hands at all. It is quite clear that Messrs. Beyfus & Beyfus would never have consented to that money going out of their hands into those of Drucker's or being applied for any other purpose whatever except the settlement of the petition by the Birmingham bank. Messrs. Beyfus & Beyfus themselves could not have applied it to any other purpose after the arrangement which they had made with the respondents' solicitor on the one hand and Mr. Drucker on the other. Nor, as I have said, could Mr. Drucker have applied it to any other purpose. The charge is contemporaneous with the arrangement that is made with the respondents' solicitor, and although the charge on the face of it treats this as a loan by Messrs. Beyfus & Beyfus to Mr. Drucker, that cannot alter the real character of the transaction if the real character was inconsistent with the way in which it is described in the charge. I cannot help thinking that this money was never free and never became part of the general assets of Drucker at all. He never had any right to receive it, or use it, or apply it to any purpose except this one particular purpose. Under these circumstances it seems to me it was impressed with a trust. Not in the strict sense of the word trust, but in substance with a trust that it should be applied by Messrs. Beyfus & Beyfus out of their own money for the discharge *pro tanto* of the claim of the bank. That being so the present application of the trustee Drucker's bankruptcy fails. I say nothing about any possible application to get rid of the charge. I do not know whether it would succeed or not.

Motion dismissed.

Solicitors, *King, Wigg, & Co.; Ernest Salaman, Fort, & Co.*, for *Alfred Green*, Birmingham.

Prob. Div. & Adm. Div. Admiralty. } April 28.

"THE ASSUNTA." (*a.*)

Admiralty—Ship—Action in rem—*Misdescription of plaintiffs in writ—Practice.*

Where there is a misdescription on a writ in an action in rem, *without real substance in it,*

The Court will allow such writ to be amended.

Motion.

This was a motion to set aside a writ in an action *in rem* on the ground of the misdescription of the plaintiff.

The writ was issued in the name of Louis Dreyfus & Co., as owners of the cargo *ex* steamship *Assunta*.

The firm of Louis Dreyfus & Co. carry on business in London, but the sole partner in the firm is M. Leopold Louis Dreyfus, of Paris.

The ship had been arrested, but released on bail.

Leck, in support, cited *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494; ord. 48A, r. 1.

Nelson.—The misdescription is a mere technical irregularity, and leave should be given to amend. Ord. 48A, r. 1, is not applicable to actions *in rem*.

He cited *The Maréchal Suchet*, 45 W. R. 141, [1896] P. 233; *The Longford*, 37 W. R. 372, 14 P. D. 34; *The Freedom*, L. R. 3 A. & E. 495, 20 W. R. Adm. Dig. 16; *Dickson* v. *Law & Davidson*, 43 W. R. 596, [1895] 2 Ch. 62; *Petty* v *Daniel*, 35 W. R. 151, 34 Ch. D. 172; *St. Gobain Co.* v. *Hoyermann's Agency*, 41 W. R. 563, [1893] 2 Q. B. 96.

JEUNE, P., in giving judgment, said the question was whether this writ was wrong. It was an important case, because if the writ was set aside the plaintiff might lose his remedy, as the steamship *Assunta* had been released and had sailed, and the plaintiff might not be able to arrest her again. It was not necessary to decide the question whether ord. 48A, r. 1, was applicable to actions *in rem* or not, for by the old-established rule of the Admiralty Court the owners of a cargo laden on board a ship were entitled to sue *in rem* as such. It was a practice peculiar to the Admiralty Court, and could never have been followed at common law, and therefore he could not hold that the rule referred to was intended to or did abrogate the old and valuable practice of the Admiralty Court. If in this case the plaintiffs had been described as "The owners of the cargo of the *Assunta*" the writ would have been good, and as the plaintiff was so described in the indorsement of the writ, he did not think that under the circumstances the misdescription on the face of the writ was more than a mere irregularity with no real substance in it, and therefore he should give leave to the plaintiff to amend.

Motion dismissed without costs. Leave to appeal granted.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitor for the defendant, *R. Greening*.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — May 31.

MORRIS v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO. (LIMITED). (a.)

Master and servant—Employers' liability—Appeal—Insurance moneys—Order for payment to workman—"Action or matter"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 5.

An appeal lies to the High Court from an order made by a county court judge for the payment of insurance moneys under section 5 of the Workmen's Compensation Act, 1897.

Kniveton v. Northern Employers' Mutual Indemnity Co., [1902] 1 *K B.* 880, *approved.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) reversing an order of the judge of the Bolton County Court.

The appellant, Morris, was a collier in the employment of the Darcy Lever Coal Co. (Limited), and he was injured by an accident arising out of and in the course of his employment. An award was made against his employers under the Workmen's Compensation Act, 1897, for payment to him during incapacity of the weekly sum of 19s. The Darcy Lever Coal Co. was being wound up, and no payments were made under the award. The appellant thereupon applied for an order under section 5 of the Workmen's Compensation Act, 1897, for payment direct to him of the weekly sums by the Northern Employers' Mutual Indemnity Co., as insurers, on the ground that the coal company were entitled to be paid those sums by the indemnity company.

The county court judge made the order asked for.

The indemnity company appealed to the Divisional Court, which held, following their own decision in *Kniveton* v. *Northern Mutual Indemnity Co.*, [1902] 1 K. B. 880, that an appeal lay to the High Court from the order of the county court judge, and they reversed the order appealed against.

Morris appealed.

Ruegg, K.C., and *Chester Jones*, for the appellant.—No appeal lies to the High Court from an order of a county court judge made under section 5 of the Workmen's Compensation Act, 1897. There is no appeal from any order made under the Act except where given by the Act itself. Schedule II., clause 4, to the Act gives an appeal to the Court of Appeal from the decision of the county court judge upon a question of law arising in an arbitration under the Act. This court held in *Leech* v. *Life and Health Assurance Association*, 49 W. R. 482, [1901] 1 K. B 707, that no appeal lies direct to the Court of Appeal from an order of a county court judge under section 5 of the Act. The consequence is that no appeal lies to any court from the order of the county court judge. The order is in truth a mere aid to execution, and no appeal was intended to lie. Nor is this an order in a "matter" within section 120 of the County Courts Act, 1888, as that section does not apply to the Act of 1897. The decision of the Divisional Court in *Kniveton* v. *Northern Employers' Mutual Indemnity Co.*, was wrong, and ought to be overruled.

They also referred to rule 51 of the Workmen's Compensation Rules, 1898.

Haldane, K.C., and *F. E. Smith*, for the indemnity company, were not called upon.

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court discharging an order made by the county court judge under section 5 of the Workmen's Compensation Act, 1897. That section gives a workman, who has been injured by an accident, and in whose favour an award of compensation has been made, in the event of the bankruptcy of his employer or if his employers are a company in the event of their being wound up, a charge upon any moneys which his employer is entitled to receive from insurers in respect of the amount due to the workman, and to payment of the moneys as therein prescribed. The county court judge in the present case made an order under section 5, on the workman's application, for payment by the insurers, the indemnity company, direct to him of the weekly sums. From that order the indemnity company appealed to the Divisional Court, this court having held, in *Leech* v. *Life and Health Assurance Association*, that no appeal lies in such a case direct to the Court of Appeal.

In the Divisional Court the point was taken that no appeal lay to that court. The Divisional Court overruled that objection, holding that they had jurisdiction to entertain the appeal, and they accordingly heard it and reversed the order of the county court judge. From that decision an appeal has been brought to this court, and the question has been raised here whether the Divisional Court had any jurisdiction to entertain the appeal. In *Leech* v. *Life and Health Assurance Association* we held that this was not a matter which was part of an arbitration under the Act, but was a matter subsequent and ancillary thereto, and therefore did not come within the appellate jurisdiction conferred by the Act upon this court; but we did not hold that no appeal lay at all. Therefore the position is this: There is an order of a county court judge acting within his jurisdiction as such and dealing with what may be described as a "matter" within the meaning of section 120 of the County Courts Act, 1888. The words of section 120 are "action or matter," and it seems to me that the word "matter" is amply wide enough to cover such a case as the present. There was, therefore, *primâ facie* jurisdiction in the Divisional Court to entertain the appeal in the ordinary course of their appellate jurisdiction, unless there is some provision in the Workmen's Compensation Act, 1897, ousting that jurisdiction. The appellant's counsel has been unable to point out anything in the Act which, while creating this matter, at the same time withdraws it from the ordinary appellate jurisdiction of the High Court in county court cases. The Divisional Court had therefore jurisdiction to entertain the appeal.

MATHEW and COZENS-HARDY, L.JJ., concurred.

The appeal was then heard on the merits, and dismissed.

Appeal dismissed.

Solicitors for the appellant, *Chester, Broome, & Griffithes*, for *Fielding & Fernihough*, Bolton.

Solicitors for the respondents, *Rowcliffes, Rawle, & Co.*, for *Peace & Ellis*, Wigan.

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

From K. B. Div.
(Vaughan Williams, Romer, and Mathew, L.JJ.) May 8.

GATES v. R. BILL & SON. (a.)

Metropolis—Hackney carriage—Negligence of driver—Liability of proprietor—Licence taken out in name of one partner—London Hackney Carriages Acts, 1831 (1 & 2 *Will.* 4, *c.* 22) *and* 1843 (6 & 7 *Vict. c.* 86).

The proprietor of a hackney carriage is liable, as a master, under the London Hackney Carriages Act, 1843, *so far as regards the members of the public, for the acts of the driver, though the licence for the carriage is not taken out in his name.*

Application for judgment or a new trial in an action tried before Ridley, J., and a jury.

The action was brought to recover damages for personal injuries caused by a collision between a carriage which the plaintiff was driving and a hansom cab, the property of the defendants, which was a licensed hackney carriage within the Metropolitan district, the collision being caused by the negligence of the licensed driver of the cab.

The cab was licensed at Scotland Yard in the name of Harry Bill, the son of Rebecca Bill, and was hired out with a horse by the day to the driver for a fixed sum per day, the driver retaining for himself any sum he received beyond that fixed sum. An appearance to the action was entered by Rebecca Bill, "trading and sued as R. Bill & Son, defendant in this action." The jury found that Rebecca Bill was carrying on business as R Bill & Son in partnership with her son, Harry Bill, and they returned a verdict for the plaintiff for £55 damages.

H. Avory, K. C., and *Moresby*, for the defendant, Rebecca Bill.—The person in whose name the cab is licensed is alone liable for the acts of the driver. At common law the relation between the proprietor and the driver of a cab hired out by the day was that of a bailor and bailee, and the bailor would not be liable for the acts of the driver. The London Hackney Carriages Acts, 1831 and 1843, have altered that relation, and have placed the licensed proprietor in the position of master to the licensed driver so far as regards the members of the public. But that liability of master for the acts of his servant is not extended beyond the licensed proprietor. It does not extend to a proprietor who is not licensed. The object of the Acts is to enable the licensed person to be summoned for an offence against the Act, and to avoid any objection there might be as to the omission to summon all the partners. The object was to make the licensed proprietor alone liable. Therefore the relation of master and servant created by the Acts extends only to the licensed proprietor of the hackney carriage. The defendant, Rebecca Bill, is therefore not liable. [They referred to *Powles* v. *Hider*, 4 W. R. 492, 6 E. & B. 207; *Venables* v. *Smith*, 25 W. R. 584, 2 Q B. D. 279; *King* v. *London Improved Cab Co.*, 37 W. R. 737, 23 Q. B. D. 281; *Keen* v. *Henry*, 42 W. R. 214, [1894] 1 Q. B. 292. They also contended that there was no evidence of partnership between Rebecca Bill and Harry Bill.]

Hammond Chambers, K.C, and *Woodfin*, for the plaintiff, were not called upon.

VAUGHAN WILLIAMS, L.J.—It is clear that there was evidence upon which the jury could reasonably find as they did upon the question of partnership. The only other question is one of law. With regard to it, I cannot for myself consider the decisions as entirely satisfactory. In *Fowler* v. *Lock*, 20 W. R. 672, L. R 7 C. P. 272, the action was brought by the cab driver against the cab proprietor, and therefore no question arose between the cab proprietor and a member of the public. Speaking for myself, in spite of the great authority of Willes, J, who did not agree with the other members of the court, I think, as Cockburn, C.J., thought in *Venables* v. *Smith*, that the decision of the majority of the court in that case was right, and that the relation at common law between the cab proprietor and the cab driver was not that of master and servant, but that of bailor and bailee. That, in my opinion, was their true relation apart from London Hackney Carriages Acts. In the earlier case of *Powles* v. *Hider* it seems to me that Lord Campbell went upon the assumption that the relation between the cab proprietor and the driver who hired the cab was that of master and servant. It is true that in his judgment he referred to the London Hackney Carriages Acts, but, as it seems to me, only for the purpose of seeing whether the defendant, by having his cab licensed under the Acts, to which is annexed the condition that his name is put on the cab, did not hold himself out to the public as the proprietor, and did not incur the liabilities of proprietor. Those cases were followed by *King* v. *London Improved Cab Co.* and *Keen* v. *Henry*. In the former of these two cases I do not think that Lord Esher was prepared to accept the view that the relation at common law between the proprietor and the driver who hired the cab was that of master and servant. He based his judgment entirely on the Acts. In the second of the two cases one finds the same view adopted, Lord Esher and Lopes, L.J., being parties to both decisions. In those circumstances I do not think it can be said that the grounds of the decisions in all the cases are the same. If this question had been entirely free from authority, and we had to look at the Acts alone, I for my part should hesitate to draw the inference that the Legislature meant to impose on the cab proprietor any new liability in respect of matters other than those dealt with in sections 28 and 35 of the London Hackney Carriages Act, 1843. But I am not at liberty to deal with this question apart from authority. We have two lines of decisions, one based upon the inference of fact as to the relation between the cab proprietor and the driver, and the other upon the Acts, and in both the cab proprietor has been held liable to members of the public for the acts of the driver. Therefore the only question is whether the present case comes within the decisions on the Acts. Is Rebecca Bill liable under the Acts as the proprietor? Once it is found as a fact that she was a partner in the business, and therefore was one of the proprietors, it seems to me that the question is at an end. I do not accept the contention that the licensed proprietor is the only person liable as the proprietor. There seems to me to be no such limitation of the word proprietor in the Act. But even if we assume that that contention is a good one, it does not assist the defendant in the present case, because in my opinion the registration adopted here was intended to include Mrs. Bill as one of the partners in the business. The verdict and judgment must therefore stand.

ROMER, L.J.—I agree. I do not see my way to upset the verdict of the jury on the question of fact. That being so, the only question is one of law—namely, assuming that Mrs. Bill is a partner in the business, is she liable in this action? It is true that at common law where the proprietor hires out the cab to the driver on the terms on which it was hired out

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

here, the relation between them at common law was not that of master and servant, but of bailor and bailee. But since the London Hackney Carriages Act, 1843, there has been a long series of decisions, and the law is now well settled that a proprietor of a London cab who hires out his cab to a driver on the terms upon which the cab was hired out in the present case stands towards the driver, so far as the members of the public are concerned, in the relation of master to servant. It is true that under the Act the proprietor must obtain a licence for his cab, but I fail to see how the liability of the cab proprietor towards the public can depend upon his having obtained a licence. It would be strange if the proprietor, whose duty it is to obtain a licence, could say that by disregarding his duty he could escape liability, whereas by fulfilling his duty he would render himself liable. In the present case I prefer to assume in favour of Mrs. Bill that she has not committed any breach of duty in not obtaining a licence in her own name. I think that the son by obtaining the licence in his own name must be taken to have obtained it on behalf of himself and Mrs. Bill. In either case Mrs. Bill is liable.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *S. E. Lambert.*

Solicitor for the defendant, *C. T. Phillips.*

From P. D. & A. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — May 7.

BLOOD *v.* BLOOD. (*a.*)

Divorce—Variation of settlement—Vested interest of child—Settled property—Extinguishment of rights of guilty party—Matrimonial Causes Act, 1859 (21 & 22 *Vict.* c. 61), *s.* 5.

By a marriage settlement property of the wife was settled upon trusts for the wife for life, then for her husband if he survived her, with remainder to the children of the marriage. There was one child of the marriage, who attained twenty-one, and died a bachelor and intestate, the beneficial interest which he had acquired in the property on attaining twenty-one passing to his father as sole next-of-kin. Subsequently to the death of this child the wife obtained a divorce from her husband.

Held, that the property was settled property within section 5 of the Matrimonial Causes Act, 1859, *and that the court would, under the jurisdiction conferred by that section, vary the settlement by extinguishing all the rights, powers, and interests of the husband thereunder, including any beneficial derivative interest which he took as next-of-kin of his deceased son.*

Decision of Barnes, J. (ante, *p.* 138), *affirmed.*

This was an appeal against a decision of Barnes, J. (reported *ante*, p. 138), upon a motion for the variation of the settlement made upon the marriage of Constance Rebecca Blood with Neptune William Blood.

On the 14th of January, 1901, a decree absolute for the dissolution of the marriage was made on the wife's petition, on the ground of the husband's adultery and desertion.

An ante-nuptial settlement was executed on the 25th of July, 1877, by which a sum of £4,000 Great Western Railway Stock, the property of the wife, was settled in trust for the wife for her life, then to the husband for his life, if he should survive her, with remainder to the children of the marriage, with a proviso that, if the wife should survive the husband and marry again after his death, and there should be only one child of the first marriage, the wife should be at liberty to appoint a moiety of the income of the trust fund to her second husband for his life, and a moiety of the trust funds to the children of the second marriage. There had been only one child of the first marriage, a son, who attained twenty-one on the 13th of July, 1899, and died on the 16th of July, 1900, a bachelor and intestate. He had on attaining twenty-one acquired a vested interest in the settled fund, the beneficial interest in which passed on his death to his father as his sole next-of-kin.

After the dissolution of the marriage the father married again, and he then executed a settlement of the previously settled property which had come to him as the representative of his son, but "subject to any variation in the terms of the (original) settlement which may be made by the court."

The first wife applied under section 5 of the Matrimonial Causes Act, 1859, for a variation of her settlement, and she asked that the whole fund might be reassigned to her free from any interest of her late husband.

Section 5 provides that "the court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit."

The learned judge held that under this section the court had power to make an order varying the settlements, notwithstanding that the son had attained a vested interest, and his lordship ordered that the fund should be retransferred to the wife, free from any interest of her former husband.

The husband appealed.

Inderwick, K.C., and *Barnard*, for the husband.—We first of all submit that this is not settled property at all within the meaning of section 5 of the Matrimonial Causes Act, 1859. Even if it is, the section gives the court no power to affect the interest of a child of the marriage, during the child's life, and we submit that the court's jurisdiction cannot be increased by the child's death. That there is no jurisdiction is shown by *Crisp* v. *Crisp*, 21 W. R. 79, L. R. 2 P. & D. 426.

Hon. F. Russell (*Priestley* with him), for the wife.—All that the court refused to do in *Crisp* v. *Crisp* was to extinguish the settlement altogether. None of the cases throw any doubt on the jurisdiction of the court to make such an order as has been made in the present case.

F. L. Wright, for the trustees of the settlement.

The following authorities were also cited: *Meredyth* v. *Meredyth and Leigh*, 43 W. R. 304, [1895] P. 92; *In re Radcliffe, Radcliffe* v. *Bewes*, 40 W. R. 323, [1892] 1 Ch. 227; *Micklethwait* v. *Micklethwait*, 7 W. R. 117, 4 C. B. N. S. 790; *Pollard* v. *Pollard*, [1894] P. 172; *Whitton* v. *Whitton*, [1901] P. 348; *Dormer* v. *Ward*, 49 W. R. 149, [1901] P. 20.

COLLINS, M.R.—This is an appeal from the decision of my brother Barnes affecting the interest of the husband, against whom a decree for divorce had gone; and the learned judge acted under section 5 of the Matrimonial Causes Act, 1859, which is in these terms: [His lordship read the section, and con-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

tinued:] Now the circumstances were these: By the marriage settlement the only fund that we have to deal with in this case, which was that of the wife, was settled upon the wife for life, then upon the husband for life, and then upon the child, and this fund therefore (after the death of the second tenant for life, the husband) would, in the absence of anything intervening, go to the child or children. In this case there was only one child—a son—and he would take the whole of that fund subject to a condition which empowered the wife, upon second marriage, to appoint half of it for the benefit of the children of the second marriage. That was the condition of affairs at the time when application was made to Barnes, J., to act under the section that I have read, the decree having then gone against the husband. What Barnes, J., has done is to extinguish the life interest of the father in the settlement, and there is an appeal against that order, on these grounds. The husband says that that order ought not to extend to the share which passed to the son, or would have passed to the son, who died before the date of the decree in question. The son died without a will, and the father, as next-of-kin, takes whatever the son's interest was.

Now as to the order—which extends not only to the father's life interest, but to the fund which he takes as next-of-kin to his son—it is said that it was made without jurisdiction—that there was no power to deal with that fund at all, inasmuch as the power of the judge is limited by the section which I have read to a settlement and to property settled; and that, this father coming as next-of-kin of his son, there was no property settled, and that, therefore, there is no jurisdiction to deal with it at all. That is one objection, and I will deal with that at once. The answer to that objection is this: The wording of the section is this, "may make such order with reference to the application of the whole or a portion of the property settled." The question therefore is, Is this property with respect to which you may make the order settled or not settled? At the time when the application was made there were two outstanding life interests in the fund, and obviously the fund was in the custody of the trustees for the purpose of the settlement and of giving the two successive life tenants the benefit of the life interest to which they were entitled before the estate in remainder came into existence at all. One of those life estates had been extinguished under this order. That was an order dealing with settled property. There was no mistake about that. Therefore there was clearly jurisdiction to make it.

Then it is said also that that is not an order which the court has jurisdiction to make, even dealing with the property as settled, because it affects the interests of the children, and that, rightly understood, the words that I have read in this section, though they do enable the court to annihilate, or diminish, or vary the interest of the delinquent parent in the subject-matter of the settlement, do not allow the court to diminish or annul the interest of the children. It is not necessary to decide that point here. I cannot say that I have been much influenced by the argument upon which it was based, nor do I think that the authority that was most relied upon as supporting it—namely, *Crisp* v. *Crisp*, when fairly construed, goes to that extent, or anything like it. But I do not think it necessary to deal with that point on the decision of this case, because I think the order here certainly ought to be to vary the settlement by extinguishing the life interest of the father and any beneficial interest of the father as next-of-kin of his deceased son. That order, which will give effect to all that is really necessary to carry out the intention of the learned judge, gets rid of any difficulty or any possible difficulty as to want of jurisdiction to deal with the interest of the son.

There were two points relied upon—namely, that there was no jurisdiction at all, because this was not settled property, and that if there was jurisdiction to deal with it as settled property, there was, nevertheless, a want of jurisdiction to in any way affect or diminish the interest of a child. It seems to me that both those points fail, and that the order that I have stated, and which my brother Stirling first suggested, is the proper order that ought to be made, and gets rid of any possible difficulty in this matter.

Therefore, in my judgment, the appeal ought to be dismissed.

STIRLING, L.J.—I am of the same opinion. The section gives the court power "to make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as the court shall think fit." The first question which is to be considered is whether there is here property settled within the meaning of the section. Prior to the making of this order which is appealed from the property stood limited thus: Upon trust for the wife during her life, then for the husband during his life, and then for the only child of the marriage, who had died intestate. In point of fact, no representation has yet been taken out to the son; he has no legal personal representative; but the sole next-of-kin was his father, the husband, in this particular case.

Now, in that state of things, it seems to me that there was property settled. There were two subsisting life interests before you come to the reversion which belonged to the legal personal representative of the son; and the words of the section seem to me ample to give the court power to deal with it as settled property. But then this is also said, that the court in dealing with property settled will not so deal with it as to deprive any person of a vested interest under the settlement, not being, of course, either the husband or wife, one of whom must necessarily be a guilty party. It certainly is a very strong thing to confer a power on any court to alter vested interests in property; and there appears from the reported cases to have been a strong objection on the part of the judges of this court to deal with property in such a way as to disturb vested interests. But none of the cases which have been cited go to the length, as it appears to me, of saying that there is no jurisdiction to do it. The case which was most relied upon is that of *Crisp* v. *Crisp*, but what the learned judge held there as being beyond the power of the court was not to modify the interests under the settlement, but to extinguish it altogether; and, if I may respectfully say so, I entirely agree. It appears to me, that except so far as the court, in the exercise of the jurisdiction conferred upon it, sees fit to alter the provisions of the settlement for the benefit either of of children of the marriage or for one or other of the parents, the settlement must remain, and that the court has no power to extinguish it. The result of the cases appears to me to be correctly summed up by the President in the case to which we have been referred of *Whitton* v. *Whitton*. There the President says: "I am clear I have jurisdiction to do so"—that is, to alter a vested interest—"and I think no case has ever thrown doubt on that; the case of *Pollard* v. *Pollard* certainly does not throw doubt on the jurisdiction, but one has in those cases to consider what is really for the benefit of the children, because I think the authorities show that nothing must be done that on the whole would

be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children being innocent parties ought not to have their interests injuriously affected by the conduct of either of their parents." Here we are not prejudicing a child. The order which has been made does not affect the child. The child is dead. The beneficial interest has, by reason of the death of the child, become vested in the husband, and it is only that interest so derived from the child that is proposed to be affected as the order has been modified. It seems to me that that is not open to the objection which is pointed out by the President in *Whitton* v. *Whitton*, but is within the powers of the court.

I think that the order ought to be modified so as to provide that the settlement be varied by extinguishing all the rights, powers, and interests of the appellant, including any beneficial derivative interest as next-of-kin of his son, in, concerning, or over the whole or any part of the capital and income of the settled funds; so that when the legal personal representative is appointed to the son such application may be made to the trustees as to the parties may seem right; but nothing ought to prejudice the rights of any persons deriving title from the son, whether they be mortgagees, or assigns, or creditors, or any other person except the father.

COZENS-HARDY, L.J.—I entirely agree. It was argued here, although it was not argued in the court below, that this was not settled property. It seems to me that a property is none the less settled because all the persons beneficially interested may be *sui juris* and capable together of dealing with it. Then, assuming it to be settled property, I desire to express my entire agreement with the view of Barnes, J., and Collins, M.R., and Stirling, L.J., as to the jurisdiction of the court to extinguish, in a proper case, an interest, although vested, of a child. In the present case, I do not think it is necessary for us, really, to consider that, because the order, as proposed to be altered, merely affects the interest of the husband, the guilty party. It affects his own original life interest, and it affects such interest as he has beneficially as sole next-of-kin of the deceased son. Administration, of course, will have to be taken out, and then one other possible difficulty may very easily be got over—that, if the wife should marry again, she has, according to the settlement, a certain power of appointing a life interest in favour of a second husband and appointing half of the fund in favour of the children of the second marriage; but that is a power which she can release, and when that is done and administration is taken out, there will be no difficulty.

Solicitors, *Valpy, Peckham, & Chaplin; C. Russell.*

From Chan. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 26.

NEAVERSON v. PETERBOROUGH RURAL DISTRICT COUNCIL. (*a.*)

Inclosure—Private road—Pasturage—Ownership of soil—User in excess of award—Prescription—Presumption of lost grant.

By an award made under an Inclosure Act of 1812, *which was passed for the draining, inclosing, and improving of a district of fen country, it was provided that all the herbage which should from time to time grow upon all the private roads therein set out should belong to and be the property of the surveyor of highways for the time being, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever.*

The plaintiff was the occupier of a farm, allotted under the award, adjoining a private road. Since 1846 *the pasturage of this private road, along with other roads, had been let annually, pursuant to directions given at public vestry meetings, without any restriction providing for depasturing sheep only. In an action by the plaintiff against the rural district council (the successors of the surveyor of highways) complaining of their having let the road for the depasturing of cattle and horses,*

Held, that, inasmuch as the restriction of pasturage to sheep was part of a permanent scheme for the drainage of a large area of land, and was intended for the benefit of the public and not only of the owners of land adjoining the road, any grant of a right to depasture cattle or horses on the road would have been illegal; and, therefore, the court ought not to presume a lost grant of any such right.

Judgment of Cozens-Hardy, J. (49 *W. R.* 154, [1901] 1 *Ch.* 22), *reversed.*

Appeal by the plaintiff from a judgment of Cozens-Hardy, J. (49 W. R. 154, [1901] 1 Ch. 22).

The action was brought for an injunction to restrain the defendants from grazing or depasturing horses, cattle, or stock other than sound and healthy sheep in or upon a private road called Moor-road, in the parish of Newborough, contrary to the provisions of the Newborough Inclosure Act, 1812, and an award made thereunder, and for damages.

By the Newborough Inclosure Act (52 Geo. 3, c. cxliii.), which was intituled "An Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton, and for forming the same into a parish to be called Newborough, and for building and endowing a church for such parish," the Borough Fen Common and the Four Hundred Acre Common were dealt with substantially in the manner usually adopted in Inclosure Acts. Commissioners were appointed, who were directed (*inter alia*) to set out certain roads, and it was enacted by section 21 that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. By section 24 one-twentieth part of the land was to be allotted to the lord of the manor in respect of his right to the soil, and by section 27 such allotment was to be had and taken in lieu full bar and compensation for all right of soil in the said open common or waste land therein directed to be divided and inclosed. The award under this Act was made in 1822. It set out a large number of roads, public and private, amongst others "one private carriage, bridle, and drift road and footpath distinguished by the name of Moor-road of the breadth of 40ft."

By the award all private roads were to be kept in repair by and at the expense of the owners and proprietors of lands and estates on the Borough Fen Common and the Four Hundred Acre Common in such shares and proportions as they by law were or thereafter would be liable to contribute to the repair of the public roads.

The award provided that all the grass and herbage which should from time to time grow and arise upon all the private roads set out and thereinbefore awarded should belong to and be the property of the surveyor for the time being of the highways to be

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

appointed for the said common and waste land called the Borough Fen Common and the Four Hundred Acre Common, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that could be reasonably obtained for the same; and that such rent or rents should be annually paid and applied towards defraying the charges and expenses of maintaining and keeping in repair the said public and private roads.

The plaintiff was the occupier of a farm, allotted under the award, on one side of Moor-road, from which it was separated by a ditch, with a low hedge on the farm side of the ditch.

In 1899 the defendants, the Rural District Council of Peterborough, who were the successors of the surveyor of the highways, let Moor-road by auction to the defendant Vergette upon conditions of which the following alone are material: "4. That not more than six horses nor more than twelve beasts shall be allowed to graze on any road at one time, under a penalty of 5s. for every head of stock above the number, and if any stock be found on any of the roads without a tender, such stock shall be deemed trespassers, and be impounded accordingly. 5. That no swine or geese shall be allowed to graze on any of the said roads. 6. That if any scabbed sheep or diseased or entire cattle be found grazing upon any of the said roads or highways, the owner thereof shall forfeit and pay to the District Council of Peterborough the sum of 10s. for every such animal."

The defendant Vergette turned horses and cattle in excess of the prescribed number into Moor-road, and without a tender.

The plaintiff claimed an injunction and damages on the ground that he was by the award bound to maintain the ditch and fence between his farm and the road, and that by reason of cattle and horses being allowed to graze on the road, the banks of the ditch were broken down, and the flow of water in the ditch obstructed, and the cost of cleaning the same increased, and that damage had been caused by horses and cattle breaking through the plaintiff's hedge and eating grass and corn in the fields adjacent to the road.

The defendant Vergette paid 40s. damages, and the action was discontinued against him.

The defendant council paid 40s. into court with a denial of liability.

The evidence showed that at least since 1846 the roads, including Moor-road, had been let by public auction year by year pursuant to directions given at public vestry meetings without any restriction providing for depasturing sheep only. On the contrary, the conditions generally provided a limit as to the number of cattle or horses which might be grazed upon Moor-road.

Cozens-Hardy, J., was of opinion that he might presume a lost grant by the owners of the soil of the road, by virtue of which the surveyors of highways were released from the restrictions imposed by the award as to the mode of grazing, and on that ground he gave judgment for the defendants.

The plaintiff appealed.

Rawlins, K.C., and *Percival*, for the plaintiff.

Eve, K.C., and *Schiller*, for the defendants.

COLLINS, M.R.—This is an action for an injunction to restrain the defendants from depasturing horses, cattle, or stock other than sound and healthy sheep on a private road, on which the plaintiff's farm fronts, and for damages. The defence is that the road in question was and is a private road which was laid out under an Inclosure Act and an award, and that the herbage on all the private roads so laid out became by virtue of the Act and the award the property of the surveyor of highways, and that the defendants, the Rural District Council of Peterborough, as the successors to the surveyor of highways, have by themselves or their tenants enjoyed the right to depasture upon the said herbage sheep, stock, horses, and cattle of all kinds for a period of over sixty years or alternatively for a period over twenty years. The defence must be taken to mean that it must be presumed that a grant of the right of grazing the herbage was made by someone to the surveyor, and that under that grant the surveyor had let the herbage for the purpose of depasturing cattle and horses as well as sheep.

The question shortly is this. The Act of Parliament, which provides for the inclosure and drainage of a district, contains provisions limiting the pasturage on roads laid out under the Act in an area called the Foreland to sheep, and it also contained a provision that the herbage on the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. By the award made by the commissioners it was provided that the herbage on all the private roads should belong to and be the property of the surveyor of highways, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever. The question is whether, in view of the provisions of the Act of Parliament and the award, it would have been legally possible for anyone to grant to the surveyor the right to let the herbage on the private road in question freed from that limitation. Evidence has been given to show that for a long period the herbage on the private roads has been let for the pasturage of cattle and horses. Can proof of that be evidence of a grant which could have a legal origin? If such a grant could not have a legal origin, then it is not for us to presume its existence. If, on the other hand, there could be a legal origin for such a grant as that which is suggested, then, no doubt, according to a well-established principle, we ought to presume it when there is evidence of user for a long period. Such a presumption, however, is more difficult to make where the number of persons who are supposed to have given the grant is large and the period within which it is supposed to have been given is short.

The Act is called "an act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish to be called Newborough; and for building and endowing a church for such parish." It does not, like ordinary Inclosure Acts, merely deal with the rights of persons having an interest in common land, and provide for dividing those lands among such persons in severalty, but it is primarily a scheme for the drainage of a large area of land which was then fen land. Both the recitals and the sections of the Act show that it was intended by Parliament to be a permanent scheme for the drainage of a large area of land, and of that as part of a much larger area—viz., the area called the North Level, which is part of the Great Level of the Fens called the Bedford Level. The object was the complete and systematic drainage of a district right down to the sea. The Act, after providing for the setting out and allotting of a certain foreland and the setting out of roads across it, and after providing that sheep only should be allowed to pasture on those roads, proceeded to provide for the setting out of other public and private roads, and by section 21 it said that the herbage of those public and private roads should belong to and be the property of

the person or persons to whom the commissioners should allot and award the same. And in connection with this it is important to notice that the provisions of the Act for the preservation of the drainage system are in the interest of the public, and not only of the allottees. The award, which was made in 1822, provided that the herbage of certain of the public and private roads, including the road in question, should belong to and be the property of the surveyor of highways, but he was only to use it for definite purposes—viz., to let it annually for the depasturing of sound and healthy sheep, and of no other cattle or stock whatever. The reason that some parts were to be depastured by sheep only was, no doubt, because cattle might become a serious nuisance to the maintenance of the drainage by trampling down the dykes.

It appears from the award that at the time when it was made the fences between this road and the allotments had been already made; and I think the provision which excluded stock other than sheep was intended to be ancillary to the main object of the Act, and not a mere temporary provision relating only to a time while the fences were growing up. I do not think that, in the face of that provision in the award, it would have been competent for the owners of the soil of this road or for anyone to grant the right of depasturing cattle or horses on it; for such a grant would have been contrary to the purpose of the Act as being an interference with the drainage of the district. It was argued that the provision limiting the right of pasturage was meant to be for the benefit of the persons who owned the land adjoining the particular road, and that, as it was for their benefit, they could waive it. And, secondly, it was said that it was a temporary provision intended only to apply during the time that the fences were growing, and that it did not really negative the right to put horses and cattle on the road. For the reasons already stated, I think that the limitation was intended to be for the public benefit, and was not intended to be merely temporary, and I think we cannot infer from the Act that it was introduced merely for the purpose of benefiting the adjoining owners. We were pressed with the case of *Haigh* v. *West*, 41 W. R. 87, [1893] 2 Q. B. 19. In that case, however, the Act and the award were very special and did not deal with fen country at all, and the provision in question was construed as limited to the time before the general scheme came into operation. Here the limitation came after the general scheme had been carried out. In my opinion, the provision for excluding cattle from the herbage of the roads was intended to be one of the principal matters of the scheme. I think therefore that the suggested grant would have been illegal, and we cannot, when we are seeking to find a legal origin to justify an existing practice, rely on an illegal origin.

It is difficult to say who could have been the grantors or the grantee. It is suggested that a grant to the surveyor of highways may be inferred. There is a difficulty as to that, as the surveyor of highways is not a corporation. But the difficulty as to the grantors is greater. It is suggested that the grantors were the owners of the soil adjoining the road. But the condition limiting the right of pasturage was not introduced for their benefit, and they could not waive it. If they enlarged the right, they did what was illegal. Then it is suggested that the grantors were the inhabitants of the parish. But neither could they, even if they were all of one mind, rightly assent to an illegal act. The presumption of a lost grant, therefore, cannot avail the defendants. If we were to presume anything it must be a lost Act of Parliament. The award, however, did not come into operation till 1822, and it seems to me to be impossible to infer that an Act of Parliament passed after 1822 has been lost since then. In my opinion the plaintiff is entitled to judgment for the damages which have been agreed to be sufficient, though it does not seem to be a case for an injunction. The appeal must therefore be allowed.

ROMER and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Clarke, Rawlins, & Co.*, for *Percival & Sons*, Peterborough.

Solicitor for the defendants, *J. Matthew Voss*, for *J. W. Buckle*, Peterborough.

High Court of Justice.

Chan. Div. Byrne, J. } April 29.

DUDER *v.* AMSTERDAMSCH TRUSTEES KANTOOR. (*a.*)

Practice—Writ—Service out of jurisdiction—Debenture deed—Foreign assets—Necessary or proper party to an action—R. S. C., ord. 11, *r.* 1 (g).

In an action where the court has jurisdiction to grant the relief asked, service of the writ on persons outside the jurisdiction who are necessary and proper parties to the action will be allowed.

Motions.

These were two cross-motions in an action brought by a foreign firm, of which one of the partners, a Mr. George H. Duder, was resident in England, for a declaration that under two deeds, dated the 13th of July, 1899, and the 21st of August, 1900, they, or some of them, were entitled to a charge upon certain freehold hereditaments and other property situate in Brazil comprised in a debenture trust deed bearing date the 25th of September, 1894, and upon the undertaking of the Bahia Central Sugar Factories (Limited) and all its assets present and future for securing moneys due, for an account, for enforcement of the charge by foreclosure or sale, and a receiver. The defendants to the action were the Amsterdamsch Trustees Kantoor (a Dutch company having no place of business nor assets in England), who were sued as trustees under the above-mentioned deed of the 25th of September, 1894, Swales and Campbell as receivers under the same deed, and the Bahia Co. (Limited) an English company having property and a business in Brazil.

The facts of the case were as follow: By the debenture deed of the 25th of September, 1894, aforesaid, a deed made in English form, the defendants, the Amsterdamsch Trustees Kantoor, purported to convey certain freehold hereditaments in the state of Bahia, in Brazil, to the use of trustees in fee simple and to assign to them the benefit of a Brazilian Government guarantee.

The deed contained provisions whereby the company agreed to do all such things as would be necessary to give effect to the deed according to Brazilian law. The deed also provided that the mortgage debentures should constitute a first fixed charge on all the property. It enabled the trustees in certain events (one or more of which had taken place) to enter into possession of and to sell and convert the premises, and until sale to carry on the whole or any part of the business, and for such pur-

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

pose to procure advances at a rate not exceeding 10 per cent. by mortgage or charge in priority to or subsequent to the debentures or otherwise. The trustees were empowered to appoint receivers with large powers, including the power to sell and other powers above mentioned. All moneys to arise under these powers were by the deed, so far as Brazilian law allowed, to be held by the trustees or the receivers subject to the repayment made or arranged by the trustees on the trusts therein mentioned, and the deed further provided that the deed was intended to operate as an English contract to be construed according to English law. The debentures purported to charge all the undertaking of the company, and all its assets both present and future as a first charge.

The defendants Swale and Campbell who were resident in England, were appointed receivers under the trust deed, and by an indenture bearing date the 13th of July, 1899, made between the trustees of the first part, the receivers of the second part, and G. H. Duder the elder, since deceased, a member of the plaintiff's firm, being supplemental to the indenture of the 25th of September, 1894, after reciting that for the purpose of carrying on the business of the company the trustees and receivers had entered into the agreement therein contained, it was agreed that the said G. H. Duder would provide £2,000 as thereinafter mentioned, and pay it to the credit of the receivers at a named bank.

There were also provisions for interest, for G. H. Duder financing the company for the crops of 1899 and 1900, advancing the necessary amounts for working expenses and payments, to include the £2,000.

By clause 5 of this indenture G. H. Duder was appointed agent of the receivers for the management of the crops and to have the sole privilege of selling produce and receiving the net proceeds, and at the end of the crop to pay to the receivers or to their order the profits that might be made, or should there be a loss such loss was to be a charge upon the factories and other assets of the company in favour of the said G. H. Duder in priority to the first or other debenture-holders, and interest was to be calculated and settled quarterly at the rate of 10 per cent. per annum.

By clause 9 it was provided as follows: "All moneys payable or due hereunder to or on account of the said G. H. Duder shall be and are hereby charged upon all the mortgaged premises as defined by the principal indenture, and all the undertaking of the company and all its assets both present and future, such charge to rank in priority to the principal moneys and interest secured by principal indenture or the mortgagee's debentures as defined by the same indenture."

By deed dated the 21st of August, 1900, made between the defendants, the said trustees of the first part, the defendant and the receiver of the second part, and G. H. Duder, described as a partner of and for the purposes of that deed, representing the plaintiff firm of the third part, such deed being described as supplemental to the deed of the 25th of September, 1894, after reciting that for the purpose of carrying on the business of the defendant company the trustees and receivers had entered into the agreements with the plaintiff firm thereinafter contained, it was agreed that the plaintiff firm undertook to continue to finance the company for the crop 1900 and 1901, advancing the further necessary amounts for working expenses and in payment of sugar canes. All such advances to be placed to the debit of the receivers. The deed contained other provisions similar to those contained in the last-mentioned deed, and by clause 5 it was agreed that all moneys payable or due hereunder to or on account of the said G. H. Duder in respect of advances made by them for account of the company since they took over the business of the said G. H. Duder, deceased; and advances to be made by them should be, and the same were thereby charged upon all the mortgaged premises as defined by and all the undertaking of the company and all its assets both present and future, such a charge to rank in priority to the principal moneys and interest secured by the principal indenture or the mortgage debenture as defined by the same indenture, but subject to the claims, if any, of the said G. H. Duder, deceased, under the said indenture of the 13th of July, 1899.

The plaintiffs moved for the appointment of a receiver of the assets comprised in the debenture deed. The first defendants, the said trustees, moved to set aside the writ, to which they had appeared under protest, by consent, as if leave had been given to serve the writ out of the jurisdiction.

Levett, K.C., and *Stokes*, for the defendant trustees.—There is no authority for the court to allow service of the writ against the first defendants, or to act *in personam* against them. They have no property or place of business within the jurisdiction, and the subject-matter of the action relates only to property situate in Brazil, and can only be dealt with by a court in that country.

Rowden, K.C., and *M. Romer*, for the plaintiffs.—As the indenture creating the charge has been made between persons in this country in respect of land abroad the court has the same jurisdiction as if the land were situate in England. These defendants were proper parties to an action properly brought against other persons within the jurisdiction.

Levett, K.C., replied.

The arguments will be found further summarized, with the authorities, in the judgment.

BYRNE, J.—In this case there are cross-motions, one by the defendants, the Amsterdamsch Trustees Kantoor, a Dutch company incorporated according to the laws of Holland, having no place of business or assets in England, to set aside the writ to which they have appeared, saving their rights; and the other by the plaintiffs for the appointment of a receiver.

It was agreed that the defendants' motion ought to be dealt with as though leave had been given to serve notice of the writ abroad (which would have been the ordinary method of procedure), and as if this was an application to discharge such an order. I think that the case falls within the terms of ord. 11, r. 1 (*g*), as the defendants, the applicants in the first motion, are necessary or proper parties to an action properly brought against other parties properly served within the jurisdiction; but, nevertheless, the applicants on the second motion—*i.e.*, the plaintiffs, ought not to succeed, if, as is contended, the court has no jurisdiction to grant the relief asked for in the action. The substantial points taken on behalf of the defendant applicants are that they are a Dutch company having no place of business or assets in England, that the action relates exclusively to immovable and movable property in the Republic of Brazil or elsewhere out of the jurisdiction, and that the rights sought to be enforced can only be determined and enforced by the courts of Brazil. [His lordship stated the facts, and continued:] If the defendants, the Amsterdamsch Trustees Kantoor, were resident in England I should entertain no doubt that the plaintiffs would be entitled to enforce their equitable charge against them, although the security were proved to have no operation in Brazil. The case of *Ex parte Pollard*, Mont. & Ch. 239, is in point.

In that case an equitable mortgage was given in English form of lands in Scotland by memorandum and deposit of Scotch title deeds. The mortgagors were partners, who carried on a business in England and Scotland, and they subsequently became bankrupts. It was proved that by the law of Scotland no lien or equitable charge was created by the deposit or memorandum in question. The creditor sought to establish his right to be treated as having a charge in the bankruptcy, and Lord Cottenham, L.C., upon appeal, upheld his contention.

In *The British South Africa Co.* v. *The Companhia de Moçambique*, [1893] A. C. 602 (a case having reference to an action to recover damages for a trespass to land situate abroad, where it was decided that no jurisdiction exists), Lord Herschell says, at p. 626, "Whilst courts of equity have never claimed to act directly upon lands situate abroad they have purported to act upon the conscience of persons living here." In *Cranstoun* v. *Johnston*, 3 Ves. 170, at p. 182, Sir R. P. Arden, M.R., said, "*Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp* and *Lord Kildare* v. *Eustace*, 1 Eq. Cas. Abr. 133, 1 Vern. 75, 135, 419, clearly show that with regard to any contract made or executed between persons in this country respecting lands in a foreign country, particularly in the British dominions, the court will hold the same jurisdiction as if they were situate in England." The case of *Norris* v. *Chambres*, 9 W. R. 259, 29 Beav. 246, affirmed on appeal 9 W. R. 794, 3 De G. F. & J. 584, which was relied upon on behalf of the applicant defendants, appears to me to fall within another class of authorities, being the case of an attempt to sue when the relief sought was not founded upon any contract or privity of contract between the plaintiff and defendant.

But it is argued that there is no precedent or authority for the exercise of the jurisdiction *in personam* unless against persons actually within this country, and that to allow service of notice of the writ upon a foreigner resident abroad, and thus to act *in personam* against him, would in effect be to enlarge or extend the jurisdiction of the court in a manner not authorized by principle or authority. It has been several times laid down that the rules under the Judicature Acts are rules of procedure only, not affecting and not intended to affect the rights of parties. [His lordship referred to the observations of Lord Herschell in *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C., at p. 628.] In *Drummond* v. *Drummond*, 15 W. R. 267, L. R. 2 Ch. App. 32, it was held that the court had power under the old consolidated orders to order service of the copy of a bill on the defendant, who was an English subject resident in Germany, although the nature of the suit was not such as to bring it within the provisions of the Acts 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82. Turner, L.J., says at L. R. 2 Ch. App., at p. 46: "The question in this case, as I view it, is not against whom or under what circumstances or in relation to what property, the Legislature of a country may be justified in authorizing the process of its courts to be served out of the jurisdiction of those courts, but whether the Legislature of this country has not in fact authorized the process of this court to be so served." The nature of the action in that case was, as appears from the report of the case in the court below, 14 W. R. 829, L. R. 2 Eq. 335, one having no relation to any property in England, but was to enforce a claim depending on Scotch law and to obtain a release of the Scotch lands from a charge. In the present case the service is authorized by the terms of the rule I have referred to, and I consider that to allow service in accordance with that rule is not to extend the jurisdiction, but to enable the old jurisdiction to be exercised in a case where at one time it could not have been exercised owing to the defective rules of procedure.

The important case of *Bawtree* v. *Great North-West Central Railway Co.* (which I am surprised to find reported only in 14 Times L. R. 448) is, I think, in point, and I do not consider the suggested distinction between that case and the present—viz., that there the validity of a charge on land in Canada was *sub judice* in Canada, while in the present case it is admitted that there is no subsisting charge by Brazilian law on the land in Brazil, is sufficient to differentiate the cases; as I understand the evidence about the Brazilian law, the plaintiffs, if they can so far establish their claim in England upon the contract, hope to be able to complete their title in Brazil also, and I see no reason why they should be prevented from endeavouring so to complete it.

One singular circumstance about the case is that the Amsterdamsch Trustees Kantoor are parties to an action brought by the first debenture-holders in which judgment was given directing amongst other inquiries an inquiry what other circumstances affect the property comprised in or charged by the deed of the 25th of September, 1894, and by another deed dated the 8th of June, 1897; and which directed an account of what was due to other incumbrancers, and an inquiry what were the priorities of such other incumbrances under the said indentures of the 25th of September, 1894, and the 8th of June, 1897, and the first and second mortgage debentures respectively; and what property other than that comprised in the said indentures and debentures respectively was comprised in such other incumbrances. That judgment has been or will be in due course served upon the plaintiffs in the present action, who can either come in and attend the inquiries, or stand loof from those proceedings altogether, relying on their claim to a prior charge and to their remedies in respect of it. At present they consider it more to their interest, and perhaps rightly, to insist on their rights outside the debenture-holders' action, and they ask for the appointment of a receiver. I think that they have made out a *primâ facie* right to a prior charge as against the defendants by virtue of their English contract, although there may be reasonable controversy, both as to the extent of property to which it relates and as to the amount due upon it. Under these circumstances I think that they are entitled to the appointment of a receiver as to so much of the property as is clearly within their contract; but it would probably be so inconvenient and detrimental to the property to appoint a separate receiver that I think it will be right to appoint the defendants Swale and Campbell to act as receivers for the plaintiffs in this action if they are willing to do so.

The motion of the defendants must be dismissed with costs and the costs of the plaintiffs' motion will be costs in the action.

Solicitors, *Sutton, Ommanney, & Rendall; Lyne & Holman.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — April 23.

STOKES (*Appellant*) v. MITCHESON (*Respondent*). (*a.*)

Mine — Coal mine — Rules — Enforcement by agent — Breach—Coal Mines Regulation Act, 1887 (50 & 51

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Vict. c. 58), s. 49, r. 1; s. 50—Inspector of mines—Dismissal of information—"Person aggrieved"—"Either party"—Summary Jurisdiction Acts, 1857 (20 & 21 *Vict. c.* 43, *s.* 2) *and* 1879 (42 & 43 *Vict. c.* 49, *s.* 33).

An information laid by an inspector of coal mines against the agent of a certain coal mine for an offence against the Coal Mines Regulation Act, 1887, *was dismissed, and on his application the justices stated a case, which purported to be stated under section* 33 *of the Summary Jurisdiction Act,* 1879.

When the case came up for argument a preliminary objection was taken by the respondent that the inspector was not a "person aggrieved" within the meaning of section 33.

Held, that the case must be taken to have been stated under section 2 *of the Summary Jurisdiction Act,* 1857, *and under section* 33 *of the Act of* 1879, *read together, the earlier of which Acts provides that "either party" may apply to have a case stated.*

Held, also, that the justices were right in refusing to convict the agent of the mine for failing to cause adequate ventilation to be provided in the mine.

This was an appeal from the dismissal of the justices of Tamworth of an information under the Coal Mines Regulation Act, 1887, s 49, r. 1, for failing to cause an adequate amount of ventilation to be constantly produced in the mine, contrary to section 50 of that Act, which provides that in the event of contravention of the general rules in the Act by any person the owner, agent, or manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the rules to prevent such contravention. Before the justices the evidence for the prosecution consisted only of the evidence of Hewitt, the assistant inspector, and was to the effect that he had found, when visiting the mine on the 1st of November, 1901, an accumulation of gas in a certain heading, and no sufficient ventilation, and that no entry of the gas was made in the report-book. He also proved admissions by the manager and the under-manager, which showed that the non-ventilation had been going on for several days previously, during which period the heading had been fenced off, but not so as to prevent the escape of gas.

The justices considered that such admissions were not evidence against the respondent, and with regard to him they only considered the state of things on the 1st of November.

With that limitation they considered that there was evidence of want of ventilation on that day amounting to a violation of the general rules for which the manager and under-manager were responsible, but the respondent, who was the agent of the mine, they thought was not proved to have committed an offence under the Act. They accordingly convicted the manager and the under-manager, but dismissed the information preferred against the respondent.

The inspector of mines thereupon asked the justices to state a case, which they did under powers given by section 33 of the Summary Jurisdiction Act, 1879.

B. C. Brough, for the respondent, raised the preliminary objection to the appeal being heard that the appellant being one of his Majesty's inspectors of mines was not a "person aggrieved" within the meaning of those words in section 33 of the Summary Jurisdiction Act, 1879. The point had been taken but not decided in *Stokes* v. *Checkland*, 68 L. T. Rep. 457, 41 W. R. Dig. 141, and the decision in *Reg.* v. *Justices of London*, 39 W. R. 11, 25 Q.B. D. 357, was in his favour.

Sutton, for the appellant.—Whether the objection raised by the respondent be well founded or not is really immaterial because the justices could have stated the case equally well under the powers given them by section 2 of the Act of 1857 (20 & 21 Vict. c. 43), which provided that "either party" might apply to the justices. The two Acts must be read together. "Person aggrieved" in the later Act was only a general term including those who in the previous Act had been given a right to appeal and also possibly covering cases where this court might be willing to hear a person who though not a party to the proceedings before the justices was able to show that he was adversely affected by the order.

B. C. Brough, in reply, relied on the fact that the case was expressly said to have been stated under the Act of 1879. If it had been stated under the Act of 1857 his objection would not have applied.

THE COURT decided to hear the appeal argued on its merits.

The case, after setting forth the facts already mentioned, stated that the justices, considered that the charge was not proved against the respondent on the following grounds: (*a*) The manager was primarily responsible for the conduct of the mine; (*b*) no evidence was given of the personal negligence of the respondent. The evidence showed that the violation of the rules took place by the negligence of the manager and under-manager. (*c*) No evidence was given of the publication of the rules; but the justices considered that the respondent had taken the proper steps to enforce the rules by appointing a duly-qualified manager and under-manager who knew the rules, and whose duty it was to carry them out without further interference from him. The violation of the rules was therefore in no way caused by the respondent omitting to enforce the rules. (*d*) As against the respondent only an occasional irregularity had been proved and not one which had been continuous. The question for the court was whether in view of sections 50 of the Coal Mines Regulation Act, 1887, the justices were justified in dismissing the charge against the respondent.

Sutton, for the appellant.—The justices ought to have convicted the respondent because there is no evidence that he brought himself within the saving clause at the end of section 50. All the prosecution has to do is to show a *primâ facie* case of negligence, and the onus is then cast on the respondent: *Wynne* v. *Forrester*, 27 W. R. 820, 5 C. P. D. 361.

Counsel for the respondent were not called on.

Lord ALVERSTONE, L.C.J., in giving judgment, said: In my opinion the preliminary objection taken to the hearing of this appeal by us is one of no substance, because I do not think that the Act of 1879 was ever intended to cut down the rights of the parties to apply for a case to be stated. Mr. Brough, for the respondent, suggested—I do not think it can be said that he put it higher than that—that as the justices had headed the case to the effect that it was stated by them under the Act of 1879, and as the "person aggrieved" in that Act did not include an unsuccessful prosecutor, the appeal could not lie. It seems to me that the point taken by the learned counsel might possibly, had it been taken before the justices, have raised the question whether the inspector had the right here to ask for a case under section 33 of that Act to be stated, and the justices might have submitted the point for the decision of the High

Court. But clearly the inspector is a person who was a party within the Act of 1857, and although this case could not have been stated by the justices under the later Act, it could clearly have been stated by them under the former Act. As I have said during the argument, it is clear that the two Acts must be read together, and therefore the justices had power to state the case, and the omission to include the earlier Act in the head-line is one that really does not affect the question. Having, therefore, decided that the inspector had a right to have a case stated, this court is entitled to entertain the appeal.

On its merits Mr. Sutton contended that the respondent had not discharged the onus that was upon him, and he said that whenever a prosecution made a *primâ facie* case of negligence against an inspector of mines, he must show that he came within the saving clause of section 50, and to do that he ought to have gone into the box and given evidence to clear himself. Now that section enacts that in the event of contravention of the general rules in the Act by any person, the owner, agent, and manager shall each be guilty of an offence against the Act unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the rules to prevent such contravention. Now what was the evidence. It was said that informations for a similar offence had been laid against the manager and under-manager, who were to be certified. For the prosecution it was said by Hewitt, the assistant inspector, that he found an accumulation of gas in a certain heading and no sufficient ventilation, and that no entry of the gas was found in the report-book. He also proved admissions by the manager and the under-manager which showed that the non-ventilation had been going on for days, but the justices considered that such admissions were not evidence against the report. With that limitation they considered that there was evidence of want of ventilation amounting to a violation of the general rules. The justices convicted the manager and the under-manager. The respondent was personally present at the hearing, but his advocate called no witnesses and there was no evidence of any visits to the mine by him. In my opinion it could not be contended by Mr. Sutton with success that the respondent here had not met the onus which he said the information cast on him merely because he had not given evidence. It cannot be said that the person charged must be called. Such a suggestion is negatived in *Baker* v. *Carter*, 26 W.R. 497, 3 Ex. D.132. Counsel for the prosecution had not pressed the point as to the rules not being published. But it was said that there was a different rule as to onus of proof in the case of a mine agent from that of a mine owner. It seems to me that there are agents and agents; and there might be an owner who had taken such a part that he had some duties cast upon him usually cast upon agents or managers. For us to hold that the justices must convict the agent in respect of an offence found to be due to the negligence on a single occasion of the manager seems to me to be going a great deal further than the court ought to go. Here we have only to say whether the justices could have come to the conclusion they did on the facts before them, and in my judgment the court would be wrong if it interfered with the justices' decision, as there is ample evidence to support it.

DARLING and CHANNELL, JJ., concurred.

Solicitor for the appellant, *Solicitor to Treasury*.

Solicitors for the respondent, *Sharpe, Parker, & Co.*, for *V. H. Jackson*, Hanley.

K. B. Div. (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — March 13, 17.

REX *v.* FRENCH AND OTHERS.
Ex parte ROBERTS. (*a.*)

Justices—Jurisdiction—Summary conviction on charge of assault—Question as to title to land—Offences Against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 46.

By section 46 of the Offences Against the Person Act, 1861, *it is provided that nothing therein contained "shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any land, tenements, or hereditaments, or any interest therein or accruing therefrom."*

Where one commoner commits an assault upon another commoner for an alleged improper use by the latter of his right of common, and no question arises as to title to the common or any interest therein or accruing therefrom, the jurisdiction to hear and determine the case of assault is not ousted by the above proviso.

The words "title to" govern not only the words "lands, tenements, or hereditaments," but also the words "any interest therein or accruing therefrom."

In this case a rule *nisi* for a writ of *certiorari* had been obtained to bring up and quash a conviction by justices of Suffolk of W. M. Roberts for an assault committed by him on one Freeman.

The following facts appear from the affidavits on which the rule *nisi* was granted:

Both Freeman and Roberts enjoyed common rights over Aspall Green, and before the magistrates it was stated in evidence that Freeman had for forty years carted produce to his farm over the green in question, and up to the time the assault was committed no dispute had arisen as to who enjoyed the common rights as between the parties.

It appeared that Freeman was leading a horse and tumbril laden with turnips across the green when Roberts came riding up, shouting, "Get off the grass." That was the first intimation that Freeman received that Roberts objected to his using the green for carting. Freeman did not get off the grass, but continued leading his horse and tumbril towards his farm. Roberts then rode right up to Freeman and hit him across the back and head with a hunting whip.

Prior to the assault no dispute had ever taken place between Freeman and Roberts as to their common rights, and previous to the day of the assault, the 16th of November, he (Freeman) had used the common without let or hindrance for a great number of years.

During the hearing of the case, before the bench, the point was taken by counsel for the defendant that the jurisdiction of the magistrates was ousted by reason of the fact that there was a claim of right set up by Roberts, and further, that it was in relation to that claim of right that the assault complained of was committed.

After hearing counsel's argument on both sides, and after retiring to consider the evidence and the arguments of counsel, the justices decided there was no evidence before them that the assault, if any, had been committed in connection with any *bonâ fide* assertion by Roberts of his claim of right. Their reasons for so deciding were that it was not disputed by the complainant in the assault case that both he and the accused enjoyed common rights, but no evidence was tendered by the accused, or at all, to show that prior to the actual time at which the assault was committed any complaint had been made by him

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

of any alleged nuisance caused by the complainant or of any notice addressed to the complainant. As to the use of Aspall Green, evidence was given that both Freeman and Roberts during the two months prior to the assault had taken tumbrils laden with products across the green without complaint being addressed by either. The justices added that, although Roberts had alleged that the green was cut up and damaged, there was no confirmation of that, and there was no evidence that damage had been previously done in this way. Further, that there was no evidence that any notice of complaint had ever been addressed by Roberts to Freeman.

The justices therefore disallowed the objection and convicted the defendant.

This rule was thereupon obtained on behalf of the defendant.

Walter Stewart, for the complainant, showed cause against the rule.—The decision of the justices on the evidence before them was right. Both the complainant and defendant enjoyed rights of common over Aspall Green, and therefore the complainant was not a trespasser. Moreover, prior to the assault, no complaint had ever been made by the defendant of any improper use of the common by the complainant. No real question of title arose in this case. A mere frivolous claim of right does not take away the right of justices to deal with a case like this.

Horace Avory, K.C. (*W. Rowley Ellaston* with him), in support of the rule.—Section 46 of the Offences Against the Person Act, 1861, contains as follows: "Provided always, that nothing herein contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom. . . ." In the present case a question was raised as to title in land or as to an interest therein, and therefore the jurisdiction of the justices was ousted whether or not they think a *bonâ fide* claim was not raised. The justification set up for the assault was that the complainant was exceeding his rights as a commoner and was thereby causing damage to the defendant's interest in the land in respect of his right of pasture. On a claim as to title arising the justices cannot proceed to inquire into and determine by summary conviction any excess of force alleged to have been used in the assertion of title: *Reg.* v. *Pearson*, L. R 5 Q. B. 237, 18 W. R. Dig. 58. A commoner may remove by force anything that obstructs his enjoyment of the common: *Perry* v. *FitzHowe*, 8 Q. B. 757; *Davies* v. *Williams*. 16 Q. B. 546; and *Hall* v. *Harding*, 4 Burr. 2426. [DARLING, J., here referred to *Jones* v. *Jones*, 1 H. & C. 1, 11 W. R. Dig. 156, and *Reg.* v. *Cridland*, 5 W. R. 679, 7 E. & B. 853.] [Lord ALVERSTONE, L.C.J.—Does not the proviso to section 46 mean that there must be a question as to the title to the land or a question as to the title to any interest in the land accruing therefrom?] The meaning is that where there is a dispute as to land the jurisdiction is ousted.

Cur. adv. vult.

March 17.—Lord ALVERSTONE, L.C.J.—This was a rule *nisi* for a writ of *certiorari* to bring up and quash a conviction for assault, and the question was raised whether the justices had jurisdiction to entertain the matter on the ground that the proceedings came within the proviso of section 46 of the Offences Against the Person Act, 1861. Before I deal with that section it may be as well that I should state the facts. The complainant was J. G. Freeman, and Roberts was the defendant. Freeman and Roberts both had rights over a green at Aspall, and it appeared that, two or three days before the assault complained of took place, Freeman had been carting across this common in a way which Roberts objected to. It did not appear that Roberts had given Freeman any notice or raised any question against what he was doing until the day of the occurrence. On the day in question, Freeman was carting swedes across the green, and defendant, after some remonstrance—it did not appear what—assaulted the complainant by striking him with a riding-whip. The justices convicted the defendant, and came to the conclusion that the objection raised on behalf of the defendant, that the jurisdiction of the justices was ousted on the ground that the case raised a question as to an interest in land, was frivolous. Mr. Avory has argued that the question that had arisen was a *bonâ fide* claim of right, and I do not suggest that Mr. Avory was not right to a certain extent in contending the magistrates did not perfectly and clearly appreciate the difference between a question arising under the proviso to section 46 and a *bonâ fide* claim of right. It was not denied that the defendant might have been indicted for what happened, but it was argued by Mr. Avory that because the question as to the rights of common was connected with the assault the justices had no jurisdiction. I am of opinion the justices were quite right, and the point raised by Mr. Avory is not a good one. I do not think that section 46 can be construed as providing that any question of interest in land whenever raised, and however raised, is sufficient to oust the jurisdiction of the justices. I think the justices' jurisdiction is ousted when the question as to the title to land or interest accruing therefrom arises in the proceedings. A question of title does not arise in the proceedings because the defendant says he owned the land upon which the plaintiff was when the assault took place. It seems to me that in the present case no question of title arose at all and no question of interest in land arose either. Both parties upon the affidavit were admitted to be commoners, and both were admitted to have rights there. No question arose as to their rights or title.

Mr. Avory argued that there was a right for commoners to remove an obstruction, and he cited authorities which are certainly binding upon us. In my opinion, however, to show that a question of right might arise in some proceedings in which commoners might have a right in law to remove an obstruction, in no way solves the question as to the true meaning of the proviso in section 46, or as to the conditions necessary for the application of that proviso. Mr. Avory also relied on the case of *Reg.* v. *Pearson*. It was held in that case that if it was shown a *bonâ fide* question as to the title of land is involved, the jurisdiction of the magistrates is ousted. If that case was really an authority upon the question raised in this case we should be bound by it; but in my opinion the facts in that case were different in substance from the facts in the present case so far as the proviso is concerned. It was uncontradicted in the case of *Reg.* v. *Pearson* that the assault was committed in the assertion of title, and it was not denied that the defendant was raising a claim of title. The reason why in such cases the justices' jurisdiction is ousted is that, unless it were ousted, the justices would indirectly decide a question of right and title between the parties. It is quite plain that no question of right arises in the case now before us, both parties being where they had a right to be when the assault took place. The justices came to a right conclusion when they considered that the defence in urging that a claim of title had arisen was frivolous, and in that sense the justices were right in considering the *bona fides* of the claim. I am of

opinion that no question of title did arise, and therefore the rule must be discharged.

DARLING, J.—I agree. It seems to me that to hold otherwise would be to determine that magistrates could not convict a person of assault if it were committed in the course of a quarrel regarding land, and that irrespective of whether the assault was committed on the land or not. By his contention, Mr. Avory would say that if a mortgagor or mortgagee of land in Yorkshire were to fight, say in Birmingham, as to whether the equity of redemption was gone or not, the magistrates could not convict either of them of assault. The statute cannot mean that, and the construction the Lord Chief Justice has put upon the section is, in my opinion, the right one.

CHANNELL, J.—I agree. I only wish to add that our judgment proceeds on the footing that the words of the proviso in section 46 must be read so that the word "title" governs the words "lands, tenements, or hereditaments," and also the words "any interest therein or accruing therefrom." In the present case no question arose as to the title to any interest in land or accruing therefrom. It was argued that it is not easy to give a meaning to the words "any interest therein or accruing therefrom," but in my opinion they apply exactly to a right such as this, a *profit à prendre* arising out of land. If any question had arisen in this case as to the title to any interest in land, or as to the title to any interest therein or accruing therefrom, such as a right of common, the statute would have applied; but no such questions arise. The right of common was admittedly in both parties.

Rule discharged.

Solicitors for complainant, *Morris & Bristow*, for *Lawton, Warnes, & Sons*, Rye.

Solicitors for defendant, *Guscotte & Fowler*.

K. B. Div. (Walton, J.) Feb. 15; March 1.

FEYERICKS AND OTHERS *v.* HUBBARD. (*a.*)

Practice—Foreign judgment, action to enforce—Claim founded on alleged breach of agreement—Judgment signed in default of appearance against a British subject not resident in the country—Condition of agreement that all disputes should be submitted to foreign jurisdiction.

By a contract made in Belgium between the plaintiffs and the defendant, who was a British subject neither domiciled nor resident in Belgium it was agreed that all disputes should be submitted to Belgian jurisdiction. Disputes having arisen, the plaintiffs sued the defendant in the Tribunal of Commerce, Ghent, the citation or summons being duly sent by registered post to the defendant's address in England, and recovered judgment in default of appearance.

Held, that, as the defendant had agreed to submit disputes arising out of the contract to Belgian jurisdiction, he was bound by the judgment of the foreign court.

Held, also, that whether in fact he received the citation by post was immaterial, as the proceedings were regular, and even if by some accident the citation did not reach the defendant, as he alleged was the case, it would be no answer to the action.

Copin *v.* Adamson, 22 *W. R.* 658, *L. R.* 9 *Ex.* 345, *and* Rousillon *v.* Rousillon, 28 *W. R.* 623, 14 *Ch. D.* 351, *considered and followed.*

Action set down for hearing under order 14.

The action was brought by Albert Feyericks and two other gentlemen, Belgian subjects, against C. F. Hubbard to recover £1,280 alleged to be due under a Belgian judgment entered for the plaintiffs in default of appearance by the defendant in certain proceedings before the Tribunal of Commerce, Ghent.

Montague Shearman, for the plaintiffs.—The cause of action is the breach of a contract entered into at Ghent, dated the 7th of September, 1895, whereby the plaintiffs agreed to purchase from the defendant the Belgian patent for improved ovens for £1,000 down and the balance as therein agreed. The plaintiffs' case was that the defendant had failed to complete his contract "inasmuch as he did not instruct their workmen to make the ovens satisfactorily," and the company promoted to make and sell the ovens in Belgium was consequently a failure. The action to recover the £1,000 they had paid was brought in the Belgian courts, the plaintiffs alleging that as the agreement provided that all disputes between the parties should be submitted to Belgian jurisdiction the judgment of that tribunal was binding on the defendant. A judgment by default in a foreign court is not binding on the defendant unless he has submitted to the jurisdiction. If the defendant had entered an appearance, there could have been no question raised of his submission, and the agreement here to submit disputes to Belgian jurisdiction is equivalent to entering an appearance. Moreover, four months were allowed for appealing, and have now expired. There was no question here that the proceedings were regular according to Belgian law.

Daniel Warde, for the defendant.—The judgment obtained by default against the defendant cannot be enforced against him here, for he was not a subject of or resident in the country in which the judgment was obtained: *Schibsby* v. *Westenholz*, 19 W. R. 587, L. R. 6 Q. B. 155. Nor can the rule laid down by that case be got over by the plaintiffs showing merely that the defendant had agreed that all disputes relating to the agreement should be submitted to Belgian jurisdiction. At the time proceedings were taken in the Belgian court there was no dispute between them, and the defendant denies that he received notice that these proceedings were being instituted.

Montague Shearman, in reply, referred to *Copin* v. *Adamson*, 22 W. R. 658, L. R. 9 Ex. 345, and *Bank of Australasia* v. *Harding*, 9 C. B. 661.

Cur. adv. vult.

March 1.—WALTON, J., in giving judgment, said: This is a case in which the plaintiffs are suing the defendant for the sum of £1,208 19*s.* 1d., being money due, as they allege, from the defendant to the plaintiffs under the final judgment in the Tribunal of Commerce of Ghent, in Belgium, bearing date the 15th of November, 1900. The question I have to decide is whether the judgment, first, is properly proved, and secondly, is binding on the defendant, who is not a Belgian subject; nor was he at the time of the judgment or, so far as I can see, ever been, domiciled in Belgium, and was not served with any process within the jurisdiction of the Belgian court. It has, however, been proved that the judgment was delivered regularly by the Belgian tribunal; that it is a final judgment, and that all the requirements of Belgian law with regard to citation, service of process or otherwise, have been complied with. The question is whether that judgment is binding on the defendant. It is said to be binding because by the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

terms of the contract upon which the action was brought in Belgium it was provided (*inter alia*) that "all disputes relating to this present agreement and to its fulfilment shall be submitted to the Belgian jurisdiction." The contract was made on the 7th of September, 1895, and appears to have been executed in Ghent in Belgium by the defendant on that date.

Now it is said that inasmuch as by the terms of the contract upon which the claim in Belgium was made and for a breach of which the plaintiffs seek to recover the sum which has been found to be due to them by the Belgian tribunal, the defendant Hubbard agreed to submit all disputes under the agreement to the Belgian jurisdiction; and therefore that Hubbard is bound by the decision of the Belgian court. At the trial the question arose whether Hubbard was properly served with a Belgian citation, which, as required by Belgian law, was sent him by registered letter. A receipt was, however, produced, purporting to have been signed by Hubbard. The defendant was called before me and he denied that the signature was his, and he denied also that he ever received the summons by post.

Now it does not appear to me to be necessary to decide the question; for indeed it is irrelevant. If the defendant is bound by the decision of the Belgian court, then, providing the proceedings there were regular, and providing the service is given in accordance with the regulations of the Belgian court, the fact that, by some accident, the particular document did not reach the defendant would not be any answer by him to this action. On the other hand, if the defendant is not bound by the jurisdiction of the Belgian tribunal, it is immaterial whether he had notice of the proceedings or not—whether the summons was served or not. Therefore it does not appear to me to be necessary to determine whether the defendant did in point of fact sign the receipt—whether in fact he received the summons or did not.

Now the general question raises the point upon which I took time to consider the law, of whether the defendant is bound by a foreign judgment, whether he contracted to submit himself to the forum in which that judgment has been obtained or not. I do not think there is any case directly in point, for there is no case which appears to decide that the mere fact of the contract on which the proceedings arose contained a stipulation that the parties would submit to the foreign tribunal has been held to be sufficient itself to make the decision of the foreign tribunal binding in itself. But I find that in the case of *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351, Fry, J., reviewed all the cases on this subject very fully and states the conclusion at which he arrives. At p. 371 he says, "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to the cases of *Schibsby* v. *Westenholz* and *Copin* v. *Adamson*, they may, I think, be stated thus. The courts of this country consider the defendant bound where he is a subject of a foreign country in which the judgment has been obtained; where he was a resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly, if *Becquet* v. *MacCarthy*, 2 B & Ad. 951, be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."

Now that is the classification by Fry, J., of the several cases in which a defendant is bound by the judgment of a foreign tribunal, and one of them covers this case—namely, where he has contracted to submit himself to the forum in which the judgment was obtained. If that is the law, then the judgment in this case is binding upon the defendant, and the plaintiffs are entitled to judgment here. It was not absolutely necessary for Fry, J., to decide that point in his judgment in the case of *Rousillon* v. *Rousillon*. He refers there to the case of *Copin* v. *Adamson*. I think the facts in that case might possibly be distinguished from the facts in the present case. It apparently was decided by Amphlett and Pigott, BB. (and the Chief Baron, Kelly, did not disagree with them), on the ground that a man may contract with others that his rights shall be determined, not only by foreign law, but by a foreign tribunal—and by reason of such a contract, not of any allegiance, absolute or qualified, he would become bound by the tribunal's decision. Therefore *Copin* v. *Adamson* is practically a decision that a defendant who has made a contract to be bound by the jurisdiction of a foreign tribunal upon any question arising under the contract is bound by a subsequent decision of the tribunal, although he is not domiciled within the jurisdiction of the tribunal, was not served within the jurisdiction of the tribunal, and was not resident within the jurisdiction of the tribunal at the time the proceedings commenced. I feel that I am bound by the decision of *Copin* v. *Adamson* as it was interpreted by Fry, J., in *Rousillon* v. *Rousillon*. Here the defendant did contract that he would submit all disputes relating to the agreement in question to the Belgian jurisdiction; that means not merely that he will submit, but that he is bound by the decision of the Belgian tribunal. On that ground, on the cases I have referred to, the judgment which has been obtained is binding on the defendant, and inasmuch as the proceedings in the Belgian court were perfectly regular, and the service required by the Belgian law was sufficient, I do not think that it is open to him even to raise the question that by some accident or mistake the summons did not really reach him in England. It cannot be said that there is anything in the nature of the Belgian proceedings or in their law of procedure, with regard to service, which is contrary to natural justice.

For these reasons I think that the plaintiffs are entitled to recover judgment for the amount which they claim, with costs.

Solicitors for the plaintiffs, *Leighton & Savory*.

Solicitors for the defendant, *Metcalfe & Storr*.

K. B. Div. (Jelf, J.) — Jan. 13; Feb. 1.

TAYLOR v. HOLLARD. (a.)

Limitations, Statute of—Action on judgment—Part payment—Bankruptcy—Release—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A plaintiff in 1884 *obtained judgment in the English courts for* £15,067 9*s* 11*d*. *He afterwards obtained a judgment in* 1886 *in the courts of the South African Republic for* £9,335 6*s* 4*d*. *in respect of the same debt, and received the latter amount in full under the defendant's bankruptcy.*

Held, that his judgment in the English court was now barred by the Real Property Limitation Act, 1874, *and*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

that it was not taken out of the statute by the payment under the bankruptcy proceedings in the South African courts, and that the judgment obtained there operated as a discharge of the original judgment debt.

This was an action to recover a sum of money alleged to be due under a judgment.

Herbert, K.C., and *Compton Smith*, for the plaintiff.

Macaskie, K.C., and *Lewis Thomas*, for the defendant.

The facts of the case and the arguments of counsel sufficiently appear from the judgment.

Feb. 1.—JELF, J.—This was an action tried before me without a jury on the 13th of January last, whereby the plaintiff sought to recover the sum of £8,515 5s. 4d. balance alleged to be due for principal and interest on a judgment obtained by the plaintiff against the defendant in the Queen's Bench Division dated the 28th of June, 1884, for £15,067 9s. 11d., including costs. Three defences were relied upon by the defendant: (1) That the Statute of Limitations—the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8—was a bar to the action as more than twelve years had elapsed between the date of the judgment, 21st of June, 1884, and the date of the issue of the writ in this action, August, 1901; (2) that on the 12th of May, 1886, the plaintiff obtained judgment in the courts of the South African Republic (the Transvaal) against the defendant for £7,000 and interest thereon at 8 per cent. and costs for the same cause of action as that now sued upon, and recovered from the defendant's trustees in insolvency £9,635 4s. 6d. in respect thereof, and thereby the judgment now sued upon was merged or satisfied; (3) that the defendant was released from the cause of action now sued upon by the sequestration and insolvency proceedings in the Transvaal. As to the plea of the Statute of Limitations, the plaintiff's counsel formally contended that the case was governed not by 37 & 38 Vict. c. 57, s. 8, which makes the period twelve years, but by 3 & 4 Will. 4, c. 42, s. 3, which makes the period twenty years. But they admitted that since the case of *Jay* v. *Johnstone*, 41 W. R. 161, [1893] 1 Q. B. 189, they would only rely on this point in the House of Lords. It was further argued on behalf of the plaintiff that the case was taken out of the statute by a part payment within twelve years of £9,635 4s. 6d. on account of the debt under the circumstances hereinafter appearing.

The defendant was formerly an official in the Transvaal for the then South African Republic, and was domiciled there, but, being temporarily in England, he borrowed money from the plaintiff, contracting to repay the loan with a very heavy bonus recoverable in England, where there were no usury laws in force. On his failure to pay he was sued in the Queen's Bench Division by the plaintiff, who recovered against him the judgment sued upon in this action. In 1886 the plaintiff sought to enforce the judgment against the defendant, who had then returned to the Transvaal, in the courts of the South African Republic. The action was brought to recover the £15,067 9s. 11d. and interest upon the English judgment. The Transvaal court, presided over by Kotzé, C.J., instead of either giving judgment for the amount of the English judgment, or refusing to enforce it at all, took a middle course. They inquired into the merits of the original cause of action to the extent of finding that only £7,000 had been actually lent by the plaintiff to the defendant, and that the rest of the £15,067 7s. 11d. had substantially consisted of a bonus by way of interest on the loan, and refused, whether rightly or wrongly it is not for me to say, to give judgment for the whole amount, holding such bonus to be usurious and unreasonable and not enforceable by the law of the South African Republic, but gave judgment for £7,000 and interest at 8 per cent. from the date of the English judgment (instead of 4 per cent., which would be recoverable in this country), making a total of £9,635 4s. 6d. The plaintiff thereupon took proceedings in the courts of the South African Republic for sequestration, and executors or trustees were appointed by the Transvaal courts. The estate would not pay all the claims of the creditors against the defendant, amounting to £12,000. The defendant then availed himself of a payment made on his behalf by another person (Mr. Sivewright) to the executors of £12,350 15s. 11d., and undertook to be responsible for any further liabilities. The £9,635 4s. 6d. was then paid in full by the executors to the plaintiff's agents, and ultimately the sequestration and insolvency were annulled and the defendant was rehabilitated and released from all debts claimable against his estate. It was contended for the plaintiff that this payment took the case out of the statute. The defendant's counsel, on the contrary, contended, first, that payment was not on account of the English judgment, but on account of the South African judgment; secondly, that it was not made by the defendant or his agents; and thirdly, that it was not such a payment as is contemplated by the statute, not being one from which an acknowledgment of liability and a promise to pay the residue of the the English judgment could be inferred. I am of opinion that the defendant's contention is correct on all these grounds. The payment was not made on account of the English judgment, which, in my opinion, was necessary to take the case out of the statute, but in satisfaction of the Transvaal judgment, and if this is a question of fact I so find. Taking the other two grounds together, as they are very closely connected with one another, I find that the payment, although the defendant took advantage of it, and obtained his release by means of it, and spoke of it as made by him, was not in fact made by him or by any agent of his, but by the curators under his sequestration out of the money found by Mr. Sivewright, and it was not in fact made voluntarily, but by way of execution of a hostile judgment obtained against the defendant *in invitum*. Under these circumstances it is, I think, impossible to infer from the payment of the £9,635 4s. 6d. an acknowledgment by the defendant or any agent of his to pay the residue of the English judgment. This being so, I am of opinion that there was no part payment of such a kind as to take the case out of the statute. The old case of *Jackson* v. *Fairbank*, 2 H. Bl. 340, was relied upon by the plaintiff's counsel to show that a payment by the trustee in bankruptcy may be sufficient. But I consider that that case has been practically overruled by *Davies* v. *Edwards*, 7 Ex. Ch. 22, and *Ex parte Topping*, 13 W. R. 1025, 4 De G. J. & S. 551, and is, I think, inconsistent with other modern decisions. An attempt was made on behalf of the plaintiff to establish a distinction between 3 & 4 Will. 4, c. 27, s. 40, and 37 & 38 Vict. c. 57, s. 8, and to show that the latter statute made the fact of a part payment *ipso facto* sufficient, without the necessity of showing that it was made under circumstances from which an admission of a liability and a promise to pay would be inferred. The only difference, however, in the wording of the two statutes is the substitution of the period of twelve years for twenty, and Lord Esher (then Brett, L.J.) in *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539, says: "In all Statutes of Limitations the principle on which they proceed is that, in those cases in which a payment is allowed to take the case out of the operation of the Statute of Limitations it must be

such a payment as amounts to an acknowledgment of liability." And Sir G. Jessel emphasises the same propositions. For these reasons I hold that the Statute of Limitations is a complete bar to this action. I am further of opinion that the second defence relied on by the defendant is established. If the plaintiff had merely obtained judgment in the Transvaal, and finding it was for £9,635 4s. 6d. instead of £15,067 9s. 11d., had not taken any steps to realize that judgment, he could, I think, have sued afterwards in this country for the original debt. But, in my opinion, when he accepted the judgment with its distinct incidents (*i.e.*, the bonus struck off, but 8 per cent. instead of 4 per cent. put on) and proceeded to sequestration and ultimately obtained the £9,635 4s. 6d. in full, I think he had elected to take the judgment of the foreign country to which he had appealed in discharge of the whole cause of action, and could not afterwards sue for the residue of the debt in England. What he wants to do is to take from the foreign court the judgment which that court gave for the whole cause of action, and sue for the residue here. To do this would be to approbate and reprobate, or in more homely language to blow hot and cold, which neither law nor common sense will allow: see *Barber* v. *Lamb*, 8 W. R. 461, 8 C. B. N. S. 95, where Earle, C.J., says: "It would be contrary to all principle for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal." In my opinion the third defence fails, as the release in a foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this: see Dicey's Conflict of Laws, [1896] R. 113, p. 451; *Gibbs* v. *La Société Industrielle et Commerciale des Métaux*, 25 Q. B. D. 399, 39 W. R. Dig. 57. But for the reasons above set forth I think the other two defences are sound, and I give judgment for the defendant with costs.

Solicitors for plaintiff, *Hurford & Taylor*.

Solicitors for defendant, *Lewis & Lewis*.

IN BANKRUPTCY.

K. B. Div. (Wright, J.) April 21.

In re JUKES.

Ex parte THE OFFICIAL RECEIVER. (*a*.)

Bankruptcy—Fraudulent conveyance—Transfer of whole of debtor's property for a past debt—Protected transaction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (b); *s.* 49.

A transfer of the whole of a debtor's property for a past debt is not protected by section 49 *of the Bankruptcy Act*, 1883, *though a similar transfer for a present consideration may be protected by that section.*

Shears *v.* Goddard, 44 *W. R.* 402, [1896] 1 *Q. B.* 406, *distinguished.*

Application by the official receiver acting as trustee in the bankruptcy for an order setting aside a transfer of property by the bankrupt as fraudulent and void.

Upon the 9th of August, 1901, the bankrupt, a cab proprietor, transferred seventeen cabs, sixteen horses, and sixteen sets in harness to the respondent, Christopher Whitfield, in payment of a past debt of £150.

At that date the bankrupt was heavily indebted to his corn merchants, who were pressing for payment and had refused to supply any more corn unless their account was paid.

The stock-in-trade transferred by the bankrupt was practically all the property he possessed.

A receiving order was made against the bankrupt on the 4th of October, 1901. His debts were returned at £296, and his assets at £10, but as a matter of fact they realized nothing.

He was adjudicated bankrupt, and the official receiver, who was appointed trustee in the bankruptcy, launched the present motion.

A. H. Carrington, for the official receiver, having proved the facts, submitted that the transfer to Whitfield was void against the trustee in bankruptcy as being an assignment of the whole of the debtor's property for a past debt, and consequently an act of bankruptcy.

G. A. Scott, for the respondent, relied upon *Shears* v. *Goddard*, 44 W. R. 402, [1896] 1 Q. B. 406, where a transfer of the whole of a debtor's property for a present consideration was upheld.

Carrington, in reply, referred to *In re Sharp, Ex parte Gundry* v. *Johnston*, 83 L. T. Rep. 416, 49 W. R. Dig. 8.

WRIGHT, J.—It seems to me that this case is not quite within the decision is *Shears* v. *Goddard*. I think it is quite clear that here the debtor committed an act of bankruptcy by parting with the whole of his property to satisfy a past debt. I do not think that I shall be deciding anything contrary to what was held to be the law in *Shears* v. *Goddard* in holding that section 49 of the Bankruptcy Act, 1883, does not protect a person who in satisfaction of a past debt takes over the whole of the debtor's property, knowing that there are other creditors. In *Shears* v. *Goddard* it did not appear that the purchaser knew that he was taking the whole of the debtor's property, or that any fraud on the Bankrupty Acts was contemplated. I think that a person who takes over the whole of the debtor's property under the circumstances of the present case cannot be held to be acting in good faith, and the transaction is not protected by the provisions of section 49 of the Bankruptcy Act, 1883.

Application allowed.

Solicitors for the applicant, *G. B. Howard & Sons*.

Solicitors for the respondent, *Alfred White & Co.*

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) } May 13, 14, 15.

BRADSHAW v. WIDDRINGTON. (a.)

Limitation, Statutes of—Mortgage—Payment of interest by person liable to the mortgagor to pay—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Solicitor's books—Entry against interest—Admissibility in evidence.*

Payment to a mortgagee of interest due upon the mortgage by a person who is liable to make the payment as between himself and the mortgagor is a sufficient payment within section 8 *of the Real Property Limitation Act,* 1874, *to prevent time running against the mortgagee under the statute.*

Decision of Buckley, J. (49 *W. R.* 698), *affirmed.*

This was an appeal from a decision of Buckley, J. (reported 49 W. R. 698).

The facts were as follow: On the 1st of August, 1879, James E. Bradshaw mortgaged the "Fair Oak" estate to J. J. Moss to secure the repayment of a sum of £5,171 14s. 6d. and interest at 4 per cent.

Moss was the surviving trustee of the will of Sir Edward Cust, of whose estate the mortgage money formed part. The defendants succeeded Moss as trustees, and he and they were referred to in the case as the Cust trustees.

James E. Bradshaw borrowed the money for his son, William Bradshaw, to whom it was immediately paid over. On the same day William Bradshaw executed a bond to secure the repayment to his father of the amount lent—that is to say, the principal money due under the mortgage and interest at 4 per cent.

Cartmell Harrison, of the firm of Birch, Ingram, & Harrison, acted as solicitor for all parties, and the deeds were left in his keeping. He also paid the interest on the mortgage to the Cust trustees. In the books of the firm till 1885 William Bradshaw was treated as paying the interest on the mortgage to his father, James E. Bradshaw, and the Cust trustees as receiving it, although James E. Bradshaw in his account was not treated as receiving it from his son. After 1885 and down to 1892 in his account William Bradshaw was treated as paying the interest direct to the Cust trustees.

In September, 1887, James E. Bradshaw died, leaving William Bradshaw and Harrison his executors.

In October, 1892, William Bradshaw paid Harrison the mortgage money of £5.171 14s. 6d. This money appeared in the books of Harrison's firm as a credit on the account of William Bradshaw. In the account of the Cust trustees in the firm books there was the extraordinary position of affairs that the trustees were treated as having received this money, and they continued also to be treated as receiving from time to time the interest due upon it. As a matter of fact Harrison misappropriated the mortgage money and never paid it to the Cust trustees, to whom he continued to pay interest down to 1898 or 1899. In 1899 Harrison committed suicide.

At this time the plaintiff, Colonel J. C. Bradshaw, was the owner of Fair Oak. He had had part of it conveyed to him by his father in 1884 in exchange for other land which he gave his father, and he had purchased the remainder from the trustees of his father's estate in November, 1887.

In both cases he bought without knowing of the Cust mortgage, and in both cases the property was expressed to be conveyed free from incumbrances. Consequently, as between himself and his father and his father's trustees, the latter were bound to discharge the sum due under the mortgage and the interest.

Harrison acted as solicitor for all parties in these purchases, and the deeds remained in his hands. Upon the death of Harrison the existence of the Cust mortgage was discovered. The Cust trustees, no longer receiving their interest, gave notice to Colonel Bradshaw to pay off the mortgage, and that in default they would sell the property.

Thereupon Colonel Bradshaw brought the present against them, asking for a declaration that their right to the mortgage was extinguished, and for an injunction to prevent them selling the property.

The trustees counterclaimed for payment of the mortgage money, or in the alternative for foreclosure or sale.

At the trial of the action before Buckley, J., William Bradshaw was not called as a witness. The books of Birch, Ingram, & Harrison were produced, and upon the evidence before him his lordship concluded that as between his father and himself William Bradshaw was liable for the principal and interest of the mortgage money, and that there was a special arrangement between them that the son, having had the money, should keep down the interest upon it.

His lordship dismissed the action against the trustees, and gave judgment in their favour upon the counterclaim.

Colonel Bradshaw appealed.

H. Terrell, K.C., and *G. Henderson,* for the plaintiff.—To prevent time running under the statute there must be either payment or acknowledgment by a person who is capable of representing the person in possession of the land. William Bradshaw, even during his father's lifetime, was not in any way his father's agent for the purpose of making these payments. At any rate, after 1885, when the property was conveyed to the plaintiff free from incumbrances, you can infer no authority to William Bradshaw to make these payments, as the father believed that the debt had ceased to exist. In any case the agency was determined on the father's death. Nor was William Bradshaw a person bound to pay the interest. He was only bound to pay interest on the bond, not on the mortgage. Even assuming that the books kept by Harrison are admissible, they only show that after 1885 payments were made by William Bradshaw, who was not the mortgagor or his agent, or bound to him by privity of estate. You cannot infer from them any agreement in 1879 by William Bradshaw to pay this interest. But it is submitted that these books are not admissible at all. They were not kept in pursuance of a duty, and even if they were there is no evidence to show that the entries in them were made at the time of the transactions to which they refer.

Astbury, K.C., and *Farrer,* for the Cust trustees.—An action brought by a mortgagee within twelve years after the last payment of interest can succeed even against a person who has acquired a good title against the mortgagor by reason of the Statute of Limitations. Here the payment by a person who was liable as between himself and the mortgagor is sufficient to prevent the statute running against us. Harrison's books are admissible in evidence on two grounds—first, they contain entries of payments received by him which are clearly admissible as entries against interest; secondly, an agent in receipt of money from a client is under a duty to keep an account, and all the authorities show that where

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

there is a duty to keep an account such an account is admissible in evidence.

Terrell, K.C., replied.

The following authorities were referred to in the course of the argument: *Loveless* v. *Richardson*, 4 W. R. 617, 2 Jur. N. S. 716; *Bright* v. *Legerton*, 9 W. R. 239, 2 De G. F. & J. 606; *Hope* v. *Hope*, [1893] W. N. 20; *Massey* v. *Allen*, 28 W. R. 212, 13 Ch. D. 558; *Newbould* v. *Smith*, 33 W. R. 690, 34 W. R. 690, 29 Ch. D. 882, 33 Ch. D. 127; *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L. Cas. 115; *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Lewin* v. *Wilson*, 11 App. Cas. 639, 35 W. R. Dig. 122; *Astbury* v. *Astbury*, 46 W. R. 536, [1898] 2 Ch. 111; *In re Lord Clifden, Annaly* v. *Agar-Ellis*, 48 W. R. 428, [1900] 1 Ch. 774; *Brown* v. *Gordon*, 1 W. R. 2, 16 Beav. 302; *Doe* v. *Eyre*, 17 Q. B. 366; *Ludbrook* v. *Ludbrook*, 49 W. R. 465, [1901] 2 K. B. 96; *Higham* v. *Ridgway*, 10 East, 109; Taylor on Evidence, pp. 438, 455, 460, 495.

COLLINS, M.R.—This action arises in a somewhat curious fashion. It is an action brought by Mr. John Charles Bradshaw, who is now the owner of the Fair Oak estate, against the Cust trustees, to have it declared that the estate is free from a certain mortgage if it ever existed. If it ever did exist he wants a declaration that it does not now bind the estate.

That is met by the trustees by saying that there has been a payment of interest within the period of twelve years before action, which takes it out of the Statute of Limitations, and they claim that the mortgage is binding, and counterclaim against the executors of the mortgagor for payment of the principal sum and foreclosure against the plaintiff.

The property belonged to Mr. James E. Bradshaw, who was the father of the plaintiff, and the father also of another gentleman, Mr. William Bradshaw, who is now the surviving executor of his father. The father borrowed the sum of £5,171, and the question of law that arises upon the facts in this case is whether a payment which was made within twelve years before action was made under such circumstances as to be a payment by the mortgagor within the meaning of the 8th section of the Statute of Limitations (37 & 38 Vict. c. 57) coupled as to the claim for foreclosure with the statute 7 Will. & 1 Vict. c. 28.

That question involves an examination of the circumstances under which this mortgage came into existence, and a difficulty arises by reason of the fact that all the parties that I have now mentioned had a common solicitor, Mr. Harrison, of the firm of Ingram & Harrison, who is now dead.

A very great discussion was opened before us by Mr. Terrell as to whether or not certain accounts kept by Mr. Harrison in his capacity as solicitor between the parties were or were not admissible in evidence. Those accounts were between him and the father, James Edward Bradshaw, and between him and the son, Mr. William Bradshaw, and then there were also the accounts kept with the Cust trustees. But there are certain facts that are either capable of proof by admissions or stand proved quite apart from documents kept by the solicitor, and I think that they may be shortly stated thus: There is no doubt that Mr. William Bradshaw was heavily indebted. There is no doubt that he was desirous of raising a loan of £5,000 odd, and that the machinery by which that loan was obtained was by his father raising a sum by mortgaging his estate of Fair Oak, with the Cust trustees, and by handing the money as received to his son. There is also no doubt that the mortgage was effected and interest continued to be paid upon it right down to 1892. I need not carry it beyond that. It was paid by Mr. Harrison, who, it is admitted, was the agent or the solicitor acting for the mortgagor, Mr. J. E. Bradshaw, down to his death, and who continued to act as solicitor for his executors, of whom he was one, after his death. Those facts are admitted.

But it is said, admitting those facts, there is no evidence of a payment by the mortgagor which would keep alive the obligation of the mortgagor under the Statute of Limitations.

The section primarily in question is the 8th section of the Act which I have just referred to. It is in in these terms—[His lordship read the section, and continued:]—and the section of the Act 7 Will. 4 & 1 Vict.—the whole Act consists of one section—after reciting that there were certain doubts as to how far the statute applied to mortgages and that it was expedient that those doubts should be removed—provides as follows—[His lordship read the section, and continued:] Dealing first with what I have called the uncontested facts, how does the matter stand? You have a mortgage created, you have interest paid upon it right up to a period within the Statute of Limitations by a person who is admitted to have been the solicitor to the mortgagor himself and afterwards to his executors, and you have the payment admittedly received as and for a payment under this mortgage by the mortgagees. Starting at that *primâ facie* case, why is the mortgagee not entitled to succeed? It seems to me that alone is sufficient to justify the mortgagee here in saying, "There has been a payment made within the statutory period on this mortgage. Therefore, though I accept that as against a person who has been in possession, as the plaintiff has here, for more than twenty years, the onus is upon me to show that that mortgage is alive; yet, accepting it, I prove by admissions or *aliunde*"—and the facts which I have mentioned are uncontested—"a continuous payment of interest by a person who, *primâ facie*, is the proper person to pay it to persons who have received it under the mortgage." It seems to me that that throws the onus of proof on the persons who say that the mortgage has ceased to exist; that is, on the plaintiff here. The question then would be whether he has discharged that onus which has been thrown back upon him by showing that these payments were made under such circumstances as not to be payments by the mortgagor within the meaning of the section.

If the case rested there and if Mr. Terrell succeeded in the very vehement argument which he has addressed to us with a view to excluding the accounts kept by the solicitor, it seems to me that Mr. Terrell would have no answer to this case at all, because he elected not to call the person now living who knows most about this matter—viz., Mr. William Bradshaw, the son. Having deliberately elected not to do that, he comes before us and objects strenuously to the admission of the accounts kept by Mr. Harrison which purport to show the whole history of the financial dealings between these parties, the father, James E. Bradshaw, the son, Mr. William Bradshaw, and himself. It seems to me that Mr. Terrell cannot really advance a step in this case without going into those accounts. Therefore I think that though this decision might be rested, and firmly rested, quite apart from anything in those accounts, which were specially dealt with by the learned judge below, yet as Mr. Terrell, though trying to keep them out, has relied himself upon some of the facts which appear in them, I think it will be better on the whole to deal with them. Dealing with them involves a slight consideration, but I think a cursory consideration will be enough of the question how far

they really are admissible. With respect to that question it seems to me that Mr. Terrell is really not in a position before us to raise the question as a matter of strict law whether these documents are admissible or not, because at the trial Mr. Astbury was there with the evidence which would have told us the precise conditions under which these documents came into existence. Owing to what passed between him and Mr. Terrell in the presence of the judge at the time that evidence was not called, and having regard to the nature of the admissions interchanged, and Mr. Terrell's very pronounced admission to us as to what was in his own mind at the time, and to the attitude of the judge, and to the absence of any note regarding any objection either in the note handed to us or in his lordship's judgment—which is a very careful judgment—to the complete absence of any reference to this point, it is obvious to me that the explanation of what took place before the learned judge was this: That Mr. Terrell had not in his mind at the time the technical difficulties which arose as to the admissibility of an entry made by a deceased person, but that he was of opinion that these entries were really *res inter alios acta*, and did not bear directly upon his position, and were not admissible in evidence as between parties. He had that in his mind. I do not think that there were present to his mind the technical grounds upon which statements made by a deceased person are or are not capable of being received at all in evidence. I think that his view was that if these entries were allowed they really were not evidence against his clients, and that they were irrelevant. He certainly did not bring it to the learned judge's mind—in fact, I understood him to admit this himself—that he thought that there were technical objections as to the reading of these entries at all. If those objections had been pressed Mr. Astbury had witnesses who were prepared to deal with them, and I do not think that we should be justified now in excluding that evidence on the ground that these technical conditions had not been made good if it were possible that they could have been made good by Mr. Astbury by calling witnesses. One objection pressed upon us by Mr. Terrell was that as to the class of entries of which it was asserted that they were entries made in the course of the discharge of duty, they must not only be made in course of duty, but they must be made at the time. Mr. Astbury's witnesses could have described how these entries came into existence and when they were made. He certainly cannot deal with an objection based on this ground, where the witness, after discussion, was not put into the box because he was not wanted.

There is a further observation to be made upon that. If this case had been seriously argued on the ground upon which Mr. Terrell argued it before us, and if the learned judge had been disposed to take his view of it, it was competent for Mr. Astbury there and then to call from the hostile camp the gentleman who knows most about it, but who—I have no doubt for very good reasons—thought it desirable not to go into the box, and that is Mr. William Bradshaw. We could not put Mr. Astbury's clients back into the position in which they were at the time, and Mr. Terrell cannot rely on the technical objections as to these documents, though I must say, after hearing the argument, that I am not disposed to attach very great weight to them. So that I do not think that the question is now open to us any more than it was before the learned judge before whom it was never raised, and whose opinion upon it we have not got.

Having said that much, I propose now to refer to one document which is outside any of the principles urged by Mr. Terrell—that is, the extract from the bill book kept by Mr. Harrison, which bears an entry: "Received on account costs of loan, the 24th of November, 1879, £150." That is a clear entry against interest as to which I do not think it can be contended that it did not make this bill admissible in evidence. But when you get this bill in evidence it really tells the whole transaction out of which this mortgage arose, because it shows that the object of raising the money was Mr. William Bradshaw, his father becoming the nominal debtor and mortgagor between him and the Cust trustee, but between him and his son raising the money for his son, the son undertaking the obligation of paying the interest upon the mortgage.

I need not go through these entries in detail, but that is to me the fair and inevitable inference to be drawn from them. The money was borrowed for the purposes of the son, and was borrowed by the machinery of the father giving a mortgage upon his own property. We know—in fact it is admitted—that the payment of interest was made by Harrison throughout and by the executors, Harrison and William, after the death of the testator. If that money was paid by the person William, who had come under that obligation which is evidenced by that bill, how can that be said to be a payment not by the mortgagor? It is a payment which was made under the obligation imposed by the bargain between the parties that William should pay, his father being responsible directly and personally to the Cust estate, but as between himself and William, William being the real debtor and the father being the surety. If you look to the origin of the inference drawn from a payment and its effect in keeping the security alive, it must be a payment by the mortgagor—that is to say, it must be such a payment as founds the inference that the mortgagor acknowledges the security as a still subsisting security. That is the meaning of saying that the statute only runs from the time of payment. It does not say in terms in the Act that it is to be a payment by the mortgagor, but it obviously implies—and the cases have established—that it must be such a payment as will operate as an acknowledgment by the party to the contract, the mortgagor, of the subsistence of the security. After such a payment he cannot say that at the time of the payment the security did not exist. You get that acknowledgment just as much when you get an arrangement between the mortgagor and somebody else, either by a contract or by a mere mandate that that other person shall pay it for him. Whether that person who pays has the obligation imposed upon him by law as a legal agent without the assent, but still having all the rights as though he had the assent, of the mortgagor, or whether you have him appointed under some arrangement with the mortgagor himself, so long as he pays with the assent expressed or implied or imposed of the mortgagor, that seems to me to be a payment that keeps alive the liability of the mortgagor, being in point of law an admission by him of the subsistence of the security. It seems to me that you have that element exactly in this case if it is inferred as a fact, as I have no hesitation in inferring, and as Buckley, J., did infer, that the arrangement at the inception of this mortgage was that the money was borrowed for the purpose of the son, and that as between the father and the son, the son was the real principal debtor and the father the surety. To follow out this transaction and looking at these entries as in, we do find that the interest continued to be paid by the son and was paid in the books apparently to the father's account down to 1886, and from that on it was paid direct to the Cust trustees so far as appears by the entries in Mr. Harrison's books. The father died in 1887, and from that on, as I said, the two executors, Mr. Harrison

and Mr. William Bradshaw, continued up to 1889, at all events, to pay interest in the same way as it had been paid before.

The payment relied upon as taking this case out of the Statute of Limitations must be a payment made before 1892. I think that 1889 would be the last date. That is to say, it must be a payment after the death of the father. It was very strenuously contended by Mr. Terrell that for more than one reason that is not a payment which would be a payment by the mortgagor within the meaning of the section. The first point that he takes is that, examining the accounts which I am now treating as in—I think that they are in for the benefit of Mr. Terrell who contested them rather than for the benefit of Mr. Astbury—looking through those you find in 1884 a transaction indicated which would seem to show that the mortgage of £5,000 odd was in point of fact paid off, and that though interest continued to be paid in the same way by William, and though he admits that it was not in point of fact paid off, still this entry, taking it at the highest against him, indicates some arrangement between the father and Mr. Harrison, whereby the father understood that the mortgage either had been paid off, or that arrangements were being made to pay it off which justified him in thinking that he might, as he did, convey the estate or a part of it which was subject to this mortgage free from incumbrances to the plaintiff. Unquestionably he did convey part, and then the executors afterwards conveyed the residue to the plaintiff free from incumbrances. Though there is a *primâ facie* difficulty in that entry, it seems to me that it is only a *primâ facie* difficulty, and that though these entries are admissible, they are like every other evidence, to be simply taken for what they are worth, and they do not become absolutely unimpeachable because they are admitted in evidence, and where you know, as we do know now—looking at all these facts as we are doing—that Mr. Harrison terminated his career abruptly by suicide, and that for some period before his death he had obviously been falsifying his books, we do look with suspicion at the entries, and when they are inconsistent with other facts that cannot be disputed we must accept the inference that they are not to be relied upon. Mr. Terrell contends that if we accept these accounts at all we are bound to accept them absolutely and for all purposes and without qualification. I do not agree to that at all. They are only evidence, and they are to be weighed as every other evidence is weighed, according to the probabilities and according to the admitted facts, and where they do not agree with those or where some particular entry does not agree with them they or it must be rejected. If you take this particular entry it does not accord with the facts, because on the very date at which it is asserted that this mortgage was paid off we find on the very same date—I think on the 17th of July, 1885, that William gives a bond for a sum which embraces this very sum—that is to say, for the sum of £15,171, being £5,171 plus the £10,000 fresh loan. That is absolutely inconsistent with the notion that William supposed that that mortgage had been paid off and the interest continues to be paid in the same way as I have said right down to 1892. Therefore it seems to me that piece of evidence in fact is displaced. It is quite probable that there was some suggestion made that something of the kind should be done, and it may even be possible that Mr. Bradshaw, the father, thought that it was going to be done, at all events to such an extent as to justify him in making a conveyance to the plaintiff on the footing that these incumbrances would be paid off, but when he conveyed this estate free from incumbrances he did not deny the incumbrances. He simply as between himself and his purchaser left the obligation upon himself to keep the interest down. Though he may have supposed it was going to be paid off so as to justify him in making the conveyance that does not in the least carry the paper entry beyond this, that it is a paper entry which does not accord with the fact.

Then Mr. Terrell says, in relying on the payment by William as taking this case out of the statute, that you can only use it for that purpose upon the inference that it is done with the assent of the mortgagor, and if the mortgagor is under the impression that the mortgage is paid off, that, at any rate, gets rid of any implied assent or admission on his part that the security is still subsisting. He regarded it as at an end, and you cannot draw from the fact that William paid it an inference that the father assented to the security being thereby kept alive. But it seems to me that that point cannot be maintained in the view which I take and which Buckley, J., took of the original arrangement for the mortgage loan. You get to this, that William came under a liability to his father to pay the interest and the principal upon that mortgage as long as it subsisted. That obligation continued upon him as long as the mortgage deed subsisted, whether the father thought it subsisted or not, and the payment by him under those circumstances under the contract with his father would, it seems to me, by virtue of that contract, be a payment which would enure as a payment in relief of the mortgage on the still subsisting contract and a payment which would be taken to be made with his assent and by his authority under his contract. That contract would survive although the mortgagors were dead. Therefore it would be possible and it was indeed obligatory still upon William as between himself and the estate after the death of the mortgagor to keep alive the mortgage and to pay the interest as he did pay it, and that although his father might for some time—I do not know that the impression continued if it ever existed; I do not think that it could have continued for some years afterwards—have been under the impression at one time that the mortgage had been paid off. Therefore it seems to me that you get a payment which has all the essentials to make it an admission by the mortgagor that the mortgage still subsists.

Then Mr. Terrell takes another point. He says: "Whether these points that I have so far taken are right or wrong, where you have a payment by a person after the death of his father, and it is a payment by a person who, although he was executor, still continued to be what he was before, that person"—who, as we think, was the person for whom the money was borrowed—"retained his attitude such as it was before the death after the death, notwithstanding that he had become an executor, and no payment made by him can have any more force or effect than if he had not been executor at all." That requires some little analysis. No doubt after the father's death the position was changed to this extent, that the father was not there to be personally and ostensibly bound and taken to make the admission involved in a payment made by his son of the interest from time to time, but there were his representatives, the executors, of whom the one was the son, and Harrison, the other, who would be just as much bound as the father would be if he had been alive. They were persons who could make the admission and who could make the payment, and *a fortiori* if they were bound by the contract made by the testator as his representatives, they were bound by that to assent to whatever was done in carrying

out that contract by the other party to it. The other difficulty arises from the fact that the other party to the contract, William, was himself executor, but it was perfectly competent, it seems to me, for William and Harrison as executors to stand in the shoes of the testator and approve of that which has been done by one of them—by William, the debtor—in implementing the bargain of the original loan.

Therefore, it seems to me that the payment by William when he was executor is exactly on the same footing as the payment by William before his father died, and has exactly the same consequences, and therefore that that was a good payment to take the case out of the statute. I do not think it is necessary to travel into any of the numerous cases that have been discussed, because I think that, on the broad principle that I have stated, this bargain clearly brings the payment by Harrison within the limits that have been put by the cases upon the right to say that a payment made by another person is a payment made by the mortgagor. There is the last case in the Privy Council, *Lewin* v. *Wilson*, which clearly covers the full position which I find as a fact was the position of these two parties, the father and the son, in relation to this mortgage.

For these reasons I think that Buckley, J., who has delivered a most admirable judgment, in which he has discussed all the authorities, is absolutely right, and really if it were not for the vigorous and interesting argument which has been addressed to us here by Mr. Terrell I should have thought it sufficient to say that I entirely agree with Buckley, J., both in his reasons and in his conclusions. I think that this appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion, and I do not wish to add anything to what the Master of the Rolls has said.

COZENS-HARDY, L.J.—I am of the same opinion. I only desire to say one word. The real point seems to me to be, what was the arrangement actually come to? Buckley, J., has arrived at the conclusion that the father borrowed money for William, the son, and as between the father and William, the son, William was the person liable to pay the interest. Apart from anything else it seems to me that the bill of costs to which the Master of the Rolls has alluded contains abundant evidence to satisfy that. I find there that it is a bill paid by the son. I find "Instructions for bond from you to your father to secure *the* amount." I find again on the 10th of October "Attended you on your calling when you executed bond to your father for the amount raised by him on mortgage." Putting together the fact that the mortgage was for an odd sum—a peculiar sum—that the bond of the same date was also precisely the same sum and that the rate of interest was the same and that there are these entries in the bill of costs, quite apart from other disputed documents, I think that it is abundantly clear that as between the father and the son, the son was bound to indemnify the father as against this mortgage obligation. That being so, although there was no contract between the mortgagee and the son, it is quite sufficient in my view that there was a contract between the mortgagor and the son which as between these parties bound and entitled the son to make the payments of interest to the mortgagee, and that being so, there has been a payment of interest which suffices to prevent the statute from running. Any other conclusion than that which has been arrived at by Buckley, J., would, I think, have placed mortgagees in a position of extreme danger. Mortgagees advance money on a mortgage—they take security, interest is paid for a very long period regularly to them and received as and for interest, and it is received by them from a solicitor who is admitted to have been solicitor for the mortgagor and for the executors after his death. It does seem to me that mortgagees are not bound to inquire into the precise relations between solicitors and their clients, but they are entitled to assume that the solicitors are doing that which is in the ordinary course of business as solicitors under those circumstances—viz., to pay for their clients the interest due on the mortgage for which those clients are liable. For all these reasons I think that the appeal ought to fail and be dismissed with costs.

Solicitors, *Humber & Haynes*; *Nicholl, Manisty, & Co.*

From K. B. Div. (Vaughan Williams, Romer, and Mathew, L.JJ.) — May 12.

CARIDAD COPPER MINING CO. (LIMITED) v. SWALLOW. (a.)

Company—Director—Remuneration—Condition precedent—Apportionment—Articles of association.

The articles of association of a company provided that the directors should be allowed to receive as remuneration for their services a certain sum per annum "to be paid at such times as they may determine."

Held, that the words "to be paid at such times as they may determine" did not merely enable the directors to apportion the remuneration for periods less than a year, but constituted a condition to the right of a director to receive any remuneration.

Appeal from the judgment of Wright, J., at the trial of an action without a jury.

The action was brought against a director of the plaintiff company for payment of certain calls.

The defendant counterclaimed for £400 as remuneration for his services as a director during two years. The only question in the appeal was that raised by the counterclaim.

Article 80 of the articles of association of the company was as follows: "The directors shall be allowed to receive as a remuneration for their services, and there shall be allowed to them out of the funds of the company from the date of the incorporation of the company the sum of £200 per annum each, with £50 per annum extra for the chairman, to be exclusive of the remuneration of any managing director, and to be paid at such times as they may determine; and they shall also be entitled to receive and be paid in like manner 5 per cent. of the net profits available for dividend in each year divisible equally amongst them."

The answer of the plaintiff company to the counterclaim was that no time had been determined by the directors for payment of remuneration under article 80, and therefore the defendant was not entitled to any remuneration.

The company was incorporated in February, 1899.

The defendant was a director from the time of the incorporation, and continued to be so, during a period of more than two years, until the time of his death, which took place after the commencement of the action. At a meeting of the board of directors held on the 28th of December, 1899, a resolution was passed with regard to the question of unpaid directors' fees to the following effect—that, in view of the fact of the company being without funds, the payment of the same should remain in abeyance for the time being.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Wright, J., gave judgment for the company on the counterclaim.

The legal personal representative of the defendant appealed.

Younger, K.C., and *Lowenthal*, for the appellant.—The learned judge was wrong in holding that it was a condition precedent to the defendant's right to claim fees for his services as a director that a resolution should have been passed by the board fixing a time for payment. It was held in the cases of *Salton* v. *New Beeston Cycle Co.*, 47 W. R. 462, [1899] 1 Ch. 775, and *In re Central De Kaap Gold Mines*, 69 L. J. Ch. 18, 48 W. R. Dig. 42, that directors' fees were only payable for a whole year's services, and were not apportionable. The object of introducing the words "to be paid at such times as they may determine" into the present articles was to enable the directors, if they thought fit, to apportion the fees for periods less than a year. Wright, J., has held that the meaning of the article is that the majority of the directors may, if they think fit, postpone payment of remuneration indefinitely.

They referred to the case of *Nell* v. *Atlanta Gold and Silver Consolidated Mines*, 11 Times L. R. 407.

Witt, K.C., and *Montague Shearman*, for the respondent company, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I am of opinion that the judgment of Wright, J., must be affirmed. The whole question turns on the construction of article 80 of the articles of association. It is argued that the words "and to be paid at such times as they may determine" do not constitute a condition to the right of the directors to be paid the remuneration here mentioned. I see no reason for limiting these words, or for not giving them their natural meaning. I think they do introduce a condition to the right of a director to be paid remuneration. In my opinion they were introduced for the purpose of giving the directors power to arrange and fix times for payment, either by way of anticipation or postponement, in any way which they may consider to be consistent with the interests of the company. The case of *Nell* v. *Atlanta Gold and Silver Consolidated Mines* turned on the special words of the article there in question, and does not in any way affect the present case.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Rowcliffes, Rawle, & Co.*, for *R. W. H. Thomas*, St. Helens.

Solicitor for the respondents, *George Castle.*

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) — April 17, 18; May 6.

BELLERBY *v.* ROWLAND AND MARWOOD'S SHIPPING CO. (LIMITED). (*a.*)

Company—Shares—Surrender—Release of liability on shares—Invalidity of surrender—Rectification of register after lapse of time—Companies Act, 1862, *s.* 35.

A surrender of shares not fully paid up in a limited company with the intention that the surrenderor shall be released from liability for the amount unpaid, falls within the principle of Trevor *v.* Whitworth, 36 *W. R.* 145, 12 *App. Cas.* 409, *and is* ultra vires *and void; and the surrenderor has a right to the rectification of the register by the entry of his name, notwithstanding that several years have elapsed and that his name was removed at his own instance.*

Trevor *v.* Whitworth; Ooregum Gold Mining Co. *v.* Roper, 41 *W. R.* 90, [1892] *A. C.* 125; *and* British and American, &c., Corporation *v.* Couper, 42 *W. R.* 652, [1894] *A. C.* 399, *discussed.*

Teasdale's case, 22 *W. R.* 286, *L. R.* 9 *Ch. App.* 54, *and* Eichbaum *v.* City of Chicago Grain Elevators (Limited), 40 *W. R.* 153, [1891] 3 *Ch.* 459, *commented on.*

Decision of Kekewich, J. ([1901] 2 *Ch.* 265, 49 *W. R. Dig.* 31), *affirmed as regards the invalidity of the surrender, but reversed on the question of the rectification of the register.*

This was an appeal from a decision of Kekewich, J. (reported [1901] 2 Ch. 265, 49 W. R. Dig. 31).

The facts were as follows:

The company was incorporated in 1890 with a capital of £275,000 in 25,000 £11 shares, and with the object of carrying on the business of shipowners. Article 37 of its articles of association provided that the directors might accept from any member the surrender of his shares or stock, or any part thereof, on such terms and conditions as should be agreed.

In 1893 the company was in depressed circumstances, and had suffered a loss of over £4,000 on the sale by the directors of one of its steamships before her first voyage owing to the difficulty of paying the shipbuilders. Mr. Bellerby and two other of the plaintiffs were then among the directors. The directors agreed to bear the loss above referred to by each surrendering to the company eighty-three of the shares held by him, on which shares £1 remained unpaid. The transaction was carried out and confirmed by resolutions of the board, and the certificates for the surrendered shares were cancelled and new certificates issued to the directors for the balance of their holdings. The intention was that the directors should be relieved of liability for the unpaid £1 per share.

In July, 1893, the directors executed a deed-poll declaring that they had surrendered the shares with the object of making good to the company the loss sustained by the sale of the steamship, but (without prejudice to the validity of the surrender) that they did not, nor did any of them, admit any obligation to make good the loss or any part of it.

The company had since become prosperous, and as the result of general meetings of the shareholders held in 1899 and 1900 the three surviving directors and the executors of those who had died since 1893 brought this action against the company claiming a declaration that the surrender or purported surrender of the shares and its acceptance by the company were *ultra vires* and inoperative, cancellation of the deed-poll, payment of back dividends since June, 1893 (which claim was abandoned), and rectification of the register by the insertion of the plaintiffs' names as holders of the surrendered shares with £10 paid up.

Kekewich, J., held that the surrender was in fact a purchase of its own shares by the company, and therefore bad; but in the exercise of his discretion declined to grant rectification of the register, holding that the justice of the case did not require it after the lapse of time and when nothing had occurred in the meantime except that the company had become prosperous instead of embarrassed.

The plaintiffs appealed from this part of his lordship's decision.

Upjohn, K.C., and *Eustace Smith*, for the appellants, supported Kekewich, J.'s, decision as to the invalidity of the surrender, and argued that it amounted to a purchase of shares, not a surrender, and was *ultra*

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

vires of the company. [They cited on this part of the case *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; *Hope* v. *International Financial Society*, 25 W. R. 203, 4 Ch. D. 327; and *In re Dronfield Silkstone Coal Co.*, 29 W. R. 768, 17 Ch. D. 76; and referred to the Companies Act, 1877, s. 4.] They contended, however, that if this was so the appellants were still the legal owners of the shares and had a right to be restored to the register, and referred to *Sichel's case*, 16 W. R. 292, L. R. 3 Ch. App. 119, and *General Property Investment* v. *Matheson*, 16 Ct. Sess. Cas., 4th ser., 282.

Warrington, K.C., and *H. E. Wright*, for the company.—The transaction was not a permanent one, and therefore was not a reduction of unpaid capital, any more than a surrender of a fully paid up share is a reduction of paid-up capital: *In re Denver Hotel Co.*, 41 W. R. 339, [1893] 1 Ch. 495. In the *British and American, &c., Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, the House of Lords only disagreed with the Court of Appeal's view of the facts of the *Denver case*. The *British and American case* shows that the court may sanction a purchase of shares by way of a reduction of capital. The company gave up only what resulted from the surrender; they did not give up any other property or claim. The surrender is not bad *ipso facto*; each case must be judged on its own merits. No case has yet decided that the court is bound to treat a surrender of unpaid shares as *ultra vires* unless it be in the form of a purchase. As to the other part of the case, even if the surrender is void, the right of a member to be placed on the register, and the machinery by which it is to be done, are regulated by section 35 of the Companies Act, 1862, and under this, whether proceedings be by action or by motion, the court must be satisfied as to the justice of the case. Kekewich, J., was right in holding that on the statement of claim and the admitted facts the justice of the case did not require that these gentlemen should be restored to the register. Shareholders have no right to come back and ask to be restored because the company is prosperous. *General Property Investment* v. *Matheson* can be distinguished on the ground that there were other circumstances requiring rectification; it was not granted on the bare ground that the transaction was *ultra vires*. The plaintiffs have voluntarily taken their names off the register.

They also referred to Lord Macnaghten's speech in *Trevor* v. *Whitworth*, 12 A. C., at pp. 440-1; *Teasdale's case*, 22 W. R. 286, L. R. 9 Ch. App. 54; *Snell's case*, 18 W. R. 30, L. R. 5 Ch. App. 22; *Marshall* v. *Glamorgan Iron and Coal Co.*, 17 W. R. 435, L. R. 7 Eq. 129; *Wright's case*, 19 W. R. 947, L. R. 12 Eq. 331, at p. 336; *Eichbaum* v. *City of Chicago Grain Elevators (Limited)*, 40 W. R. 153, [1891] 3 Ch. 459, and *Morrison* v. *Trustees Corporation*, 68 L. J. Ch. 11, 47 W. R. Dig. 34.

Upjohn, in reply.—A shareholder's liability for unpaid capital can only be got rid of (1) by payment in full, (2) by transfer, (3) by forfeiture, or (4) by reduction of capital sanctioned by the court. The purporting surrenderor is liable till his successor is found, and to diminish the liability of a member is equivalent to a reduction of capital.

Cur. adv. vult.

May 6.—The following judgments were delivered:

COLLINS, M.R., after stating the facts, continued: Since *Trevor* v. *Whitworth*, it is clear law that a limited company cannot purchase its own shares unless it does so by way of reduction of capital with the sanction of the court (see *British and American, &c., Corporation* v. *Couper*), and cases before *Trevor* v. *Whitworth* dealing with the acquisition of their own shares by companies are now of little assistance. Is the transaction in this case a purchase of its own shares by the company? It was certainly intended by the parties to involve the release by the company to the surrenderors of the right to call up the unpaid balance of £1 on each share, and it was therefore not a gratuitous surrender. There was an exchange of real consideration between the parties, and therefore it ought, perhaps, to be described as a sale and purchase rather than as a surrender. But assuming it can properly be described as a surrender, although it involves a consideration given out of the assets of the company to the surrenderors, it remains to be considered whether there is any legal ground on which it can be taken out of *Trevor* v. *Whitworth*. It seems to me there is not. Mr. Warrington based an argument on a minute criticism of some passages in the speeches of the learned lords in *Trevor* v. *Whitworth*, in which they deal with the argument that to hold a sale bad would be to forbid forfeitures and surrenders, and point out that these differ from the case actually before them, which involved a present parting by the company with the amount actually paid up on the shares. But whether this distinction is conclusive or not, it seems to me that when closely criticized these *dicta* as to surrenders deal with them as a species of forfeiture, which, as the lords point out, is recognized by the Act itself, and cannot be extended to cover a transaction having none of the elements of a forfeiture. Lord Herschell says (12 App. Cas., at p. 417), that forfeiture "does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender, no doubt, stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections." Lord Watson says (at p. 429) that surrenders "have been admitted by the courts on the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding *in invitum* and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on his shares." Lord Macnaghten says (p. 438) that "there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction." And in the *British American case*, [1894] A. C., at p. 414, he says, "I cannot agree that a transaction which involves a surrender of shares as part of the consideration is anything but a purchase of shares within the meaning of the opinion of this House in *Trevor* v. *Whitworth*."

I can see no distinction in principle between returning to a shareholder a part of the paid-up capital in exchange for his shares and wiping out his liability for the uncalled up sum payable thereon. Both methods involve a reduction of the capital, which, as Lord Watson points out in *Trevor* v. *Whitworth*, 12 App. Cas., at p. 423, persons dealing with the company are entitled to rely upon as existing either as paid up or as still to be called up, and such a reduction therefore can only hold good if sanctioned under the condition prescribed. If it be objected that the shares may, in Lord Watson's language, be "reissued," and that though the liability of the surrenderor to pay the amount still at call is extinguished the liability will remain good against anyone to whom the company disposes of the share, the answer in this case is the

same as that suggested by Lord Watson in the case where the money paid up on the share is returned to the shareholder. He says, at p. 424, "In the event of the company continuing to hold the shares (as in the present case) the amount paid up is permanently withdrawn from its trading capital." But further, and apart from the question of sale or trafficking in a company's own shares, I think the reasoning in the *Ooregum case*, [1892] A. C. 125, establishes that to release a shareholder from any part of his obligation to pay the uncalled-up balance on his share is *ultra vires* of the company. "It seems to me," says Lord Halsbury, at p. 133, "that the system thus created by which the shareholders' liability is to be limited by the amount unpaid upon his shares renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of their shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing. I observe on the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security," and the opinion of the other learned lords are to the same effect. The justification of forfeitures rests on the statute itself, and I think that since *Trevor* v. *Whitworth* no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture. It is not necessary to refer to *Eichbaum* v. *City of Chicago, &c., Co.*, decided by Stirling, L.J., on the authority of *Teasdale's case*, as he will deal with those cases himself. In *In re Denver Hotel Co.* Lindley, L.J., in supporting a surrender, relied on the fact, pressed by counsel in argument, that "the shares being fully paid up, their surrender involves no release by the company of any of its rights against the surrenderor," indicating thereby the possible importance of a release. It is not, however, necessary to consider in this case whether a surrender, even of fully paid-up shares, could be supported. I am of opinion, therefore, that Kekewich, J., was right in his decision on the principal question in the case.

On the second point, however, he has held that notwithstanding that the surrender of the shares was void as being an act *ultra vires*, still the application to restore the plaintiffs to the register must be treated as being made under section 35 of the Act of 1862, and that he was not satisfied of the justice of the case within that section, and therefore refused to make the order. He relied on the fact that so much time had elapsed since the surrender, and that conceivably some persons might have altered their position on the footing that the capital of the company had been reduced; and relying on *Sichel's case* and the *dicta* of Lord Macnaghten in *Trevor* v. *Whitworth*, he held that the plaintiffs showed no equity in their favour to disturb the existing state of things, and he therefore refused to rectify the register at their instance. The application in this case is not in fact made under section 35 (if anything turns on that), but is an action asserting the legal right of the plaintiffs to be on the register, on the ground that the act whereby they were removed from it was *ultra vires*, and therefore a nullity. *Sichel's case* did not relate to an act *ultra vires* of the company, and Lord Macnaghten in his observations on *In re Dronfield, &c., Co.*, in *Trevor* v. *Whitworth* treated the application as made by one who had no equity to set the court in motion. Here it seems to me that in point of law the plaintiffs never ceased to be the legal owners of the shares, and therefore are not obliged to rely upon an equity to have the register rectified. Nor, on the other hand, can the company set up lapse of time or acquiescence as validating that which was in its essence incapable of being made valid, being, as Jessel, M.R., pointed out in the *Dronfield case*, void and not voidable only. *General Property Investment Co.* v. *Matheson* is an authority directly in point on this part of the case, unless the fact of liquidation makes a difference. An action was there brought by a liquidator to place on the register a shareholder who had sold his share to the company at their instance many years before. Lord Shand said (16 Ct. of Sess. Cas., 4th ser., at p. 291): "If the legal right of the company be clear, then it follows that the justice of the case requires that effect shall be given to that right." I think, therefore, that Kekewich, J.'s, decision on this part of the case cannot be supported, and the appeal must be allowed.

STIRLING, L.J.—I have arrived at the same conclusion on both points, though not without some doubt upon the first. I think, however, that in view of the decisions of the House of Lords in the *Ooregum case* and the *British American case*, the weight of authority must be considered to be in favour of the view that a transaction of this kind falls within the principle of *Trevor* v. *Whitworth*. Forfeiture stands on a special footing, and surrender is only justified in circumstances which would justify forfeiture. I wish to add a few remarks with reference to *Eichbaum's case*. That case was decided by me on the authority of *Teasdale's case*, which appeared to me to be precisely in point. Cozens-Hardy, L.J., has, however, pointed out during the argument of the present case (so far as I know for the first time) that the resolutions authorizing the surrender of shares in *Teasdale's case* were passed in 1865, before the date of the Companies Act, 1867, whereas those in *Eichbaum's case* were passed after that Act. I think this makes a very material difference, and that in view of it I ought not to have followed *Teasdale's case* in *Eichbaum's case*. Moreover, the two decisions of the House of Lords since 1891 (the date of the decision in *Eichbaum's case*) which I have above referred to, make it more difficult now than it was in 1891 to exclude such transactions from the principle of *Trevor* v. *Whitworth*. As to the second point, I think Kekewich, J., paid too much attention to the *Dronfield case*. All difficulties in the way of restriction of the plaintiffs to the register are in my opinion removed by the withdrawal of the claim for back dividends, and this appeal must be allowed.

COZENS-HARDY, L.J.—The transaction was no doubt perfectly honest and beneficial to the company, but as by it the company parted with some of its assets in consideration of the acquisition of the shares, it amounts to a purchase of the shares. The earlier authorities on the first question are neither consistent nor satisfactory, but *Trevor* v. *Whitworth* and *Ooregum* and *British American cases* are now the three governing authorities. The conclusion to be drawn is, in my opinion (1) that a company may forfeit shares, a right recognized by section 26 of the Companies Act, 1862, and by Table A, but that (2) it may not purchase its shares. Where shares may be forfeited they may be surrendered, but where, as here, the transaction involves a reduction of liability on the shares, it falls within the principle of *Trevor* v. *Whitworth*. It follows from the *Ooregum case* that a company cannot relieve a shareholder of liability on his shares, since it in-

volves a reduction of capital, which is illegal unless sanctioned by the court. Forfeiture is a statutory, and a sole, exception.

On the second point I cannot follow Kekewich, J. If, as I think, the plantiffs are still shareholders, they ought to be on the register. No doubt their names were removed from it at their own instance, but this does not affect their right to be restored to it if, as we hold, the transaction by which they were removed was illegal and void, and in the event of a winding up they might be held liable by the liquidator. There should be no costs of the appeal.

Appeal allowed.

Solicitors, *Bell, Brodrick, & Gray*, for *W. S. Gray*, Whitby; *Radford & Frankland.*

High Court of Justice.

Chan. Div. Kekewich, J. — June 5.

In re ANDREWS.
ANDREWS *v.* ANDREWS. (*a.*)

Donatio mortis causâ—*Post Office Savings Bank deposit book—Certificate of Local Loans 3 per Cent. Stock—Validity.*

A. was possessed of a certain sum in the Post Office Savings Bank and a sum of £50 10s. Local Loans 3 per Cent. Stock. Three days before her death, being well aware that her death was imminent, she expressed a desire that her sister should, in the event of her death, have all the money in the savings bank and the sum of £50 10s. Local Loans 3 per Cent. Stock. She accordingly delivered to her sister a desk containing the savings bank deposit book and the certificate of the Local Loans Stock, and gave her also the key of the desk.

Held, that the gift of the money in the savings bank was a proper subject for a donatio mortis causâ, *and therefore valid, but that the gift of the Local Loans Stock was not, and was therefore invalid.*

This was a summons taken out by the executrix of the will of Miss Amy Caroline Andrews to determine the validity of certain *donationes mortis causâ* made by the testatrix to her sister, Miss Anna Catherina Andrews.

It appeared that the testatrix, on the 31st of August, 1901, being then in expectation of death, expressed a desire that, in the event of her death, her sister should have all the money in the Post Office Savings Bank, including a sum which the bank had invested for her in Government Stock, and accordingly she delivered to her sister a desk containing her savings bank book and an investment certificate issued to the testatrix by the savings bank for £50 10s. Local Loans 3 per cent. Stock, and also gave her the key of the desk.

Three days after making the above gifts the testatrix died.

The substantial question related to the validity of the gift of the Local Loans Stock, it being admitted during the argument that the recent decision of Byrne, J., in *In re Weston, ante*, p. 294, [1902] 1 Ch. 680, was conclusive in favour of the validity of the gift of the balance at the savings bank.

The rules contained in the savings bank book provided for the receipt of deposits for investment upon certain conditions, and rule 16 enabled depositors to invest their deposits in certain descriptions of Government Stock, including Local Loans 3 per cent. Stock.

Rule 16 then proceeds as follows: "Dividends upon such stock standing in a depositor's name will be credited to his deposit account as they become due, and will be entered in his deposit book when it is received for the annual examination. They will, when credited, carry interest like cash deposits. Any depositor who may desire to invest in Government Stock must forward to the Controller of the Savings Bank Department an application on a printed form to be obtained at any Post Office Savings Bank, and the deposit book will also be required in that department, but where a deposit is made for the purpose of immediate investment the book need not be sent with the application to invest, but can be held over until the acknowledgment of the deposit is received. The investment will be at the current price of the day upon which it is made, and a certificate thereof will be sent to the depositor by post. Sales of stock will be effected at the request of the depositor made in like manner, the application being accompanied by the deposit book and investment certificate, and in such case the value of the stock at the current price of the day of sale, less commission, will be forthwith paid by warrant to the depositor at the Post Office Savings Bank most convenient to him. A depositor may transfer stock standing to the credit of his account with the Post Office Savings Bank into the Bank of England upon making application to the Savings Bank Department on a form which can be obtained at any Post Office Savings Bank, and sending with it his deposit book and investment certificate."

The testatrix's bank book contained an entry stating that the stock had been invested for the depositor. The investment certificate certified that £50 10s. Local Loans 3 per cent. Stock had been placed on the Savings Bank Investment Account of the Bank Commissioners, that the same had been credited in the Government Stock Register of the Post Office Savings Bank to Amy Caroline Andrews, and that the deposit account had been charged with the sum of £51 1s. 4d., being the price of the stock at the date of investment and commission. It also contained a note that in the event (*inter alia*) of the depositor desiring to sell the stock, or transfer it into his own name in the books of the Bank of England, he must forward the certificate and his deposit book, with his application, to the Controller of the Post Office Savings Bank.

H. E. Wright, for the executrix.

Lyttleton Chubb, for Miss Anna Catherina Andrews.—I submit that both the money in the bank and the Local Loans Stock are proper subjects for a *donatio mortis causâ*. With regard to the stock, this is in the same position for the purposes of a *donatio mortis causâ*, with the exception that the stock is not entered in the name of the person entitled to it. The bank book and the investment certificate together form evidence of the indebtedness of the Post Office, and of the circumstances of that indebtedness. If the stock had been invested in the name of the depositor, as it might have been under rule 16, then no doubt the delivery of the stock certificate would not have been a good *donatio mortis causâ*, as a transfer would then be necessary. Here there was no transfer necessary by the depositor, the transfer being made by the savings bank.

G. Cave, for a legatee in opposition to the claim, was not called upon.

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

KEKEWICH, J., said that as regards the cash deposit at the bank, the case was covered by the decision of Byrne, J., in *In re Weston, ante*, p. 294, [1902] 1 Ch. 680, and he desired to express his entire concurrence with that decision. The question as to the Local Loans Stock was new. The Post Office gave facilities to depositors to invest in Government Stock. They might invest through the Post Office Savings Bank in their own names, and in that case the stock could only be released in the ordinary way. It could not be contended that that would be a good subject-matter for a *donatio mortis causâ*. Both principle and authority were against that contention. But in order to assist the depositors the Post Office Savings Bank did something else. Instead of purchasing so much stock in their own names, it invested the money for them; in other words, the bank acted as trustees of the stock for the depositors, and every depositor whose money was so invested had an investment certificate. After referring to the certificate issued to the testatrix, his lordship said that there was a large sum of Local Loans Stock standing in the name of the National Debt Commissioners. That would only be transferred in the ordinary way at the Bank of England, but the Commissioners had a Post Office Savings Bank account in their books, and in that account they credited the Post Office Savings Bank with the sum of £50 10s. on behalf of the depositor Amy Caroline Andrews. There was no transfer of stock; it was a mere credit in their books. If the depositor desired to realise, there must be a debit of so much as was to be transferred to her. There was no transfer, but the £50 10s. was credited to her at the current price of the day, less commission, and the result was that she was entitled to receive that amount in cash; and, if she so requested, the money would be paid to her by warrant at the Post Office Savings Bank most convenient to her. If she changed her mind, and preferred that the money should remain at the savings bank, she had to make a fresh deposit, notwithstanding that she never touched the money. The depositor could not get the money simply by asking for it, but these forms had to be gone through, and in truth it was a sale of the stock standing in the lady's name, although as a matter of fact there was no sale at the Bank of England. According to the principle of *In re Dillon*, 38 W. R. 369, 44 Ch. D. 76, as stated by Byrne, J., in *In re Weston, ante*, p. 294, [1902] 1 Ch. 680, at p. 685, the test was whether or not the document, besides acknowledging the receipt of the money, expressed the terms upon which it was held, and showed what the contract between the parties was. There was here a book in which the sum of stock was mentioned. That showed that the Post Office Savings Bank had invested the money, and the rules which were printed in the bank-book no doubt showed the terms upon which it was held. But it was not intended that that should be necessarily exhaustive. It was necessary in the present case to go a step further, and Byrne, J.'s, decision did not assist his lordship to say that this must be a proper *donatio mortis causâ* of the Local Loans Stock so invested. So to hold would be to push the doctrine beyond the decided cases; and although the doctrine had been extended of late years in some cases, this was a substantial step further, and he thought it was a step which ought not to be taken by a judge of first instance. His lordship accordingly decided in favour of the validity of the gift of the balance at the bank, and against the validity of the gift of the Local Loans Stock.

Solicitors, *Radford & Frankland; W. D. Mercer; Pritchard & Sons.*

Chan. Div. Kekewich, J. } July 21, 1900; May 27.

In re LEGH'S SETTLED ESTATES. (*a.*)

Settled land — Tenant for life — Capital moneys — Expenses of improvement and development of building estate — Rebuilding of mansion-house — Dry rot — Salvage — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 25 — *Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-section* 4.

Where the principal mansion-house on settled land had been rebuilt owing to dry-rot, and additions and improvements had at the same time been made to the house, and the gross expenses (being more than one-half the annual rental of the settled estates) had been paid by the tenant for life,

Held, on a summons by him for recoupment, that such part of the expenditure as was not in excess of one-half the annual rental of the estates was payable out of capital under the Settled Land Act, 1890, *s.* 13, *but that no part of the excess could be allowed by way of salvage.*

This was an amended and adjourned summons by the tenant for life of settled land for an order directing the trustees out of capital moneys in their hands to repay to the tenant for life (among other sums) the sum of £17,109 17s. 3d. expended by the tenant for life in rebuilding the principal mansion-house owing to its threatened destruction by dry-rot.

At the first hearing of the summons in 1900 prior to its amendment the sum asked for in respect of these expenses was only £1,260 or such further sum as might be found necessary for rebuilding and reconstructing the mansion-house, and this part of the summons stood over until the work should be completed and the total amount of expenditure upon such works ascertained. It appeared that owing to the spread of dry-rot the house was in a very bad state, and almost the whole of it had to be pulled down and rebuilt and certain additions and improvements were also carried out upon the occasion of the rebuilding. The trustees were from time to time informed of the extent and progress of the works, and there were letters from them approving what was being done, but owing to its being impossible accurately to forecast what the extent of the works would be, no scheme was laid before them.

Under the Settled Land Act, 1890, s. 13, capital money may be applied in rebuilding the principal mansion-house on the settled land provided that the sum to be so applied shall not exceed one-half of the annual rental of the settled land. The annual rental in this case was £22,153 13s. 1d., and there were capital moneys in the hands of the trustees more than sufficient to pay the sum of £17,109 17s. 3d. asked for by the summons.

J. Mulligan, K.C., and *R. Morrison*, for the tenant for life.—In so far as the sums expended exceed one-half of the annual rental of the estate they should be allowed out of capital by way of salvage under the original jurisdiction of the court: *In re Hawker, Duff* v. *Hawker*, 45 W. R. 440; *Willis* v. *Willis, ante*, p. 70, [1902] 1 Ch. 15.

L. F. Potts, for the trustees.

KEKEWICH, J. (after stating the facts).—I am satisfied that the mansion-house was of necessity rebuilt owing to the spread of dry-rot, and a sum equal to one-half of the rental—viz., the sum of £11,076 may properly be applied out of capital moneys in recouping the tenant for life. But with regard to moneys spent in excess of such sum I cannot sanction any further payment out of

(*a.*) Reported by A. C. NESBITT, Esq., Barrister-at-Law.

capital by way of salvage since the expenditure has in fact been incurred for additions and improvements, and there are no means of determining what sums have been paid in that way, and what might have been paid by way of salvage.

Solicitors, *Philpott & Morrell*, for *Potts, Potts, & Gardner*, Chester.

Chan. Div. } May 29; June 5.
Buckley, J. }

SUTTON *v.* ENGLISH AND COLONIAL PRODUCE CO. (LIMITED). (*a.*)

Company—Director—Qualification—Articles of association—Construction—Shares held "in his own right"—Bankruptcy of shareholder.

A registered holder of shares in a limited company holds the shares "in his own right" so as to qualify him for being a director under the articles of association, when he holds them in such a way that the company can safely deal with him as the owner of the shares; and where the shareholder is an undischarged bankrupt and his trustee in bankruptcy claims the shares, but has not decided whether he shall be registered or not, the company cannot safely deal with the bankrupt shareholder as owner in respect of those shares, and consequently he does not hold them in his own right for the purpose of qualifying as a director under the articles.

Dictum *of* Lindley, L.J., *in* Bainbridge *v.* Smith, 37 *W. R.* 594, 41 *Ch. D.* 462, *followed.*

Motion.

The defendant company was incorporated in November, 1901. The plaintiff was under its articles of association the first director. Article 104 was as follows: "A director must be member of the company. The qualification of a director shall be holding in his own right alone, and not jointly with any other person, 100 shares of £1 each, or £100 stock, and this qualification shall be required as well of the first directors as of all future directors."

By article 116 the office of director was to be vacated (*b*) if a receiving order was made against him, or (*c*) if he ceased to hold the qualifying number shares or amount of stock.

By article 35 a person becoming entitled to a share in consequence of the bankruptcy of a member might, upon producing evidence of his title, either be registered himself as holder or elect to have some person nominated by him registered.

The plaintiff was, and on the 25th of April, 1902, continued to be, the registered holder of 1,000 shares, numbered 6,000 to 7,000.

The plaintiff had in fact been adjudicated a bankrupt in 1888, and had never been discharged.

On the 14th of April, 1902, the trustee in bankruptcy gave the company formal notice, requiring them forthwith to place his name on the register in respect of the above-mentioned 1,000 shares.

On the 16th of April, by a telegram and letter, he modified this by stating that although he claimed the shares as property vested in him by law, he did not ask for an actual transfer for a few days, but wished to have a list of the shareholders, as he proposed to offer the shares for sale to the shareholders.

On the 25th of April, the plaintiff was excluded from the board of directors upon the ground that he had become disqualified.

On the 28th of April a transfer of 100 other shares in the company was executed in his favour, and this was lodged with the company for registration. It came before the board on the 1st of May, and the directors refused to register it.

The plaintiff brought this action against the company and two of the directors for an injunction to restrain them from excluding him from acting as a director, and for rectification of the share register by inserting his name as holder of the 100 shares transferred to him, and the plaintiff now moved in the action to the same effect.

Hansell and *A. R. Macklin*, for the plaintiff.—The plaintiff is the registered holder of the shares. It is true he is trustee of them for his trustee in bankruptcy, but that does not prevent his holding them "in his own right": *Pulbrook* v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610. That case was approved of by Lindley, L J., in *Bainbridge* v. *Smith*, 37 W. R. 594, 41 Ch. D. 462, and is now settled law: see observations of Lord Herschell in *Cooper* v. *Griffin*, 40 W. R. 420, [1892] 1 Q. B. 740. The decision, however, in *Cooper* v. *Griffin* and in *Howard* v. *Sadler*, 41 W. R. 126, [1893] 1 Q. B. 1, turned upon the words of the statute 1 & 2 Vict. c. 110 As regards the 100 shares transferred to him, the plaintiff had a right to be registered as holder as his trustee had made no objection.

H. Terrell and *J. Israel*, for the defendants.—The views of Jessel, M.R , in *Pulbrook* v. *Richmond Consolidated Mining Co.*, as to the absence of the beneficial interest not preventing shares being held "in his own right" were not necessary to the decision, as the registered holder there had the beneficial interest subject to a mortgage. *Bainbridge* v. *Smith* is an express authority that the plaintiff does not hold these shares in his own right. *Cooper* v. *Griffin* and *Howard* v. *Sadler* were also decided upod the same words in a statute, and show that the trustee of shares does not hold them in his own right. As to the 100 shares, by section 50 (5) of the Bankruptcy Act, 1883, they must be deemed to be assigned to the trustee. The shares belong to the trustee and the plaintiff is not entitled to be registered.

Cur. adv. vult.

June 5.—BUCKLEY, J.—The effect of the action taken by the trustee in respect of the shares standing in the name of the plaintiff was, in my opinion, that he claimed the shares as his, but postponed for a few days his decision as to whether under article 35 he would require to be registered himself or elect to have some person nominated by him registered as transferee. Under these circumstances the question is whether, after the 14th and 16th of April, 1902, the bankrupt continued to hold "in his own right" these 1,000 shares. In *Pulbrook* v. *Richmond Consolidated Mining Co.* Jessel, M.R., held that a man may hold as registered member in his own right notwithstanding that he has not the beneficial ownership of shares. Looking at what was said by Lindley, L.J., in *Bainbridge* v. *Smith*, 37 W. R., at p. 598, 41 Ch. D., at p. 474, by Lord Herschell in *Cooper* v. *Griffin*, 40 W. R., at p. 422, [1892] 1 Q. B., at p. 750, and by Lord Coleridge and Wills, J., in *Howard* v. *Sadler*, 41 W. R. 126, [1893] 1 Q. B., at pp. 3 and 4, I think that, notwithstanding what was said by Cotton, L.J., in *Bainbridge* v. *Smith*, 37 W. R., at p. 597, 41 Ch. D., at p. 472, this decision of Sir George Jessel's cannot now be treated as open to question. It is true, as has been pointed out in some of the subsequent cases, that Pulbrook, in the case before Jessel, M.R., was beneficial owner subject to a

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

mortgage, and that therefore the decision might be supported upon a different ground. But the ground upon which the Master of the Rolls put it, and which is supported by the later cases, is that the words "holding in his own right" do not require that the holder shall be beneficial owner. Negatively, then, the holder in his own right need not be beneficial owner. It remains to say what, affirmatively, he must be. That, I think, is answered by Lindley, L.J., in *Bainbridge* v. *Smith* 37 W. R., at p. 498, 41 Ch. D., at p. 475. He must be a person who holds shares in such a way that the company can safely deal with him in respect of his shares whatever his interest may be in the shares. Holding in a representative character will not do. Holding as trustee without beneficial ownership will do, but the holder must so hold as that the company can safely deal with him as owner. Turning, then, to the facts of this case, after the 14th and 16th of April, 1902, could this company have safely dealt with the plaintiff in respect of the shares? I think not. The company had received notice from the trustee that he claimed the shares and that he postponed for a few days stating in which way he would under article 35 avail himself of his rights of ownership. After that the company could not have safely dealt with the plaintiff in disregard of the claims of the trustee. In my judgment, therefore, the plaintiff (although he had a beneficial interest in case his estate proved to be solvent) was not on the 25th of April the holder in his own right of the 1,000 shares. He had become disqualified, and his office of director was vacated. Subsequently a transfer in his favour of 100 shares was executed and lodged for registration. The directors refused to register it, and the ground upon which they rely is that, if they had registered it, the trustee in bankruptcy would have been entitled to take the shares. This is not, I think, in the mouth of the company, any answer to a demand for registration of the transfer. It is an effectual transfer. The trustee had not raised, and I see no reason why he should raise, any objection to its registration. The right of the trustee to the shares is in no way defeated, but, on the contrary, is assisted by the company taking the shares out of the name of the transferor and putting them into the name of the transferee. Seeing, however, that the plaintiff had previously become disqualified as a director, and his office had fallen vacant, his subsequent registration as the holder of these 100 shares will not re-establish him in his office. So far, therefore, as the notice of motion asks an injunction to restrain the defendants from excluding the plaintiff from acting as director, it fails, and I dismiss it. So far as it asks for rectification by inserting the plaintiff's name as the holder of the 100 shares, Nos. 5,901 to 6,000, it succeeds, and I make an order for rectification. I make no order as to costs. To complete the review of the cases relating to holding "in his own right," I may add that the words "in his own right" for the purpose of qualification, and the same words for the purpose of a charging order under 1 & 2 Vict. c. 110, s. 14, have not the same meaning. The language of 1 & 2 Vict. c. 110, s. 14, is "standing in his name in his own right or in the name of any person in trust for him." The juxtaposition of these words shows that the shares to be charged are to be shares in which the judgment debtor has a beneficial interest. The same shares, therefore, may be held by the judgment debtor "in his own right" for purposes of qualification, but not so as to render them available for the purpose of a charging order. This was the decision in *Cooper* v. *Griffin* and *Howard* v. *Sadler*.

Solicitors, *Churchman & Winser; Dyson, Smith, & Marchant.*

Chan. Div. } June 3.
Buckley, J. }

In re CARATAL (NEW) MINES (LIMITED). (a.)

Company—Special resolution—Voting—Show of hands—Proxies—Chairman's declaration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51; *Table A, art.* 42.

Although a chairman's declaration is, under section 51 *of the Companies Act,* 1862, *conclusive evidence of the carrying of a special resolution, even if founded on an error or mistake of fact, it is not conclusive if on the face of it wrong in fact and founded on a mistaken view of the law.*

Creditor's petition for a compulsory winding up order.

In the course of the case a question arose as to whether a special resolution for voluntary winding up had been validly passed.

The facts were briefly as follows:

The company's articles provided (by clause 58, which was practically identical in terms with clause 42 of Table A.) that "at any general meeting, unless a poll is demanded by at least five members personally present, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution"; and (by clause 61) "every member shall have one vote for every share held by him." The first of the two meetings for passing and confirming the special resolution for voluntary winding up was held in July, 1901. There was considerable discussion; the resolution was put to the meeting; there was a show of hands and the chairman announced "those in favour, six; those against, twenty-three, but there are two hundred voting by proxy, and I declare the resolution carried as required by Act of Parliament." No poll was held or demanded.

Gore-Browne, K.C., and *Martelli*, for the petitioners.

John Henderson, for the company and the alleged voluntary liquidator (upon whom the petition had been served), argued that, having regard to the articles and to section 51 of the Companies Act, 1862, the chairman's declaration could not be disputed.

BUCKLEY, J., in dealing with this point, after reading section 51 of the Companies Act, 1862, said that the respondent's contention that the chairman's declaration was conclusive seemed to involve the drawing by the court of the inference that if the chairman's declaration in giving the numbers for and against a resolution showed that there was not the necessary three-fourths majority, but nevertheless declared that the result in law was that there was the necessary majority, such declaration was conclusive; if, for instance, the chairman were to declare when the numbers only showed a bare majority that as the statute only required a bare majority, the resolution was duly passed, or were to say that he held a number of proxies and to purport to count them and thereby carry or reject the resolution (as *Ernest* v. *Loma Gold Mines*, 45 W. R. 45, 86, [1897] 1 Ch. 1, showed he could not) his declaration would, on the respondent's contention, be conclusive.

If the chairman erroneously or by mistake declared a resolution carried, the court would not go behind that declaration (*In re Hadleigh Castle Gold Mines*, [1900] 2 Ch. 518, 49 W. R. Dig. 28, and *Arnot* v. *United African Lands*, 49, W. R. 322, [1902] 1 Ch.

(a.) Reported by L. W. BYRNE, Esq., Barrister-at-Law

518); but these decisions had no application to a case where a chairman gave the figures rightly, but by an error as to the law wrongly declared a resolution carried, as he had done in the present case.

Solicitors, *Mayo & Co.; Adler & Perowne.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.)

April 15; May 1, 2.

REX *v.* LICENSING JUSTICES OF FARNHAM AND OTHERS. (*a.*)

*Licensing Law—Justices—Refusal to renew licences—Justices themselves the objectors—Notice of objection by the justices served on licensees—Jurisdiction of same justices to hear and determine applications—Appeal entered to quarter sessions—*Mandamus—*Licensing Act,* 1872 (35 & 36 *Vict. c.* 94), *s.* 42, *sub-section* 2—*Licensing Act,* 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

The licensing justices of F. gave notice that they intended to object to the renewal of certain licences, having themselves previously taken steps to get information as to the requirements of the division and the number of licensed houses, and on that information they considered there were too many licensed houses for the population.

The applications were made and refused. The licence-holders thereupon entered an appeal to quarter sessions, and also moved and obtained a rule nisi *for a* mandamus *directed to the justices on the following grounds:* (1) *That the justices were not entitled to be objectors to the granting of the licences;* (2) *that if they were so entitled, and if in fact they did object, they were not entitled to sit and adjudicate on the applications;* (3) *that in these particular cases the justices were disqualified by reason of the steps they had taken to get information concerning the houses, and had prejudiced the case; and* (4) *that one of the justices was a member of the authority actively engaged in opposing the renewal of these licences, and had been party to a resolution in opposing them.*

Held, discharging the rules that the justices could raise these objections under section 42 *of the Licensing Act,* 1872, *and that the proceedings were not invalid, because the notice of objection had been given by the justices.*

Held, also, that the notices of appeal to the quarter sessions were no bar to proceedings for mandamus, *and conversely that the failure of the application for a* mandamus *did not invalidate the notice of appeal.*

On the 15th of April this court had granted a rule *nisi* directed to the licensing justices of the Farnham Division of Surrey to show cause why a *mandamus* should not issue commanding them to hold an adjourned licensing meeting and to hear and determine certain applications for the renewal of licences, including one to Mrs. J. E. Smith, of the Queen-street Tavern, Farnham.

There were in all nine applications of the same nature, the facts being substantially the same in each instance. The rule was asked for on the following grounds—(1) that the justices were not entitled themselves to object to the renewal of a licence; (2) that they were not entitled to adjudicate upon their own objections; (3) that they were precluded from sitting and adjudicating by having previously collected evidence and prejudged the cases; and (4) that one of the justices (Mr. Bentall) who refused the licence was not only a member of a body which had previously resolved to oppose renewal of licences, but had been an actual party to the resolution.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

It appeared that some months ago the justices appointed a committee to make inquiries in Farnham with a view to reducing the number of licences; evidence or what was called evidence was collected and embodied in a report which was headed "'Private and Confidential'—Proposed Reduction of Licences in the Division." It contained tabulated particulars as to all the licensed houses. The justices held a meeting to consider this report prior to the annual licensing meeting on the 1st of March, and resolved that their clerk should obtain the presence of witnesses in support of the report. At the annual licensing meeting notice was given on behalf of a majority of the justices that they would object to the renewal of all the full licences in the district. Two justices (one being Mr. Gould, K.C.) dissented, but the clerk, nevertheless, served notices of objection, on behalf of the justices on a number of licence-holders. At the adjourned meeting on the 14th of March objection was taken, on behalf of Mrs. Smith and others, that the justices were not entitled to serve notices of objection to renewal, and that those who had taken part in so doing were disqualified from sitting in such cases; and, in particular, an objection was urged against one of the justices, who was a member of the Congregational Union, and had taken an active part in the proceedings before referred to. The justices whose conduct was impeached retired to consider the matter, and on their return overruled the objection, and the chairman conducted the case of the opposition and examined the witnesses. In the result the licences were refused.

The court granted the rule *nisi* as asked in each case, and the rules now came on for argument before the same judges.

F. Low, K.C., and *Hohler*, for the justices.—This case raises two important questions of law—(1) can justices start an opposition themselves to a licence, and (2) if they have taken any steps to oppose a licence being granted can the adjudicate upon the application? Unless the court is prepared to hold that section 42 of the Licensing Act, 1872, as amended by section 26 of the Act of 1874 has so cut down the discretion of the justices with regard to their refusing to renew licences that they are unable to use their discretion and must grant an application unless it is opposed by an objector outside their own body, the answer to the first question must be that the justices themselves may oppose a licence. As to the second question, if bias is proved the ruling of the justices is void; but there is nothing on the facts here that carry this case to that length. It was impossible to sustain the proposition that a magistrate might not object. If the objector must be a third party it would be a good answer to say because you are a magistrate the objection raised by you is invalid. Certainly the bench has a right to view the premises and to form their own opinion as to the requirements of the neighbourhood. The notices here were served on all the alehouses—there was no picking out. The affidavits of the chairman and justices showed that they considered the objection to the licences and heard evidence on oath and reserved their decision until all the cases had been heard. All the material facts which were known to the justices were given in evidence. The question is really can a magistrate formally object for the purpose of allowing himself to exercise the discretion given him by statute and then proceed to hear the application on its merits? *Baxter* v. *Leche*, 79 L. T. Rep. 138, 47 W. R. Dig. 99, really decides the point. The only authority to the contrary is the *dictum* of Hawkins, J., in *Reg.* v. *Justices of Anglesea*, 65 L. J. M. C. 12,

44 W. R. Dig. 89. That was the view of a single judge, and it cannot be reconciled with any decision of the Divisional Court. Moreover, here *mandamus* is not the proper remedy, for *mandamus* is not available where there is another remedy; and the parties have here a right of appeal to quarter sessions and are actually pursuing it, for they have given the justices notice of their appeal.

Avory, K.C., and *Stimson*, for the licensees.—Dealing with the second point first, *mandamus* is really the only remedy open to us, because we say that the tribunal whose decision we seek to have set aside was improperly constituted, and that under the circumstances the justices had no power to hear the applications at all. That is a question which the quarter sessions cannot decide. They must assume that the licensing justices had jurisdiction. All they can say is whether the decision they arrived at ought to stand or ought to be set aside: *Reg.* v. *Farquhar*, L. R. 9 Q. B. 258, 22 W. R. Dig. 38; *Reg.* v. *Howard*, 37 W. R. 617, 23 Q. B. D. 502; *Akkersdyk* v. *London County Council*, 40 W. R. 285, [1892] 1 Q. B. 190. Here the justices were the objectors, contrary to what was ever contemplated by section 42 of the Act of 1874, which clearly contemplated an objection made to the justices by some third party: *Reg.* v. *Anglesea Justices*. The present case is distinguishable from *Baxter* v. *Leche*. That being the question, it is *nihil ad rem* to discuss whether they were biassed by anything which took place, or whether they were actuated by anything but the best of motives, for all the justices who made themselves parties to the notice of opposition or had otherwise identified themselves with the opposition are disqualified.

Low, K.C., replied.

The following cases were also referred to during the argument: *Reg.* v. *Justices of Merthyr Tydvil*, 14 Q. B. D. 584, 33 W. R. Dig. 122; *Reg.* v. *Eales*, 42 L. T. Rep. 735, 28 W. R. Dig. 129; *Leeson* v. *The General Medical Council*, 38 W. R. 303, 43 Ch. D. 366; *Akkersdyk* v. *London County Council*; *Boulter* v. *Justices of Kent*, 44 W. R. 114, [1897] A. C. 556; and *Allinson* v. *General Medical Council*, 42 W. R. 289, [1894] 1 Q. B. 750.

Lord ALVERSTONE, L.C.J., in giving judgment, said: The rules are moved on four grounds—first, on the very important ground that justices who are members of the tribunal cannot raise the objection contemplated by section 42; secondly, if they did so, they must not adjudicate on the cases in respect of which they had given notice of objection; thirdly, that in this case the justices had obtained information on which they had acted contrary to the provisions of section 42; and, lastly, there was a special objection to one of the justices named Benthall on the ground that he had been a party to proceedings which, it was said, would invalidate his action in the judgment to which he was a party. The first and most important thing we have here to do is to try and lay down certain principles which may be deduced from the cases and then consider what are the rights of the justices and of the parties in regard to this matter, having regard to these principles.

I think it is quite clear that the justices could only act and should only act upon sworn evidence given before them, and that if in any case it appeared to the court that the justices had acted upon information obtained otherwise than from the evidence, their proceedings ought to be set aside. I think it further equally clear, not so much from the decisions as from the legislation and the general principles applicable to the set of circumstances with which the Legislature was dealing, that it would not invalidate the proceedings if the justices became acquainted with what I call the general circumstances of the case and made use of that information to bring to the minds of the persons before them the points with which they had to deal.

There is one other qualification which is most important, that if in any particular case a justice had private information with regard to that case, he ought not, in my opinion, to sit upon the case nor to do anything except go into the box and give evidence. In other words, if the case ever arose of a justice having particular knowledge with regard to a particular individual or against a particular individual or house, the knowledge could only be utilized for the purpose of the case by his giving evidence as a witness subject to cross-examination in the ordinary way. I mention these broad principles because it is only right to make it clear that I bear them in mind in expressing the opinion I have formed with regard to what the justices did.

I will state as briefly as possible, but I hope sufficiently fully, what I really understand the justices to have done: During the previous year the attention of the Farnham bench had been called to the fact that there were considered to be too large a number of licensed houses for the population of the district, and preparatory to the proceedings which had given rise to this question information was collected which would be of value for the purpose of directing the minds of any tribunal that had to deal with it to the incidents relating to the various houses. Information was collected by a committee, and the magistrates had not shrunk from stating that they did, before they sat, go round and make themselves acquainted with what would be called the surrounding circumstances of each of these houses.

It was going a great deal too far to say that, applying their general knowledge of the district to the cases they were going to sit upon, or applying the information so obtained, would invalidate the proceedings, provided that everything they intended to act upon was brought to the minds of the persons against whom it could be used.

Then they took a course to which, subject to a legal objection I will deal with in a moment, no reasonable objection could be taken. They thought it right when dealing with the suggestion of there being too many houses in the district that every house should be investigated; and certainly the justices, if the affidavits properly represented the facts (and the contrary was not suggested), did investigate individually each case but gave no decision until all the cases had been argued before them.

The principle of fairly considering all the requirements of the district and the sufficiency of each particular house no one could question.

In that state of circumstances Mr. Avory's first objection arose—a very important objection which possibly I should have taken time to consider if I did not think it was covered by authority. Mr. Avory said the justices could not either give themselves or cause any person to give on their behalf the notice contemplated by sub-section 2 of section 42. He did not of course dispute that the justices could adjourn a case on objection being made, and that they could hear the case ultimately when the owner was called upon to attend without the previously prescribed notice being given; but he said that "an objection being made" must mean made by somebody *to* the justices, not by the justices themselves. That proposition undoubtedly raises a very important point, which, however, was considered by Sir Henry Hawkins in the *Anglesea case*. At any rate there has for a long time been the view, whether judicially decided or not, that justices could raise objections to

licences being renewed, and that they ought to be able to do so having regard to their functions and duties under the Licensing Acts I have myself no doubt at all. There may be many cases in which the liquor traffic could not be properly controlled unless the justices did raise such questions, but I do not found my opinion on general principles, but repeat opinions that have been expressed from time to time. In 1874 Blackburn, J., in *Reg.* v. *Farquhar* obviously thought that the justices might be able to give a notice; and when that decision was referred to in *Reg.* v. *Merthyr Tydvil*, Stephen, J., put that construction upon Blackburn, J.'s, judgment, and said it would seem to show that the objection might be made by the justices themselves. In another case, that of *Reg.* v. *Eales*, Cockburn, L.C.J., took the same view. There was, therefore, during a series of years, a considerable amount of opinion, although no actual decision to the effect that justices could raise objections. When the question came before Hawkins, J., in the *Anglesea case*, he certainly did use expressions which amply supported Mr. Avory's argument—expressions to the effect that in his opinion the objection must be raised by a third party. He said, "The language of the proviso, no objection being made, could only mean made to the justices." Of course that does not cover the case of an individual justice making an objection and then ceasing, so to speak, to act as a justice. It is only fair to say that the argument of Mr. Avory was well founded to this extent, that Hawkins, J.'s, opinion seemed to be that justices could not raise an objection. Then came the last case, *Baxter* v. *Leche*, in which there was a decision of Wills and Kennedy, JJ., to the effect that justices might raise an objection, and having raised it might adjourn and give notice. It is perfectly true that in that case the justices did not give the grounds on which they were going to entertain the objection, but it seemed very much fairer to those whose licence was going to be questioned that they should be told what objections were going to be raised, and therefore that particular argument seems not to affect the weight of that authority, in which I am bound to concur, as it is binding on this court. Then there is the opinion—I agree it is only an opinion, but one which contains very weighty reasoning indeed, of Fry, L.J., and all the more so because of the strong line he had taken in *Leeson* v. *The General Medical Council*, which opinion was given in a case where he was only giving his opinion after consideration as chairman of the quarter sessions, but he came to the conclusion that justices could give these notices, or, rather, raise these objections under section 42, and that it did not invalidate the proceedings that a notice had been subsequently given. Mr. Avory said, that being so, even then they must not sit and act; and that raised the really fundamental question, what was the position of the person who objected? Taking the language of Lord Herschell in *Boulter's case*, in the sense to be naturally gathered from his expressions, the objector was not in the position of a party, and it seemed to him, looking at the duty the magistrates had to perform and the considerations that ought to affect them, it was not right to regard a person who objected on the ground that had been raised in this case as a personal opponent of the person whose licence was being questioned, or as a party to any litigation. It was in that respect, I think, that, assuming the justices had acted without any suggestion of improper bias or of taking action on improper materials, the fact that they had given notice did not bar them from subsequently acting in the proceedings. Certainly in a case in which the real question was that the justices being of opinion that there were too many houses in the district, and the matter to be considered was how these houses were to be reduced, it would be very unfortunate that the mere fact that the notices were given so that the question might be fairly considered should prevent those gentlemen acting. Mr. Avory said if they had approached the question from the point of view of having previously made up their minds that there ought to be a reduction in the number of licences, that would be defective. I am not prepared to agree with that argument, nor prepared at present to dissent from it, but it is not applicable in this case.

As to the second point, that the justices had acted on information obtained beforehand and not given in evidence. I have seen the notes in the only case which had been argued in detail, which, it was agreed, was a typical one, and I find that all the points on which objections to the house could be founded were proved in the case of the Queen-street Tavern. All the magistrates have said that they did not act in any single case except on the evidence. And the conclusion I have come to is that it is impossible to come to the conclusion that the magistrates here acted in giving their judicial opinion on information they had obtained elsewhere. As to the question of bias, with regard to the authorities Mr. Avory has referred to, particularly the case of *Akkerdyke* v. *The London County Council*, they are all cases illustrating the principle that if a person has taken sides in a matter which he is called upon or purports to act judicially in, he cannot be allowed so to act; but in my opinion they really do not assist Mr. Avory in the view I take of the facts.

I come, therefore, to the conclusion that none of the four grounds prevail, and that this application for the rule must be discharged.

DARLING and CHANNELL, JJ., gave judgment to the same effect.

Rule discharged with costs.

Solicitors, *Prior, Church, & Adams*, for *Richard Mason*, Town Clerk, Farnham; *W. Montgomery White*, for *Edgar Kempson*, Farnham.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — March 17, 18, 24, 25; April 29.

In re HOLLAND.

GREGG *v.* HOLLAND. (*a.*)

Settlement—Husband entitled jure mariti *to wife's reversionary personalty—*Ante*-nuptial agreement for settlement—*Post*-nuptial settlement—Recital of agreement—Husband's interest made determinable on bankruptcy—Fraud on creditors—Trustee in bankruptcy—Statute* 13 *Eliz. c.* 5*—Statute of Frauds.*

A reservation, in a post*-nuptial settlement of a wife's reversionary property, of a life interest to the husband, determinable on his bankruptcy, does not avoid the settlement* in toto *against his trustee in bankruptcy, in the absence of evidence that he was in embarrassed circumstances at the date of the settlement or contemplated entering on a speculative business. A recital in a* post*-nuptial settlement of an* ante*-nuptial agreement for settlement is evidence of such agreement sufficient to satisfy the Statute of Frauds.*

(*a.*) Reported by H. W. LAW, Esq., Barrister-at-Law.

Barkworth *v.* Young, 5 *W. R.* 156, 4 *Drew.* 1, *approved.*

In re Pearson, 25 *W. R.* 126, 3 *Ch. D.* 807, *disapproved.*

Decision of Farwell, J. (49 *W. R.* 476, [1901] 2 *Ch.* 145), *reversed.*

This was an appeal from a decision of Farwell, J. (reported 49 W. R. 476, [1901] 2 Ch. 145). The facts were as follows: On the 27th of August, 1872, Charlotte F. Holland, then an infant aged 18 years, married Isidore M. Bourke. She was at the date of the marriage entitled in remainder expectant on the death of the testator's widow to one-eighth of the proceeds of sale of the residuary real and personal estate of Henry Holland, who died in December, 1871, by virtue of his will made in April, 1871. No *ante*-nuptial settlement was executed, but a *post*-nuptial settlement was executed by deed dated the 8th of February, 1873, and made between the husband and wife of the first part, the testator's widow and the trustees of his will (who were the wife's guardians) of the second part, and settlement trustees of the third part. The settlement contained the following recital:

"And whereas the said parties hereto of the first part intermarried on the 27th day of August, 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained."

Then followed a covenant by the husband with the trustees that immediately upon the share and interest of and in the residuary estate and effects of the said H. Holland—to which the husband and wife, or the husband in her right, or either of them then were or was or thereafter might become entitled—becoming an interest in possession, the husband and wife or the survivor and all other necessary parties would assign and transfer the said share to the trustees of the settlement upon the trusts thereinafter declared. These trusts were for the wife for life for her separate use without power of anticipation, and after her death, if the husband should not have been or become a bankrupt or assigned, &c., for the husband until he should become bankrupt or assign, &c., with remainder for the issue of the marriage at twenty-one or marriage in the usual way, the survivor of the husband and wife having a power of appointment amongst issue failing a joint power of appointment which was not exercised.

Mrs Bourke died on the 14th of April, 1877.

On the 25th of October, 1897, Mr. Bourke appointed two-thirds of the trust funds to two of his sons and surrendered his life interest to them; on the 1st of March, 1898, a receiving order was made against him, and on the 18th of March he was adjudicated a bankrupt. The one-eighth share of residue fell into possession on the death of the testator's widow on the 11th of December, 1899.

On a summons taken out to determine whether it was bound by the settlement or belonged to the official receiver as the husband's trustee in bankruptcy, Farwell, J., held that the settlement was void *in toto* against the official receiver under 13 Eliz. c. 5.

Parties interested under the settlement appealed.

W. H. Cozens-Hardy, for the trustees of the will.

Herbert Reed, K.C., and *Aubrey St. John Clerke*, for the appellants.—Till the husband reduces the property into possession the wife does not lose her right to it. By the covenant to settle contained in the settlement of 1873 the husband disabled himself from consenting to his wife's selling her reversion, and the husband's trustee in bankruptcy, claiming under him, is bound by the recital. Even if the covenant by him was a voluntary one, yet having entered into it he would have held the property on the trusts of the settlement if he had become possessed of it, and the burden of showing that there was no consideration for it lies on those who make the allegation. To bring the case within the statute of Elizabeth an intention to defraud must be shown. The presumption is against fraud, and the whole deed must be looked at. The evidence here negatives fraud in fact. There is no evidence that the husband had debts or that he had no other property at the date of the settlement. The recital of the agreement is a sufficient written memorandum of it: *Barkworth* v. *Young*, 5 W. R. 156, 4 Drew. 1. The defeasance clause does not vitiate the settlement as a whole, and if it is not void as a whole the trustee in bankruptcy is not entitled to the fund: *In re Detmold*, 37 W. R. 442, 40 Ch. D. 585.

They also cited or referred to *Dundas* v. *Dutens*, 1 Ves. jun. 196; *Mackintosh* v. *Pogose*, 43 W. R. 247, [1895] 1 Ch. 505; *Ex parte Mercer*, 17 Q. B. D. 290, 34 W. R. Dig. 169; *De Beil* v. *Thomson*, 3 Beav. 469; *Montefiore* v. *Behrens*, L. R. 1 Eq. 171, 14 W. R. Ch. Dig. 44; *Codrington* v. *Lindsay*, 21 W. R. 182, L. R. 8 Ch. App. 578; *Higinbotham* v. *Holme*, 19 Ves. 88; *Buckland* v. *Buckland*, 48 W. R. 637, [1900] 2 Ch. 534; *Harris* v. *Truman*, 30 W. R. 533, 9 Q B. D. 264; *Freeman* v. *Pope*, 18 W. R. 906, L. R. 5 Ch. App. 538; *Spirett* v. *Willows*, 13 W. R. 329, 3 De G. J. & S. 293; *In re Lane-Fox*, 48 W. R. 650, [1900] 2 Q. B. 508; and *In re Brewer*, 45 W. R. 8 [1896] 2 Ch. 503.

Upjohn, K.C., and *A. Adams*, for the official receiver.—A settlement cannot be rendered valid against a trustee in bankruptcy by the insertion of a recital like this. If the covenant is voluntary the settlor showed a contemplation of bankruptcy such as brings the case within the statute of Elizabeth. *In re Detmold*, *Higinbotham* v. *Holme*, and *In re Brewer* were all cases of *ante*-nuptial settlements. The defeasance clause vitiates the whole settlement, and *In re Pearson*, 25 W. R. 126, 3 Ch. D. 807, lays down the true principle on this point. And notwithstanding the recital the covenant is a voluntary one of which the court would not decree specific performance: *Ellison* v. *Ellison*, 6 Ves. 656. The covenant is voluntary and unenforceable (1) because there is no evidence, binding the official receiver, of any *ante*-nuptial agreement at all; (2) because there is no memorandum, to satisfy the Statute of Frauds. [They cited on this point most of the cases referrred to in the judgment.] If a trustee in bankruptcy is bound by such a recital, any settlor can escape section 47 of the Bankruptcy Act by inserting it: *Battersbee* v. *Farrington*, 1 Swanst. 106. And the memorandum is insufficient, since it does not show who were the parties to the agreement, nor what was the consideration for it.

A. St. J. Clerke in reply.

Cur. adv. vult.

April 29. — The following judgments were delivered:—

VAUGHAN WILLIAMS, L.J., after stating the facts, continued: It is conceded by Mr. Clerke that the settlement rests *in fieri*, and cannot be enforced unless it can be supported by the consideration of marriage, and he relies on the recital of an *ante*-nuptial contract.

Now, as I understand the official receiver shapes his case in two ways.

First he says that the covenant is void, as being a fraudulent conveyance or alienation within the statute 13 Eliz. c. 5; secondly, he says that even assuming that the settlement is not fraudulent within the statute, yet the settlement is a voluntary settle-

ment resting *in fieri*, of which a court of equity would not grant specific performance, and that, therefore the only right of the trustees and beneficiaries under the marriage settlement is to come in and prove with the other creditors.

Now, as to the first point Farwell, J., has decided, on the authority of the case of *In re Pearson*, that having regard to the fact that Mr. Isidore Bourke was at the date of the execution of the *post*-nuptial settlement entitled *jure mariti* to the property the subject of the settlement, the fact that the settlement contains a clause providing that his beneficial interest should continue until he should become bankrupt, or assign or attempt or affect to assign, is conclusive to make the settlement fraudulent within the statute of Elizabeth. I agree that this is the effect of the decision in the case of *In re Pearson*, and the court's decision bound Farwell, J., but the decision does not bind us, and I shall therefore consider whether or not it was right. I do not think that the decision in *In re Pearson* is right. I think that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors: *Ex parte Mercer*.

In my judgment, in the present case one ought not, on the evidence before us (even excluding the recital of the *ante*-nuptial promise), to find such intent. The property the subject of the settlement had been reversionary property in the right of the wife, and only came to the husband in her right. Under these circumstances it was right and proper that the husband should make some settlement, and the settlement which he in fact did make seems to me to have been a right and proper settlement for the husband to make, of property coming to him in the right of his wife, provided only he was not at the time of the execution of the settlement unable to pay his creditors, or contemplating entering upon or continuing in a business of such a speculative nature as to be likely to land him in financial embarrassments.

In the present case the settlement gives to the wife a first life interest and then to the husband if he survives the wife, but not otherwise, a life interest until he should become bankrupt or should assign or incumber, or attempt to assign or incumber his life interest, and after the failure and determination of the trusts declared in favour of the husband, the trustees were to stand possessed of the trust premises in trust for the children as the parents or their survivor might appoint.

I cannot draw the inference that this settlement was fraudulent or made with intent to defeat or delay creditors, in the absence of evidence of either indebtedness by the husband at the date of the settlement or of an intention by the husband at the date of the settlement to enter upon a speculative business likely to result in insolvency. There is no such evidence, and I have no reason to doubt but that as a fact the husband had no intention of defeating or delaying creditors, but only intended to reserve to himself, out of the property coming to him in the right of his wife, such an interest as after her death he could receive without prejudice to the welfare of her children. As long as he could so receive it he was to do so, but no longer. Suppose that the husband, being perfectly solvent and not contemplating a speculative business, had settled the whole of his property coming to him in the right of his wife on his wife for life, and after her death in trust for the children, would it have been possible to have drawn the inference that such a settlement was intended to defeat and delay creditors? If not, why is one to infer fraud because the husband gives himself a life interest, so long as he can receive the income of the money coming to him in right of the mother, without prejudice to the welfare of her children. I decline to draw any such inference.

The case of *Montefiore* v. *Behrens*, although it differs from the present case in that the wife's property was in possession and not in reversion is yet an authority that the settlement by the husband of property coming to him in right of his wife is not made fraudulent by a clause making the husband's life estate thereunder determinable on his bankruptcy.

It seems to me that the case of *Middlecome* v. *Marlow*, 2 Atk. 519, goes far to show that in the opinion of Lord Hardwicke a *post*-nuptial settlement by a husband of property coming to him in right of his wife is *primâ facie* good where there is no proof of his being indebted at the time, and that it is made upon such consideration as to prevail against creditors; and it is to be observed that the settlement was held not to be fraudulent within the meaning of 13 Eliz., although it contained a proviso empowering the trustee to lend a part or the whole to the husband. The trustee lent the husband the whole, and fourteen months after he became a bankrupt. The trustee brought his bill to be admitted a creditor, and Lord Hardwicke decreed he should come in as a creditor under the commission for the money he paid to the husband. If the money settled had not come to the husband in the right of his wife I cannot but think that the decision would have been different. Lord Hardwicke distinctly founds his decision on the money having come to the husband in right of his wife and on the deed, doing no more than the court would have done in a case where the husband had no estate of his own to settle.

As to the other question, that of the Statute of Frauds and the effect, if any, of the recital, I propose to examine the reason of the matter, as there seems to be some conflict in the authorities, or rather *dicta*. Now, the wife's mother, her guardians, and two trustees—one, I think, an executor of the father's will, are parties to the settlement. It is true that the recital does not in terms state who were the parties to the agreement, but I think, on a reasonable construction, the husband agreed with Miss Holland and her guardians: see *Codrington* v. *Lindsay*. If so, the recital, if contained in a writing outside the settlement, would satisfy the Statute of Frauds, and I cannot understand why the recital in the settlement is not enough to satisfy it. If the settlement had contained no recital, and the trustees had sought to enforce the agreement, it would have been enough if they had produced at the trial a memorandum in writing signed by the party to be charged, though none existed at the time of the contract, provided it were signed before the trial: see *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467. The statute deals only with the evidence necessary to prove the agreement, and I know of no difference between agreements in consideration of marriage and other agreements within section 4—*e.g.*, agreements to answer the debt, default, or misconduct of another. On the reason of the thing I think the recital gets over any objection based on the Statute of Frauds. No doubt the fact that the agreement is first mentioned in a *post*-nuptial settlement must be considered, but to my mind this does not touch the question on the Statute of Frauds. I think the court ought not to say that a *post*-nuptial agreement is voluntary if there is written evidence to satisfy the statute or an *ante*-nuptial agreement for good consideration, and this is the case here, the only difficulty being whether the agreement sufficiently indicates the parties. As I think it does, I will now deal with the authorities. Farwell, J., calls attention to those cases which in his opinion

show that *Barkworth* v. *Young* cannot be supported, viz.: *Spurgeon* v. *Collier*, 1 Eden. 55; *Warden* v. *Jones*, 6 W. R. 180, 2 De G. & J. 76; and *Trowell* v. *Shenton*, 26 W. R. 837, 8 Ch. D. 318. Now *Spurgeon* v. *Collier* had nothing to do with creditors, and the plaintiff was not claiming through Collier, but against him. There was no proof of an *ante*-nuptial agreement, and the court held that the attempted proof of one failed in fact and therefore the deed was voluntary. *Warden* v. *Jones* is not, I think, an authority for the general proposition that a *post*-nuptial settlement, reciting that it was made in pursuance of an *ante*-nuptial agreement, cannot be good, since in that case there was no such recital, and though Lord Cranworth may have said that such an agreement would not satisfy the statute, this is very different from deciding that the settlement would have been void against creditors if it had contained such a recital. And the circumstances of the husband were such as to afford cogent evidence that he in fact executed the settlement with intent to defeat and delay creditors. *Trowell* v. *Shenton* was a case where it was held that an *ante*-nuptial agreement by an infant is not sufficient to take a *post*-nuptial settlement, in which no reference is made to the agreement, out of 27 Eliz. c. 4. No doubt Jessel, M.R., expresses the opinion that Lord Cranworth was right in his references in *Warden* v. *Jones* to the decision in *Dundas* v. *Dutens*, but it will be observed that Jessel, M.R.'s, observations were not necessary to the decision of the case, and that the case was really decided on Lord Tenterden's Act and not on the Statute of Frauds. Against these authorities there are the positive decision of Kindersley, V.C., in *Barkworth* v. *Young*, the *dictum* of Turner, L.J., in *Surcome* v. *Pinniger*, 3 De G. M. & G. 578, and the opinion of Lord Cottenham in *Hammersly* v. *De Biel*, 12 Cl. & F. 45, at pp. 61-2. It does not seem to me that anything said by Lord Cottenham in *Lassence* v. *Tierney*, 1 Mac. &. G. 551, as to the grounds of his decision in *Hammersly* v. *De Biel* can get rid of his deliberate differing from Sir W. Grant's doubt in *Randall* v. *Morgan*, 12 Ves. 67, at p. 73. And in the House of Lords counsel abandoned the Statute of Frauds point. The balance of authority and of reason supports the view of Kindersley, V.C., in *Barkworth* v. *Young*, where he held that a *post*-nuptial memorandum of an *ante*-nuptial agreement satisfies the statute. I think the settlement must prevail against the official receiver (1) because, even treating it as voluntary, the husband's circumstances at the date of it, the source of the property, and the lapse of time between the settlement and the bankruptcy, all go to negative intent to defeat or delay creditors; and (2) assuming it not to be fraudulent, because the recital is sufficient evidence against anyone claiming through the husband of a parol *ante*-nuptial agreement such as would prevent the *post*-nuptial settlement from being voluntary. The appeal must be allowed.

STIRLING, L.J.—The trustee in bankruptcy raises two objections to the payment of the fund to the trustees of the deed of the 8th of February, 1873—first, that the deed is fraudulent under the statute 13 Eliz. c. 5; and secondly, that it is voluntary, and resting as it does in covenant it cannot be enforced in equity, and therefore does not bind the property. These two objections involve different considerations and must be dealt with separately, but it will be convenient to make some preliminary observations on one point which arises with respect to both—viz., whether the recitals and statements of fact in the deed are admissible as evidence against the trustee in bankruptcy. These recitals and statements are in the nature of admissions made by the bankrupt long prior to the bankruptcy. Admissions of a party to an action or of one identified in interest with him are as against such party admissible in evidence: see *Spargo* v. *Brown*, 9 B. & C. 935; *Woolway* v. *Rowe*, 1 Ad. & E. 114). Now where the trustee in bankruptcy, on behalf of the creditors of the bankrupt, claims to treat the deed as void under the statute of Elizabeth, he is asserting a right which the bankrupt could not have set up, and is not identified in interest with the bankrupt; and consequently the recital and statement in the deed are not admissible against him, though they are admissible as against the trustee of the deed, whose interest is the same as that of the bankrupt. On the other hand, when the trustee resists specific performance of the covenants contained in the deed on the ground that it is voluntary, he is setting up a defence which would have been available to the bankrupt himself, and is identified in interest with him; and the recitals and statements in the deed are admissible against him, though the weight to be attached to them must depend on the circumstances of the case. The distinction just stated is recognized by the Master of the Rolls (Sir J. Plumer) in *Battersbee* v. *Farrington*, and appears to have been taken by Bramwell, B., in *Harris* v. *Ricket*, 4 H. & N. 6, 7 W. R. C. L. Dig. 9. As to the circumstances in which the deed was executed there is little or no evidence other than appears on the face of the deed itself. It was evidently executed after the marriage; but it purports to have been executed in consideration of marriage and in pursuance of an *ante*-nuptial agreement. For the reasons first stated these statements are not admissible in evidence as against the trustee in bankruptcy setting up the statute of Elizabeth. It was expressly decided by Lord Northington in *Spurgeon* v. *Collier* and Lord Cranworth in *Warden* v. *Jones* that a statement in a deed that it was executed in consideration of marriage was of no avail as against plaintiffs who claimed adversely to the deed, and in the latter case Lord Cranworth said that notwithstanding the *dictum* or decision of Lord Thurlow to the contrary in *Dundas* v. *Dutens*, his opinion was that the recital made no difference as against creditors. I think that the weight of authority is in favour of this view, that for the purpose of the decision of the question whether or not the deed of the 8th of February, 1873, is or is not void against creditors it must be taken that the deed is not founded on valuable consideration. The deed must therefore be treated as a voluntary settlement of the wife's fortune made by the bankrupt soon after marriage. Twenty-five years elapsed between the execution of the deed and the bankruptcy of the settlor, and there is nothing to suggest that the settlor was indebted at the time he made the settlement, or that any creditors he then had remained unpaid, or that he then had in contemplation any hazardous or speculative transactions. With an exception to be presently mentioned the deed is such as might in ordinary course be executed by a man of honour, who had without making any settlement married a lady of wealth, for the purpose of settling his wife's fortune in such a way as to secure to her and his issue by her such a provision as is in this country commonly made on the occasion of marriage; and indeed the trusts are (with the same exception) such as might have been adopted in a settlement by the court when called on by the wife to enforce her equity to a settlement. The exception is that under the settlement a life interest is reserved to the husband on the death of his wife and is made determinable on bankruptcy. The case does not fall within the line of authorities (such as *Freeman* v. *Pope*) which establish that under the statute a voluntary deed may be

set aside without proof of actual intention to defeat or delay creditors if the circumstances are such that the settlement necessarily would have that effect; it lies on the trustee in bankruptcy to prove the existence of such intention: *Ex parte Mercer*. The only evidence to that effect is the circumstance that the bankrupt's reversionary life interest is made determinable in the way just mentioned. It may be that such a limitation of the bankrupt's life interest is void as against his trustee (see *Higinbotham* v. *Holme*), but does it invalidate the settlement altogether? Apart from authority I should think not. The only authority relied on is *In re Pearson*, a decision of Bacon, V.C., as chief judge in bankruptcy, but with the utmost respect I cannot think that the conclusion of fact (and it is one of fact) at which he arrived was well founded, and certainly I am unable to arrive at a like conclusion in the present case.

I pass on to consider the second objection—that the deed is voluntary and cannot be enforced in equity. The answer given to this objection on behalf of the trustees of the deed is in substance that the deed taken as a whole constitutes a note or memorandum of a parol *ante*-nuptial contract in consideration of marriage which satisfies the Statute of Frauds, and enables the contract to be enforced both against the settlor who signed the deed and against his trustee in bankruptcy, and so binds the property in question. I think that this contention is well founded. It is laid down by Lord Blackburn in *Maddison* v. *Alderson* that "it is now finally settled that the true construction of the Statute of Frauds, both sections 4 and 17, is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract." It is also established as regards many of the contracts within sections 4 and 17 that the note or memorandum need not be contemporaneous with the contract, but that it is sufficient if it comes into existence before the commencement of the action to enforce the contract: see *Bill* v. *Bament*, 9 M. & W. 36; *Bailey* v. *Sweeting*, 9 W. R. 273, 9 C. B. N. S. 843; *Lucas* v. *Dixon*, 37 W. R. 370, 22 Q. B. D. 357. In *Lucas* v. *Dixon* Fry, L.J., points out that where the plaintiff wishes to avail himself of a memorandum which comes into existence after the commencement of the action he can only do so by discontinuing and commencing a new action. The note or memorandum need not be given for valuable consideration, nor have any particular form; a letter by the party to be charged to a third party (*Bailey* v. *Sweeting*; *Gibson* v. *Holland*, 14 W. R. 86, L. R. 1 C. P. 1), an affidavit (*Barkworth* v. *Young*), and even a will (*In re Hoyle*, 41 W. R. 81, [1893] 1 Ch. 84) have each been accepted by the courts as sufficient. Farwell, J., has, however, held that the agreement or memorandum or note made on consideration of marriage must be reduced into writing and signed, not merely before action, but before the marriage. He says that the contract in consideration of marriage differs from contracts for sale within sections 4 and 17, because the marriage is performed once for all and is irrevocable, and that in contracts for sale the consideration continues if the whole purchase-money has not been paid, and if it has been paid the purchaser can recover it back if the contract is repudiated. I will assume this to be accurate as regards contracts of sale, but there are other contracts within sections 4 and 17—*e.g.*, guarantees. The person to whom a verbal guarantee is given may, on the face of it, have once and for all irrevocably advanced a sum of money to a pauper from whom he can recover nothing back. Yet *In re Hoyle* shows that he can enforce the contract of guarantee if at any time before action is brought he is able to obtain a proper note or memorandum in writing signed by the guarantor. It seems to me, with all respect, that Farwell, J., has overlooked the point of the decisions that a note or memorandum is sufficient if it comes into existence before action brought. This is found in the language of the statute, which in section 4 prohibits the bringing of an action unless the agreement on which the action shall be brought, or some memorandum or note of it, is in writing. If, on the true construction of that section, the commencement of the action gives the limit within which the note or memorandum in a contract of guarantee may be reduced into writing and signed, I cannot see why another and narrower limit shall be imposed by the court with reference to contracts in consideration of marriage. Further, *Barkworth* v. *Young* is an express decision that such a contract may be enforced against a party who has signed a written memorandum of it after the marriage. There is no decision to the contrary, and much authority in the shape of *dictum* in support of it. In particular, though Farwell, J., may be right in saying that the ultimate decision in *Hammersley* v. *De Biel* turned on part performance by acts other than the marriage, still the judgments of Lord Langdale and Lord Cottenham show that they considered that a verbal *ante*-nuptial contract in consideration of marriage could be enforced if a proper memorandum were signed after marriage. The cases relied on to the contrary are *Spurgeon* v. *Collier*, *Warden* v. *Jones*, and *Trowell* v. *Shenton*. In the first two the plaintiffs were persons claiming adversely to an instrument purporting to have been executed in consideration of marriage; they were not identified in interest with the party who signed it, but stood in the same position as does the trustee in bankruptcy in the present case, when seeking to enforce rights under the statute of Elizabeth. These cases seem to me to be consistent with the proposition that an *ante*-nuptial verbal contract may be enforced against a party to it who has after marriage signed a written memorandum of it and also against a person identified in interest with him, as I think his trustee in bankruptcy is when he sets up, as here, a defence open to the bankrupt himself. They certainly do not establish the contrary proposition. *Trowell* v. *Shenton* was decided with reference to another statute and a different class of cases, but is relied on mainly for the observation of Jessel, M.R., that *Warden* v. *Jones* overruled *Barkworth* v. *Young*. But he expressly says: "So far as the two are inconsistent," and as I have just said, I think there is no inconsistency between them. But it was further said on behalf of the trustee in bankruptcy that even so, the deed does not satisfy the Statute of Frauds, because it only recites the agreement for settlement, and does not state with whom the husband agreed. No doubt the note or memorandum must show who the parties to the agreement are, but they need not be namely or specifically described as such; it is sufficient if by reasonable intendment it can be inferred from the document who they are: see *Newell* v. *Radford*, 16 W. R. 79, L. R. 3 C. P. 52. For this purpose the whole deed may be looked at, and I find the guardians of the wife named as parties, and the covenants of the husband are entered into with their approbation as such. They were the persons with whom the *ante*-nuptial contract would in ordinary course be made. I see no reason why they should have been made parties to the deed except that the contract was with them, and it is the reasonable intendment that it was actually made with them. I think this objection is not well founded, and that the appeal should be allowed.

COZENS-HARDY, L.J., after stating the facts, said:

There is no evidence that the husband was in difficulties or was contemplating entering on speculative transactions; in short, there is nothing to show that the settlement was executed with intent to defraud creditors. But Farwell, J., following Bacon, C.J., in *In re Pearson*, held that the limitation for the benefit of the settlor was in such a form as rendered the whole settlement fraudulent within the statute of 13 Eliz. I think it is not material on this point to decide whether the settlement was voluntary or for value, since everyone claiming under it was affected by notice of the provision in the settlement which, and which alone is said to avoid it *in toto*. But I treat it for this purpose as voluntary. *In re Pearson* is not supported by any prior authority, and I am not aware that it has ever been followed. I think it cannot be regarded as good law. It may well be that such a limitation of the settlor's life interest is void against creditors, but I see no ground for holding that it avoids the settlement *in toto*. The next point that arises is that the trustee cannot obtain specific performance of the settlement unless it was for valuable consideration, as it rests in covenant. I think it is clear that the trustee in bankruptcy is for this purpose in no better position than the settlor himself, apart from his bankruptcy, or than his executors would be. It has been argued that the settlement was necessarily voluntary because under section 4 of the Statute of Frauds a mere parol agreement before marriage imposes no obligation on the settlor, and further, that a note or memorandum of it must be signed before marriage. Farwell, J., adopted this view. It is well settled that in the case of other contracts within section 4—*e.g.*, a guarantee—it is sufficient if the note or memorandum is made at any time before an action brought (*Lucas* v. *Dixon*), and it is strange that a different principle should prevail with reference to the one class of contracts made in consideation of marriage. There are *dicta* by Lord Hardwicke in *Taylor* v. *Beech*, 1 Ves. sen. 297, by Lord Langdale in *De Biel* v. *Thomson*, 12 Cl. & Fin. 61*n*, and by Turner, L.J., in *Surcome* v. *Pinniger*, and a decision by Kindersley, V.C., in *Barkworth* v. *Young* to the effect that a signed note or memorandum after marriage takes the case out of the Statute of Frauds, and I think these *dicta* and decisions are right and ought to be followed. If, therefore, there had been a note or memorandum signed by the husband after marriage and before the settlement I think an action for specific performance of the agreement could have been maintained against the settlor.

The next question, and to my mind the most difficult, is this, whether it is sufficient that the *post*-nupital settlement itself should be not merely a settlement in fact made in pursuance of an *ante*-nuptial parol contract, but also a memorandum of that contract. The settlement contains a recital which, though not sufficiently definite and precise to create an estoppel, is as against the settlor, and anyone claiming under him, evidence of a parol agreement for such a settlement between the settlor and his intended wife before marriage: see *Codrington* v. *Lindsay*, per Lord Selborne. There is no evidence to the contrary. The settlement was, *ex hypothesi*, executed for valuable consideration. Before the Statute of Frauds such a settlement would not have been voluntary, and the statute does not make it voluntary. It is really only a rule of evidence. The memorandum or note required by it may be before the deed, or in or after the deed, so long as it is before action brought. It seems to me that a settlement framed as this is may well be a memorandum in writing which satisfies the statute. Moreover, as a general rule evidence may be given to shew that a deed in form voluntary was in fact executed for valuable consideration: see *Pott* v. *Todhunter*, 2 Coll. 76; *Gale* v. *Williamson*, 8 M. & W. 405. A settlement in no way referring to the parol contract cannot be a note or memorandum of it, nor can the marriage be regarded as a part performance taking the case out of the statute. This, I think, is all that was decided by Lord Cranworth in *Warden* v. *Jones*, and his *dictum*, on which Farwell, J., relies, creates no difficulty when it is remembered that he was dealing with a case in which the plaintiff was asserting that the settlement was void as against creditors, and was therefore in a better position than the settlor. The result is that, in my opinion, there is sufficient and uncontradicted evidence that the settlement was not voluntary, and it follows that the trustees of it are entitled to the wife's share. Whether the official receiver is or is not entitled to the husband's life interest is a different question, which does not arise on the present summons, and the reversal of Farwell, J.'s, order will in no way prejudice this.

Appeal allowed.

Solicitors, *Van Sandau & Co.; Tarry, Sherlock, & King; H. Clifton Lambert.*

From Chan. Div. (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) } May 8, 9, 15.

SAVILL BROS. (LIMITED) v. BETHELL. (*a*.)

Vendor and purchaser—Conveyance—Exception to be ascertained by subsequent election—Limitation of estate to commence in futuro—Invalidity of exception—Conveyance operating at common law—Statute of Uses—Perpetuity.

By a conveyance on sale certain freehold lands were conveyed unto and to the use of the purchaser in fee simple, with the exceptions and reservations set forth in the first schedule to the conveyance. This schedule contained the following words: "Save and except and reserving unto the vendors a piece of land not less than forty feet in width," commencing at a specified point and terminating "at the nearest road to be made by the purchaser or his assigns on the estate so as to give access to such road" from other lands of the vendors. The purchaser afterwards constructed certain roads on the estate. In an action brought to determine whether a plot of land on which a road had been commenced but not completed was excepted from the conveyance,

Held, that the conveyance operated at common law and not under the Statute of Uses, and that the exception was bad; but that even if the conveyance operated under the Statute of Uses it was equally bad as infringing the rule against perpetuities.

This was an appeal from a decision of Buckley, J., in an action raising the question whether a certain plot of land was validly excepted from the operation of a conveyance of certain lands at Ilford and East Ham, dated the 23rd of May, 1896. Previously to the conveyance in question certain lands situate both on the east and west side of the Tottenham and Forest Gate Railway were vested in the trustees of the will of one Charles Bartholomew (described in the conveyance as the vendors), who conveyed them by the following description: "All and singular the lands and hereditaments with the dimensions and abuttals thereof more particularly described in the first schedule hereto, and

(*a*.) Reported by H. W. LAW, Esq., Barrister-at-Law.

the plan annexed hereto, together with the rights of way in the said first schedule, and with the exceptions and reservations therein set forth"; to hold the same unto and to the use of the purchaser in fee simple.

The first schedule was, so far as material, in the following terms: "All that piece or parcel of land coloured blue in the plan drawn hereon containing thirty-seven acres or thereabouts situate in the parishes of Little Ilford and East Ham, in the county of Essex, being part of a larger piece of land . . . which said larger piece of land contains in the whole sixty-seven acres or thereabouts more or less, save and except and reserving unto the vendors a piece of land not less than forty feet in width commencing at the level crossing over the railway at the point marked A on the said plan and terminating at the nearest road to be made by the purchaser or his assigns on the estate so as to give access to such road from the land of the vendors lying on the east side of the Tottenham and Forest Gate Railway curve shown on the said plan."

There were also in the schedule reservations to the trustees of rights of way over all roads then existing or which might be made by the purchaser or those claiming under him on any of the lands conveyed, together with a right of way for those claiming under him over roads which might be made by the trustees or those claiming under them on their lands lying on the east side of the railway.

The plot of land as to which the question arose was part of that coloured blue on the plan, and was in the immediate neighbourhood of the level crossing at the point marked A.

It appeared that the property was conveyed for building purposes, and that roads were shortly afterwards laid out by the purchaser in accordance with a plan, which showed the plot in question as the site of a road reaching from the point A (mentioned in the schedule) to a circular road called Shakespeare-crescent. It was not proved that this or any other plan was in existence at the date of the conveyance, and so far as appeared the purchaser was under no obligation to construct the road. The road from point A to the crescent had been commenced, but the work had not been carried very far. The other roads shown on the plan were completed by the 31st of December, 1897.

The defendant Bethell had purchased the plot of land, and proposed to erect on it a public-house, in violation of a covenant contained in the conveyance, of which he had notice at the date of the purchase; he claimed that the plot was excepted from the conveyance.

The plaintiffs, who had acquired the right to enforce the covenant, brought this action for that purpose, when Buckley, J., held that the exception was void for perpetuity and uncertainty, and gave judgment in their favour.

Bethell appealed.

H. Terrell, K.C., and *J. W. Manning*, for the appellant.

Neville, K.C., and *H. M. Humphry*, for the respondents.

The arguments used and the principal authorities cited appear in the judgment.

Duke of Sutherland v. *Heathcote*, [1891] 3 Ch. 504, [1892] 1 Ch. 475, 40 W. R. Dig. 71, and *Cooper* v. *Stuart*, 14 App. Cas. 286, 37 W. R. Dig. 130, were also referred to.

Cur. adv. vult.

May 15.—STIRLING, L.J., delivered the judgment of the court: [After stating the facts, his lordship continued:] It was contended on behalf of the plaintiffs that the exception was bad for uncertainty. The answer made by the defendant was that although at the date of the conveyance the position of the road on the property conveyed was perfectly uncertain, as also that of the piece of land not less than forty feet in width mentioned in the schedule, yet the position of both became subsequently defined by the act of the purchaser, which operated as an election, and so made the exception effectual; and it was also said that if the exception was bad the whole grant was rendered uncertain, so that nothing passed by the deed. The last point may be disposed of at once. It is a settled rule of construction that where there is a grant and an exception out of it the exception is to be taken as inserted for the benefit of the grantor, and to be construed in favour of the grantee: see Sheppard's Touchstone, p. 100; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Bullen* v. *Denning*, 5 B. & C. 842. If, then, the grant be clear, but the exception be so framed as to be bad for uncertainty, it appears to us that on this principle the grant is operative and the exception fails.

The question, therefore, is whether the exception is good. It was admitted that if the conveyance had been by some modes of assurance—as, for example, a feoffment—the exception would have been bad. A similar point appears to have been decided in the time of Queen Elizabeth with respect to a feoffment which required an election to support it. The case is reported under the name of *Bullock* v. *Burdett*, 3 Dyer 281, Moo. 81, and is thus stated in Viner's Abridgment, Tit. Election A. 1: "If A. seised in fee of 100 acres enfeoffs B. of eighteen of the 100 acres (without assigning which of the 100 he enfeoffs him of) to hold to B. and his heirs when he please, this is a void feoffment, so that this cannot be made good by any election, because a livery cannot operate in future, but ought to pass the freehold presently or never, and therefore the feoffment is bad." It was said, however, that the law was otherwise with respect to grants, and in support of this proposition various passages were cited from Sheppard's Touchstone as well as some decided cases—*Hungerford's case*, 1 Leon. 30; *Lee's case*, 3 Leon. 106; and *Jenkins* v. *Green*, 7 W. R. 304, 27 Beav. 437. Of the passages in the Touchstone those most favourable to the appellants' contention appear to be the following (which are quoted from Preston's edition): "If the exception be set down uncertainly, as if one grant a house, excepting one chamber, or grant a manor, excepting one acre, but doth not set forth which chamber or which acre it shall be, these exceptions are void (for uncertainty. However, query, for there are authorities to the contrary—namely, that the exception may be available by election)" (p. 80). "If there be tenant for life of three houses and four acres of land, and he in reversion grant the reversion of two (of the) houses and of two (of the) acres of this land, this is a good grant, and hath sufficient certainty in it (to be rendered complete by election. But election must be made in the lifetime of the grantor or of the grantee)" (p. 250). "If one be seised of two acres of land, and he doth lease them for life and grant the remainder of one of them, and doth not say which, to J. S., then in this case, if J. S. make his election which acre he will have, the grant of the remainder to him will be good. [As to the point that it may be made good by election, query; and see *supra*, 250]" (p. 251). The comments of the learned editor appear to show that the law as to making good an uncertainty by election was not regarded by him as completely settled, and in any case the law laid down in the text requires some care in its application. The force of the phrase "making good or complete by election" will be understood

from the following passage from *Sir Rowland Heyward's case*, 2 Rep. 36*a*: "Here is not election to claim one of two several things by one and the same title, but to claim one and the same thing by one of two several titles, for" (and this is the material part) "where the things are several, nothing passes before election and the election ought to be precedent, but when one and the same thing shall pass, then it passeth presently and the election of the title may be subsequent; and therefore if I have three horses and I give you one of my horses, in this case the election ought to be made in the life of the parties, for inasmuch as none of the horses is given in certain, the certainty and thereby the property begins by election." If, then, by a deed there had been a grant of a plot of land to be ascertained by election, it follows that until the election nothing passed; and if the deed granted certain specified lands with the exception of a plot to be ascertained by election, it seems to us that the deed would at once pass the whole, but subject to an exception which could only be ascertained and take effect when the election was made. Formerly a deed of grant was a mode of assurance applicable only to incorporeal hereditaments, including reversions and remainders, in land; but by virtue of 8 & 9 Vict. c. 106, s. 2, it was enacted that corporeal hereditaments as regards the conveyance of the immediate freehold thereof should be deemed to be in grant as well as in livery. The statute, however, in no way alters the rules of law with respect to the creation of estates. It appears to have been suggested in the argument in the case of *Boddington* v. *Robinson* 23 W. R. 925, L. R. 10 Ex. 270, that section 6 of the Act has this effect; but that section deals not with the creation of new estates but with the disposition of existing interests in real estate: see Challis on Real Property (2nd ed.), p. 99, where the question is discussed. The conveyance of the 23rd of March, 1896, is expressed to be to the purchaser to hold unto and to the use of the purchaser in fee simple. A conveyance in such a form as this has repeatedly been held to operate at common law and not under the Statute of Uses: *Jenkins* v. *Young*, Cro. Car. 230; *Meredith* v. *Joans*, Cro. Car. 244; *Peacock* v. *Eastland*, 18 W. R. 856, L. R. 10 Eq. 17; see *Orme's case*, 21 W. R. 171, L. R. 8 C. P. 281. This turns on the language of the statute, which only applies "where any person or persons . . . shall happen to be seised of and in any . . . hereditament to the use, confidence, or trust of any other person or persons: 27 Hen. 8, c. 10, s. 1. Now it has long been settled that according to the common law a limitation of an estate of freehold to commence *in futuro* is void: *Buckler's case*, 2 Rep. 55; *Barwick's case*, 5 Rep. 93; *Roe* v. *Tranmarr*, Willes 682; and see Challis (2nd ed.), p. 93. Indeed, the case already cited is an example of the operation of this very rule. If, then (as we think), the conveyance of the 23rd of March, 1896, operates at common law, the exception is bad.

If, however, it can be held that the conveyance operates under the Statute of Uses, then it appears to us that it is equally bad as infringing the rule against perpetuities, for the election, without which the exception is of no effect, need not be made, according to the terms of the conveyance, until after the nearest road had been made by the purchaser or his assignee, an event which need not necessarily occur within the period prescribed by the rule. It was contended that according to the law as stated in Sheppard's Touchstone the election must be made in the lifetime of both grantor and grantee, but the answer is that although this might be so if the deed had been silent on the subject, the parties have chosen to determine otherwise. On this part of the case the reasoning of Jessel, M.R., in *London and South-Western Railway* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562, see p. 580, appears to be important. This conclusion is not in conflict with any of the cases cited for the appellant, and is in accordance with the opinion expressed by Jessel, M.R., in *Pearce* v. *Watts*, 23 W. R. 771, L. R. 26 Eq. 492. There, speaking of a contract by which a vendor agreed to sell certain land, but reserved "the necessary land for making a railway through the estate to Princetown," he says (p. 493): "If the conveyance were executed in this form it is obvious that according to the present law the whole land would pass to the purchaser, the reservation being void for uncertainty." In our opinion, therefore, the plot of land as to which the question arises was not effectually excepted from the conveyance of the 23rd of March, 1896, and as the covenant sought to be enforced in this action extends to all the lands thereby conveyed, the appellant's case fails. We do not thereby decide that effect cannot in some other way be given to the intention, plain on the face of the deed, that the vendors should be entitled to access from their land on the east side of the railway to the roads which the purchaser proposed to make on the west side. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *A. M. M. Forbes.*

Solicitors for the respondents, *Sandilands & Co.*

From K. B. Div.
(Vaughan Williams, Romer, and Mathew, L.JJ.) — May 14.

HERTFORDSHIRE COUNTY COUNCIL v. BARNET RURAL DISTRICT COUNCIL. (*a*.)

Highway—Surveyor of highways—Power to incur expenditure—Agreement with county council—Construction of bridge—Agreement for payment of money after expiration of surveyor's term of office—Liability of rural district council as successor to surveyor of highways—Highways and Bridges Act, 1891 (54 & 55 *Vict. c.* 63), *s.* 3—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25.

The surveyor of highways for a parish, acting on behalf of himself and his successors as highway authority, entered into an agreement with the county council for the payment of a sum of money in two instalments by the highway authority for the parish towards the expenses to be incurred in the construction of a bridge. The second instalment was agreed to be paid on a date after the expiration of the surveyor's year of office. Before the expiration of that year the rural district council, under section 25 of the Local Government Act, 1894, *became the highway authority for the parish. The work of constructing the bridge lasted a year. In an action by the county council against the rural district council to recover the second instalment,*

Held, that the surveyor of highways had power, under section 3 of the Highways and Bridges Act, 1891, *to enter into the contract, and that the rural district council were liable as his successors to pay the second instalment.*

Appeal from the judgment of Lawrance, J., at the trial of an action without a jury.

The action was brought by the Hertfordshire County Council to recover the sum of £100 alleged to be due from the Barnet Rural District Council under an agreement dated the 24th of September, 1898.

On the 19th of April, 1898, Henry Lovejoy was

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

appointed surveyor of highways for the parish of Totteridge, in the rural district of Barnet, for the period of one year.

By deed dated the 24th of September, 1898, Lovejoy, as surveyor of highways, entered into an agreement, on behalf of himself and his successors as highway authority, with the plaintiffs for the payment of two instalments of £100 each by the highway authority for the parish of Totteridge towards the expenses to be incurred in the construction of a bridge which was proposed to be erected for the purposes of carrying a main road over a ford known as Totteridge Ford, in the parish of Totteridge. The expenses of constructing the bridge were estimated at £600, and the residue of £400 was to be paid by the plaintiffs. The first instalment of £100 was agreed to be paid on the 31st of December, 1898, and the second on the 31st of December, 1899.

The erection of the bridge was begun on the 31st of October, 1898, and on the 2nd of January, 1899, Lovejoy, as surveyor of highways, paid the plaintiffs the first instalment of £100.

On the 1st of April, 1899, Lovejoy ceased to be surveyor of highways, and the defendants, by virtue of section 25 of the Local Government Act, 1894, became the highway authority for the parish of Totteridge, and all the powers, duties, and liabilities of the highway authority were thereby transferred to them.

The bridge was completed on the 25th of October, 1899. When the second instalment of £100 became due on the 31st of December, 1899, the defendants refused to pay on the ground that Lovejoy had no power to make any contract which would bind his successor.

The plaintiffs thereupon brought this action, contending that the surveyor of highways had power, under section 3 of the Highways and Bridges Act, 1891, to enter into the contract of the 24th of September, 1898, and that the defendants, as his successors, were bound to pay the second instalment of £100 out of the rates.

Section 3 of the Highways and Bridges Act, 1891, enacts as follows: "The council of any administrative county, and any highway authority or authorities, and the council of any adjoining county, may from time to time make and carry into effect agreements with each other for or in relation to the construction, reconstruction, alteration, or improvement, or the freeing from tolls, of any main road or other highway, or of any bridge (including the approaches thereto) wholly or partly situate within the jurisdiction of any one or more of the party or parties to the agreement. All expenses incurred by any such county council or highway authority, in pursuance of this section, shall be defrayed as part of the expenses incurred in relation to the maintenance, repair, improvement, or enlargement of bridges, main roads, or other highways by such council or highway authority, in such proportions as shall be determined by any such agreement as aforesaid, and any powers of borrowing applicable to the raising of any fund for the payment of any such expenses as aforesaid shall be applicable accordingly."

Lawrance, J., gave judgment for the plaintiffs.

The defendants appealed.

Macmorran, K.C., and *Alexander Glen*, for the defendants.—The surveyor of highways, not being a corporation, has no power to incur debts to be paid by his successors: see *Frodingham Iron and Steel Co.* v. *Bowser*, [1894] 2 Q. B. 791. No highway authority has power under any of the Highway Acts to enter into such a contract as that entered into by the surveyor of highways in this case. A highway board can only borrow money with the consent of the justices in quarter sessions: see sections 47, 48, and 49 of the Highway Act, 1864. What the surveyor did in this case was equivalent to a borrowing of money. It is unlikely that the Legislature intended to give a surveyor of highways larger powers than those possessed by a highway board. Section 5 of the Highway Rate Assessment and Expenditure Act, 1882, says that if the rates levied by a surveyor of highways is insufficient to meet the expenditure incurred by him, his successors may reimburse him the amount of the deficiency. That shows that the surveyor has no power to enter into a contract to be completed after the termination of his year of office. Section 3 of the Highways and Bridges Act, 1891, only extends the powers of the surveyor so as to enable him to incur certain expenses outside his district; it does not extend the time within which the expenditure may be incurred beyond his year of office.

Danckwerts, K.C., *R. D. Muir*, and *T. R. Colquhoun Dill*, for the plaintiffs, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—In my opinion the appeal fails. It is hardly denied that the words of section 3 of the Highways and Bridges Act, 1891, are such that, if they are construed in their natural sense, the section gives the surveyor of highways as highway authority power to enter into such a contract as the present. But it is said that, if the court construed the words according to their plain meaning, they would be imputing to the Legislature that they had in this section passed a law not entirely consistent with previous legislation or legal history on these points. I do not think that is a good reason for not giving to the section the meaning naturally conveyed by its words. It is not sufficient to justify us in refusing to put on the section a construction in accordance with what seems to be the manifest intention of the Legislature. It may be that the Legislature did not contemplate that they were giving to the surveyor of highways larger powers than they had given to superior authorities. But that does not justify us in not giving effect to the meaning of the section. That being so, it seems to be clear that, by the Local Government Act, 1894, the duties and liabilities of the surveyor of highways in connection with this contract have passed to the rural district council.

ROMER, L.J.—I am of the same opinion. I think we ought not to put a narrow construction on section 3 of the Highways and Bridges Act, 1891. The power given by that section does not seem to me to be limited to a case where the work of constructing a bridge will not continue longer than the surveyor's term of office, or where the agreement provides for payment being made in advance. I do not see why the agreement may not provide for payment to be made when the work is terminated or from time to time while it proceeds. The contrary contention would render it very difficult for the surveyor to make any contract near the end of his term of office, and in my opinion the section clearly contemplates that the power of entering into contracts may be exercised by the surveyor at any time during his term of office. No doubt the power must be exercised reasonably, but the contract in this case—a contract in relation to the construction of a bridge, which took a year to build—seems to me to be a reasonable and proper contract, and to be one which comes within the powers of the section.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *J. N. Mason & Co.*, for *C. E. Longmore*, Hertford.

Solicitors for the defendants, *Byfield & Son.*

High Court of Justice.

Chan. Div.
Farwell, J. } May 29, 31.

AERATORS (LIMITED) v. TOLLIT AND OTHERS. (a.)

Company—Registration—Similarity of name—Deception—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.

The plaintiffs carried on business under the name of "Aerators (Limited)." The defendants sought to register a company under the name of "Automatic Aerator Patents (Limited)."

Held, that a name is not necessarily calculated to deceive because it is similar, and that on the facts there was not any probability of deception, and that the plaintiffs were not entitled to restrain the defendants from registering their company.

The plaintiff company, Aerators (Limited), claimed an injunction to restrain the defendants from registering a company under the title "Automatic Aerator Patents (Limited)" or any other name so nearly resembling the name of the plaintiff company as to be calculated to deceive.

The plaintiff company was registered on the 15th of February, 1900.

The defendants were the seven signatories of the company proposed to be registered.

The Companies Act, 1862, s. 20, provides: "No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive . . ."

Jenkins, K.C., and *J. G. Wood*, for the plaintiffs.

Upjohn, K.C., and *George Lawrence*, for the defendants.

FARWELL, J., in giving judgment, said: The plaintiffs, Aerators (Limited), claim an injunction to restrain the defendants from registering a company under the name of "Automatic Aerator Patents (Limited)" on the ground that such name so nearly resembles the plaintiffs' name as to be calculated to deceive within the meaning of section 20 of the Companies Act, 1862. The plaintiffs were incorporated in 1900 and took over the business of a similar company of the same name incorporated in 1896. Their business consists in the sale of sparklets. This word is their trade-mark and they have largely advertised "sparklets." I understand them to be a small apparatus containing carbonic acid gas, by means of which, contents of bottles are aerated. One of the merits claimed for them is their portability and their applicability to a small quantity of liquid. The defendants propose that the new company to be formed by them shall acquire patents for the aeration of liquids contained in tanks or cisterns of large size, and shall either work such patents themselves or shall form subsidiary companies for the development of such patents. Section 20 of the Companies Act enacts that no company shall be registered under a name identical with that by which a subsisting company is already registered or so nearly resembling the same as to be calculated to deceive, except in certain cases which are not material to the present case. It will be observed that a company has therefore a greater right than an individual in respect of names that are identical, for John Smith cannot prevent other persons of the same name from using their own names, but John Smith (Limited) can prevent the registration of any other company as John Smith (Limited). I do not consider, however, that it follows that the Legislature has intended to give companies any greater rights than individuals possess in respect of names which are not identical but only similar: and it has been held that "calculated to deceive" does not point to intentional fraud, but it is a question of fact in each case whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical.

In considering this question it is material to ascertain—(1) What business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new, and (2) what sort of name has been adopted by the old company. As to to the first point, I do not think that it is sufficient for an existing company to point to clauses in its memorandum which will enable it to extend its operations to numerous classes of trade, unless it can satisfy the court that it either has carried on or really proposes within a limited time to carry on such particular businesses. It cannot, I think, be enough in these days, when the objects of a company are usually limited only by the number of letters in the alphabet and extend to every form of business whether connected or not with the principal object, to show that the intended new company includes some similar objects. It is necessary to see whether the real objects of the two companies are similar. As to the second point, I think that it is necessary to consider the nature of the title registered by the old company. The plaintiffs have argued that the House of Lords, in the case of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83, 47 W. R. Dig. 192, decided that in no case can a new company take the whole title of an existing company, whatever additional words they may add to it, and they accordingly claim a monopoly of the word "Aerators." In my opinion this is not correct. The House of Lords found as a fact in the case before them that the adoption by the defendant company of the whole of the plaintiffs' title, although added to other words, was "calculated to deceive," but it appears to me impossible to say as a general proposition that a company can, by registering a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies. In the present case the plaintiffs have taken a word which, and which only, aptly and rightly describes a machine for producing a particular result. The word has been in common use in the English language for at least thirty years. It is to be found in dictionaries such as the Century (1889), Murray's Dictionary (1891), and in the Dictionary of Mechanics (1876), to which one of the witnesses referred. It would obviously lead to the greatest inconvenience if any company could prevent all other companies from using as part of their title the one word in the English language which aptly describes the articles they manufacture or deal in, or the name of the individual associated for years with a particular firm. For example, suppose a company had registered the name of "Motors (Limited)," and another the name of "Automobiles (Limited)"; it appears to me impossible to say that they could thereby prevent all other companies from using as part of their title these two words, which, so far as I know, are the only words which represent the fashionable locomotives of the day, although their sole trade was the manufacture or sale of motors or automobiles. Or again, to take an instance of names, it would be absurd to suppose that Barclay & Co. (Limited), the well-known bankers, could restrain Barclay, Perkins, & Co. (Limited), the well-known brewers, from registering

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

as such on the ground that they take the whole of the title of the banking firm. In considering whether a name is calculated to deceive, it is, as I have said, material to see what that name is, and if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even of the name of a place. The latter may well point to a particular company; the former certainly points *primâ facie* to the machine or article, and can only under very exceptional circumstances and by a long course of usage point to the company rather than the thing itself. English-speaking people know "aerators," "motors," and the like as machines, not as companies, and the presence of such a word in the title of a company suggests that the company deals in those machines, not that it has anything to do with a company of that name. If the plaintiffs assert the contrary, it is for them to prove it, and the principles applied by the House of Lords in *Reddaway* v. *Banham*, 44 W. R. 638, [1896] A. C. 199, explained as they were in *Cellular Clothing Co.* v. *Maxton*, [1899] A. C. 326, 47 W. R. Dig. 193, to which I had occasion to refer in *Chivers* v. *Chivers*, 17 Rep. Pat. Cas. 420, apply as much to the name of a company under section 20 as to the camel's hair belting, the cellular clothing, or the name of Chivers in those cases. I will read the passage from Lord Shand's speech, *Cellular Clothing Co.* v. *Maxton*, at p. 340, which I read in *Chiver's case*: "The case on which the appellants have chiefly relied is that of the camel-hair belting, *Reddaway's case*. Of that case I shall only say that it no doubt shows it is possible, where a descriptive name has been used, to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning, and so to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only, and, indeed, were it not for the decision in *Reddaway's case*, I should say this should be made altogether impossible."

The plaintiffs further argued that the Act of Parliament was intended for the protection of the public, and that there must necessarily be some confusion in the minds of the public if the whole of their title is taken; but I would point out that the plaintiffs cannot assert in their own names the rights of the public—that is for the Attorney-General. They can only assert their own rights as members of the public if and so far as they can show special damage to themselves. But the choice of their own name rests with themselves. The registrar has no discretion to refuse to register any name put forward on behalf of a company, and if by reason of their adoption of one single word in common use they run the risk of suffering injury, they have only themselves to thank, and they can no more acquire a monopoly in the use of the word "Aerators" by adopting that as their title, than an individual can acquire a monopoly in his own name or the name of the article that he manufactures. As in the latter case it is necessary for the individual to show not merely that the defendant is trading under his name or is making the article the name of which he has adopted, but must also show that the name or article is exclusively identified with his own manufacture so as to have acquired a secondary meaning, so a company must also show that the name which *primâ facie* refers to a number of persons or articles is in fact identified solely with the plaintiffs before they can satisfy the court that its use as part of another company's name is calculated to deceive. A name is not necessarily calculated to deceive because it is similar. It must depend in great measure upon what the nature of the name is, and if it merely represents the name of the article supplied by the company, it would require very strong evidence to show that such name had lost its primary meaning and had become identified with the plaintiff company.

In the case before me, as indeed in all cases under section 20, the action is a *quia timet* action, and evidence of actual mistake is therefore impossible, but there is in fact no evidence, to my mind, of any probability of deception. The plaintiffs' trade-mark is "sparklets," and their name is put prominently forward on their shop-fronts, invoices, bill-heads, and letter-paper. The articles in which they deal are very different from those to be manufactured under the defendants' patents. When the plaintiffs ascertained that the defendants intended to register the Automatic Aerator Patents (Limited) they themselves applied to register another company under the same or all but the same title, and were only prevented from so doing because the defendants' application was first lodged. The plaintiffs' managing director, who gave his evidence in a very fair and candid manner, stated that although their chief object was to be beforehand with the defendants and prevent their registration of the name, yet that they had intended that the new company should carry on business under this title, and that, if proper care was taken, they did not anticipate that any confusion would arise. But this new company of the plaintiffs was intended to deal in articles similar to those sold by the plaintiffs, and if due care can prevent confusion in such a case, *a fortiori* can it do so where the articles dealt in are so different as those of the plaintiffs' and defendants'. In my opinion the plaintiffs' action is an attempt to monopolize for the purposes of nomenclature a word in ordinary use in the English language, and fails, and must be dismissed with costs.

Solicitors for the plaintiffs, *Wainwright & Co.*

Solicitors for the defendants, *Hind & Robinson.*

Chan. Div. } Buckley, J. } **May 14.**

In re CLARKE'S SETTLEMENT. (*a.*)

Settled land — Capital money — Leasehold house — Additions with a view to letting—Electric light installation—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (ii.).

The word "additions" in section 13 (ii.) *of the Settled Land Act*, 1890, *means structural additions.*

The installation of the electric light in a leasehold house, although reasonably necessary to enable the house to be let, is not a structural addition within the meaning of the section, and cannot, therefore, be paid for out of capital moneys.

In re Freake's Settlement, ante, *p.* 237, [1902] 1 *Ch.* 97, *not followed.*

In re Gaskell's Settled Estates, 42 *W. R.* 219, [1894] 1 *Ch.* 485, *followed.*

Adjourned summons.

This summons was taken out by the tenant for life of a certain leasehold house, asking that the cost of

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

certain improvements which had been made by him might be allowed out of capital moneys in the hands of the trustees as being improvements within the meaning of section 13 (ii.) of the Settled Land Act, 1890.

It appeared that on the 19th of August, 1901, the tenant for life entered into negotiations for the lease of the house as a shooting lodge; it was stipulated by the intending lessee that certain improvements should be made and possession given by the 1st of September.

Consequently, the improvements had to be made without submitting a scheme to the court.

The present application was, accordingly, made under section 15 of the Settled Land Act, 1890.

One of the improvements the cost of which was now sought to be charged against capital consisted in the wiring of the house for electric light.

W. A. Peck (*Birrell, K.C.*, with him), for the tenant for life.—An electric lighting installation is an "addition" reasonably necessary within the meaning of the Settled Land Act, 1890: *In re Freake's Settlement, ante*, p. 237, [1902] 1 Ch. 97, which has since been followed by Kekewich, J., in chambers, in *In re Lord Howe's Settled Estates*. The "addition" need not be structural. *In re Gaskell's Settled Estates*, 42 W. R. 219, [1894] 1 Ch. 485, appears to be against the applicant on that point; if that is the case, the two decisions can only be reconciled by saying that the installation of an electric light system is a structural addition.

Herbert Robertson, for the trustees, was not called on.

BUCKLEY, J.—The question to be determined on this summons is as to the true construction in section 13 (ii.) of the Settled Land Act, 1890, of the words "additions to or alterations in buildings." Mr. Peck, on behalf of the tenant for life, has addressed an argument to the court which involves the proposition that the word "additions" means additions of any kind, and that an addition to be within the section need not be structural. If the word be so understood, it would follow that there would fall within it venetian blinds, sun blinds, furniture in the house, and a park added to a house which had none. All these are additions to a building, but they are not additions within the section. I think the word "addition" in the section means a structural addition in some sense. The frame of the section shows that an addition or alteration means an addition to or alteration in the building. The argument of the tenant for life amounts to this, that of these two nouns substantive, although the word "alteration" must mean structural alteration, the other word "addition" does not mean a structural addition, but the addition of anything. I do not understand that to be the true construction of the section. I understand the section to mean the addition to the building of some further building or the alteration of the building by removing and replacing in some form part of the building—that is to say, that both the one and the other must be structural. The question is not without authority; it was considered by Chitty, J., in *In re Gaskell's Settled Estates*. The question there was whether a fixed boiler with hot water pipes running through the house was an addition within the section. No doubt, in a sense, it was an addition, but the learned judge held that it was not an addition within the meaning of the section. He construed these words as meaning structural additions or alterations. He says: "Section 13 (ii.) is very precise in its terms, and is confined to 'additions to or alterations in buildings,' and any improvement authorized under this sub-section (ii.) must, therefore, be an addition or alteration in the building." Then at the top of the next page he says: "I am of opinion that this warming apparatus, however convenient it may be to the occupier, is neither an addition to or alteration in the building within the section." Although throughout the judgment he does not use the word "structural," his language points to the conclusion that he meant it. He then says: "As regards the change in the main entrance, and the other minor alterations consequent thereon, they appear to have been alterations in the structure of the building itself." He then goes on to discuss the matter of the new roof and goes into it in this way: "Then a question of a metaphysical nature arises as to the identity of the house. Is a house with a rotten roof identical with the house it becomes when the roof has been replaced with a new and sound one?" It would have been unnecessary to discuss that unless he had meant to say that the alterations and additions must be structural. Then it is said that in *In re Freake's Settlement*, Joyce, J., had held that an installation of electric light fell within the sub-section. I have had an opportunity of seeing the learned judge and he authorizes me to state that he did not in that case intend to lay down any general principle, but that his decision was to be confined to the facts of that particular case. But, however that may be, where there is a conflict between two decisions, I am at liberty to act on my own judgment, and my own view is that the addition or alteration must be structural. I do not mean to limit an inquiry as to whether any particular additions or alterations are structural or not, but the present matter I have to deal with is this: There was a house for which a tenant could be found if electric light were installed. The installation was no doubt necessary, in order to enable the house to be let; but, in my opinion, it was not an addition within the meaning of the section, because it was not structural. I cannot distinguish between this case and *In re Gaskell's Settled Estates*. I therefore disallow the first item in the summons—£148 15s. for installation of electric light.

Solicitors, *Frere, Cholmeley, & Co.*

Chan. Div. Joyce, J. } May 28; June 13.

PRYCE-JONES v. WILLIAMS. (a.)

Vendor and purchaser—Leaseholds—Conditions of sale—Title—Requisition out of time—Imperfect abstract—Outstanding legal estate—Costs.

Property stated to be held on leases was contracted to be sold subject to a condition requiring the purchaser to deliver requisitions and objections on or to the title within fourteen days after receiving his abstract, and in this respect time was to be deemed of the essence of the contract. The abstract showed only an equitable beneficial title in the vendors, and the legal estate was outstanding owing to the non-execution by a company (which had since been dissolved), through whom the vendors made title, of any legal assignment of the leases. Upon the purchaser raising an objection upon this point out of the time prescribed by the condition:

Held, that, as the purchaser got a perfect equitable title and could get the legal estate by application to the Crown, his objection did not go to the root of the title as to free him from the condition limiting the time for delivery of objections and requisitions, and must therefore be deemed waived, and could not be insisted upon.

Vendor and purchaser summons.

In April, 1884, two leases were granted to a company incorporated in 1869 under the title of the Van Mining Co. (Limited). In 1884 this company was

(a.) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

dissolved and a new company formed under the same title, which purchased the assets of the 1869 company, including the leases, but no legal assignment of the leasehold terms was executed by the 1869 company. In 1891 the second company went into liquidation and sold its assets to a third company then formed under the same title, but again there was no legal assignment of the leasehold terms.

The debenture-holders of the latter company obtained an order for sale under the direction of the court of their security, which included the two leases, and they were subsequently sold by private contract subject to conditions framed for a sale by auction, but which were made applicable so far as possible to a sale by private contract, of which condition 6 (so far as material), was as follows:

"Each purchaser is within fourteen days after the actual delivery of the abstract to deliver . . . a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract; and upon the expiration of such last-mentioned time, and in this respect time is to be deemed of the essence of the contract, the title is to be considered as approved of, and accepted by, such purchaser subject only to such objections and requisitions, if any." The particulars stated that the property was "held on lease."

The purchaser, after the expiration of the prescribed time, objected that no title was shown by the vendors to the leases, because the legal estate therein remained outstanding.

The vendors thereupon took out this summons asking (in effect) for specific performance of the contract by the purchaser.

There was a cross-summons by the purchaser asking for rescission and consequential relief.

R. J. Parker, for the vendors, undertook to obtain the lessor's consent to the assignment to the purchaser of the residue of the terms.

A. Dunham, for the purchaser.—The vendors show no title to what they agreed to sell—viz., a legal leasehold estate, and not a mere equitable interest. As to the requisition being out of time, no perfect abstract was ever delivered, for no assignments were abstracted, and there was no such title shown as would enable the vendors to insist on the time condition; a mere consent by the lessor to a new assignment would not heal the defect, for it would not confer privity of contract. I rely upon *Want* v. *Stallibrass*, 21 W. R. 685, L. R. 8 Ex. 175, and *In re Tanqueray-Willaume and Landau*, 30 W. R. 801, 20 Ch. D. 466.

JOYCE, J. (after stating the facts and reading condition 6), said: In my opinion the legal estate is outstanding in the Crown as *bona vacantia*; it cannot be seriously contended that the abstract was imperfect; it seems to me to have been the most perfect in the vendors' possession, and on consideration I cannot see why the purchaser should not be bound by the condition limiting the time for delivering objections, and held to have waived this objection. It is not an objection which goes to the root of the title; the purchaser will get a perfect equitable title and the means of getting in the legal estate by applying in the right quarter. On the other hand I think that the vendors should have made special provision in the contract to cover this defect in their title, and though they are entitled to an order I do not think this is a case for costs. Each party will therefore bear their own costs and the purchaser's summons will be dismissed, but without costs. The vendors are to procure the consent of the lessor to the assignments to the purchaser.

Order as asked by vendors' summons.

Solicitors, *Busk, Mellor, & Co.; Vallance, Birkbeck, & Barnard.*

K. B. Div. (Bigham, J.) — April 25; May 15.

MARTEN v. STEAMSHIP OWNERS' UNDERWRITING ASSOCIATION (LIMITED). (a.)

Insurance—Marine—Insured value to be taken as repaired value—Reinsurance against total loss—"To pay as may be paid thereon."

Attached to a policy of insurance on a vessel was a clause that "the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." The vessel was valued at £16,000 and was insured against all risks. The underwriter effected a policy of reinsurance on the vessel against total, including constructive total, loss only "being a reinsurance applying to policy or policies and to pay as may be paid thereon." During the period covered by the policies the vessel ran ashore, and notice of abandonment was given. The vessel could have been repaired at a less sum than £16,000, and if the ordinary rules had been applied the vessel would have been a constructive total loss.

Held, that the reinsurers were not liable under the reinsurance policy, since the original underwriter was not liable for a constructive total loss, and that the words "pay as may be paid thereon" meant that he could only recover such a sum as he could have been compelled to pay.

Action tried in the Commercial List without a jury.

This was an action brought by the plaintiff, who was an underwriter of a policy of insurance on *The William Symington*, against the defendants under a policy of reinsurance.

The facts and arguments appear in the judgment.

Hamilton, K.C., and *Lochnis*, for the plaintiff.

Scrutton, K.C., and *Hurst*, for the defendants.

The following cases were cited: *Chippendale* v. *Holt*, 44 W. R. 128; *Franco-Hungarian Insurance Co.* v. *Merchants Marine Insurance Co.*, cited in *Charlesworth* v. *Faber*, 5 Com. Cas. 408; *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A. C. 593, 47 W. R. Dig. 86.

Cur. adv. vult.

May 15.—BIGHAM, J., gave the following judgment: By a policy of the 29th of May, 1899, the plaintiffs underwrote a vessel called *The William Symington* against all risks for twelve months. The vessel was valued in the policy at £16,000. Attached to the policy was a printed memorandum containing what are called the Institute Time Clauses, one of which is as follows: "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." The effect of this clause is that, if the vessel becomes damaged by the perils insured against, the owner, before he can recover for a constructive total loss, must show that the cost of repairing her will exceed £16,000. The plaintiffs had taken risks on many other vessels, in respect of which they had issued other policies. At the end of the year they were desirous of reinsuring all these risks, and accordingly they effected a policy of reinsurance with the defendants, which is the policy sued on. It is dated the 3rd of January, 1900, and it covers a sum of £42,884 "upon the vessels as per schedule annexed." The schedule contains the names of about 100 vessels, one of them being *The William Symington*. In the body of the policy there is a valuation clause in the following words: "The said steamships, by agreement between the assured

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

and assurers in this policy, being valued at as per schedule annexed or as per original policy or policies." On turning to the schedule it is found that *The William Symington* is valued at £16,000 and is covered to the amount of £650. The risk is described in the policy as "against the risk of total and (or) constructive total loss only warranted free of all average and (or) salvage charges, being a reinsurance applying to policy or policies, and to pay as may be paid thereon." Thus it will be seen that, whereas the original policy was against total or partial loss (all risks), the reinsurance was only against total or constructive total loss. The Institute Time Clauses were printed on the reinsurance policy, but many of them were struck out by an ink line being drawn diagonally through them; the clauses so struck out were such as applied more particularly to cases of partial loss, and were inapplicable to a policy against total loss. They included, however, the clause by which it is stipulated that the insured value is to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss. This clause is numbered 14, and the diagonal line went down from number 5 to number 15 inclusive, thus traversing number 14. During the period covered by the two policies—namely, on the 9th of December, 1899—*The William Symington* ran ashore at Chioggia, in the Adriatic, and on the 20th of December the owner served the plaintiffs with notice of abandonment. The vessel was floated on the 23rd of February, 1900, and was towed into Venice. There some temporary repairs were done to her, and she was then taken to Fiume, where she was sold to a Mr. Fragala for a sum of £5,200. Mr. Fragala repaired her, and she is now trading on his account. Having heard the evidence as to the cost of proper repairs to restore the vessel to her original class, I am satisfied of two things—first, that if the ordinary rules are applied to ascertaining the fact, the vessel was a constructive total loss at the date of the notice of abandonment. I mean that a prudent uninsured owner would not have repaired her; he would have made the best of a bad job by selling the wreck as it lay at Chioggia; but I am also well satisfied of a further fact—namely, that if the repaired value is to be taken at £16,000, and not at its true figure, then the vessel was not a constructive total loss. She could have been repaired at a cost which, after taking everything into account, would have been much less (less by some thousands of pounds) than £16,000. The question I have to consider is whether the plaintiffs ever became liable to pay a constructive total loss to the shipowners within the meaning of the reinsurance policy. If they did become liable to pay such a loss and have compromised with the shipowners for a payment of some less sum, the defendants will get the benefit of the abatement. The whole question of the defendants' liability of course turns upon the true construction to be placed upon the reinsurance policy. The defendants say that the only risk they undertook was the risk of the plaintiffs having to pay as for a total or a constructive total loss on their policy with the shipowners—that is to say, on the basis of a repaired value of £16,000; and that as the plaintiffs never became liable to pay such a loss no cause of action has arisen on the reinsurance policy. On the other hand, the plaintiffs say that the defendants are not entitled to inquire whether the plaintiffs had become liable for a constructive total loss on the original policy; and that it is sufficient for the plaintiffs to show a constructive total loss on the basis of the actual repaired value of the ship. Thus the question is reduced to this—Is the clause that the insured value shall be taken as the repaired value to be read into the reinsurance policy? I will first examine this policy as though it contained no express reference of any kind to this clause—that is to say, as though the clause had never appeared in print in the margin and had never been struck through in ink, as already described. What then would have been the meaning of the policy? Now, I think, the meaning quite plain, it is a "reinsurance"; that expression connotes the idea of something already insured. Then what was already insured? The answer is two things, namely, the risk of total loss and the risk of partial loss; but the defendants only reinsured one of these two risks, that is to say, the risk of total loss. But, again, what risk of total loss? The answer is only the risk which arises when the repaired value is taken at £16,000. The plaintiffs are not liable for any other kind of total loss, and therefore cannot reinsure any other kind. The fact is that the sole object of the reinsurance policy was to indemnify the plaintiffs against the risk of total loss covered by the policy which they themselves had issued. Then does it make any difference that the clause can be seen in the print, and has been struck through by the ink line? It is said that this shows an intention to let the question of constructive total loss, if it arises, be determined without reference to the agreed value; in other words, that it shows an intention to reinsure a kind of constructive total loss which does not form the subject of the already existing policy. But, even if any significance at all ought to be attached to the striking out of the clause, there are two answers to this contention; first, that the body of the policy is so worded as to make the clause quite unnecessary—the body of the policy, as I have already said, indemnifies against the risk in the original policy, and against that risk only; and, secondly, that it may well be that, among the many original policies issued in respect of the other 100 ships, there are some which do not contain the repaired value clause; in which case it would be right to strike the clause out of the reinsurance policy. In the way in which the body of the policy is worded it covers all the original risks against total loss or constructive total loss whether the original policies contain the clause or do not contain it, and this is exactly what the parties intended. In truth the plaintiffs have sustained a very large partial loss on the original policy, and they want to recover it back under the reinsurance policy against constructive total loss only. This they cannot be allowed to do. The plaintiffs further say that, having paid as for a constructive total loss on the basis of a repaired value of £16,000, they ought to be allowed to recover against the defendants, as the reinsurance policy contains the words "to pay as may be paid on the original policy." But the answer is, first, that they have not paid as for a constructive total loss. They may so describe the payment which they have made, but it was, in fact, only a payment for a large partial loss; and, secondly, even if they have paid as for a constructive total loss, inasmuch as, in my opinion, they were not liable to pay they cannot recover. The words "to pay as may be paid" mean only to pay as the reassured may have been compellable to pay.

Judgment for defendants.

Solicitor for plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitor for defendants, *Prichard & Sons.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 24.

REX v. MEAD.
Ex parte WREBITZKY.
Ex parte GRODZINSKY. (a.)

Sunday trading—Bakers Act—Consent in writing of chief constable—Sunday Observance Act, 1871—*Lord's Day Act* (*Car.* 2, 1663)—*London Bread Act* (3 *Geo.* 4, *c.* 106), *s.* 16.

The provision in the Sunday Observance Act, 1871, *requiring the consent in writing of the chief constable to any prosecution is not applicable to the London Bread Acts regulating the sale of bread, which form a special code by themselves.*

This was the hearing of a rule *nisi* calling on R. Mead, Esq., a Metropolitan Police Magistrate, to show cause why a *mandamus* should not be granted to state a case.

The following facts were proved before the police magistrate:—

The defendant Wrebitzky carries on business as a baker at 20, Commercial-road, E., and the defendant Grodzinsky at 31, Fieldgate-street, E.C.

On the 17th of February, 1902, a summons was taken out against each defendant for on the 16th of February, 1902, at 8.15 a.m., unlawfully exercising or causing to be exercised the trade or calling of a baker by selling and exposing for sale bread, contrary to the statute on the Lord's Day.

Two other summonses were also issued for delivering on that date.

The summonses were heard on the 19th of February, and the magistrate then convicted both the defendants and inflicted a fine of twelve shillings and sixpence costs.

He was applied to, to state a case, but refused on the ground that it was frivolous.

On the 3rd of March, an application was made for a rule *nisi* to state a case on various grounds and the Divisional Court granted it on the point whether the Sunday Observance Act, 1871, applied to the local Act regulating the sale and making of bread in London.

By section 16 of 3 Geo. 4, c. 106 (London Bread Act) it is provided: that no master, mistress, or other person respectively, exercised or employed in the trade or calling of a baker within the limits aforesaid shall on the Lord's Day or any part thereof make or bake any bread, rolls, or cakes of any sort or kind, or shall on any other part of the same day than between the hours of nine of the clock in the forenoon and one of the clock in the afternoon sell or expose to sale any bread, rolls, or cakes of any sort or kind.

By section 1 of the Sunday Observance Act, 1871, it is provided that no prosecution or any other proceeding shall be constituted . . . for any offence committed by him under the Act of the twenty-ninth year of the reign of Charles II. entitled Act for the Better Observation of the Lord's Day commonly called Sunday, or for the recovery of any forfeiture or penalty for any such offence except by or with the consent in writing of the chief officer of police, of the police district in which the offence is committed, or of two justices of the peace, or of a stipendiary magistrate having jurisdiction where the offence is committed.

No such consent had been obtained in this case.

Powell, K.C. (*McBurnet* with him), showed cause.—The Act of 1871 does not apply. The object of the London Bread Acts was to regulate the sale of bread in the metropolis, and to sanction a limited breach of the law.

Henriques, in support of the rule.—This is an offence under the Act of Charles II. The Bread Acts are merely explanatory of the Act of Charles II.

He cited *R.* v. *Younger*, 5 T. R. 449.

Lord ALVERSTONE, L.C.J.—This is the hearing *nisi* of a rule moved before us in order to compel the magistrate to state a case. If it were necessary we should be willing to make the rule absolute, but as we are in a position of knowing all the facts of the case we think that we can now deal with the matter. The contention of the appellants is that the words of the Sunday Observance Act, 1871, apply to prosecutions under the London Bread Acts. However much we may desire it I think it is plain they do not. The Sunday Observance Act provided that all prosecutions under the Act of Charles II. should be subject to the consent in writing of the chief constable, or of two justices of the peace, or of a stipendiary magistrate. The statutes relating to the making and baking of bread, and ranging from 34 Geo. 3 to 3 Geo. 4, form a complete code in themselves. The Act of Charles II. exempted works of necessity and charity, and the Legislature may well have thought that some special protection should be provided by the Act of 1871. But as regards the special code relating to the baking of bread, with special provisions as to time and the exemptions which are to prevail, it seems to us that the Act of 1871 does not apply to those Acts. It is important to notice that some offences are offences under the Bread Acts which are not offences under the Act of Charles II. To make the Act of 1871 apply to the Bread Acts you would have to find either words clearly mentioning them or words of necessary implication. We are unable to find any such words in the Act, and the rules will therefore be discharged.

DARLING and CHANNELL, JJ., concurred.

Solicitors for the appellant, *Pattison & Brewer.*

Solicitors for the respondent, *H. Solomon.*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Wright, Bruce, and Kennedy, JJ.) April 26.

REX v. HADWEN AND INGHAM. (a.)

Criminal law—Evidence—Prisoners jointly indicted—Cross-examination of one prisoner by another—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*iii.*).

Where two prisoners are tried together, and one of them gives evidence, under section 1 *of the Criminal Evidence Act,* 1898, *on his own behalf, and in the course of it gives evidence incriminating the other prisoner, the former can be cross-examined by the latter as well as by the prosecution.*

Case stated by Ridley, J.

The two prisoners, Frederick Walter Hadwen and Alfred Ingram, were jointly indicted at the assizes held for the West Riding of the county of York at Leeds and tried on the 14th and 15th of March, 1902, upon an indictment whereby they were jointly charged in thirty counts with the following: (*a*) Offences under the Debtors Act, 1869, s. 11, sub-section 10, in

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

making and being privy to the making of certain false entries in a document relating to their affairs—namely, a certain balance sheet within four months before the presentation of a bankruptcy petition by them with intent to conceal the state of their affairs; (*b*) offences under section 13 of the same Act by obtaining credit under false pretences in incurring a debt to the Halifax and Huddersfield Union Banking Co.; (*c*) conspiring together to cheat and defraud the said banking company.

The prisoners had for many years carried on business as silk spinners under the style of Hadwen & Sons, at Triangle, near Halifax. Prisoners pleaded "Not guilty," and were separately defended by counsel. Upon the close of the case for the Crown each prisoner gave evidence exculpating himself, and against the other prisoner. Counsel on behalf of each prisoner then claimed the right to cross-examine the other prisoner, but counsel for the Crown contended that such cross-examination was not permissible. The judge upheld the contention, and excluded all cross-examination of one prisoner on behalf of the other, but agreed to state a case for the opinion of the High Court. The jury found both prisoners guilty upon all the counts, and the judge respited the sentences, and let the prisoners out on bail to appear at the next general gaol delivery of the county of York if called upon.

The question reserved for the opinion of the court was whether counsel for one prisoner was or was not entitled to cross-examine the other prisoner upon the evidence given by the latter against him.

If the learned judge was right in excluding such cross-examination the conviction was to be affirmed; otherwise it was to be quashed.

Tindal Atkinson, K.C. (*Waugh* with him), for the prisoner Hadwen.—Before the passing of the Criminal Evidence Act, 1898, a statement not on oath by one prisoner was not evidence against another prisoner, because it could not be cross-examined to. But if a witness was called by one prisoner whose evidence tended to incriminate another prisoner, he could be cross-examined: *Reg.* v. *Woods*, 6 Cox Cr. Cas. 224; *Reg.* v. *Burditt*, 6 Cox Cr. Cas. 458, and in civil cases one co-defendant could cross-examine another co-defendant: *Allen* v. *Allen*, 42 W. R. 549, [1894] P. 248; *Lord* v. *Colvin*, 3 W. R. 342, 3 Drew. 222. By section 1 of the Criminal Evidence Act, 1898, it was provided that "every person charged with an offence, and the wife or husband, as the case might be, of the person so charged shall be a competent witness for the defence at every stage of the proceedings." Sub-section (*f*) provides that a person charged with an offence and called as a witness shall not be required to answer any question tending to show that he has been previously charged with any offence or that he was of bad character; but there were certain exceptions given, and amongst these exceptions was this one: "Unless the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or he has given evidence against any person charged with the same offence." This showed clearly that the Act contemplated that a prisoner who gave evidence against his co-prisoner might be cross-examined as to his previous character. This shows clearly that counsel for the prisoner incriminated by the evidence given on behalf of another prisoner was entitled to cross-examine such a witness on behalf of his client, and in the present case for this court to hold otherwise would be calculated to defeat the ends of justice.

Scott Fox, K.C. (*R. A. Shepherd* with him), for the prisoner Ingram.—The statute admits of no doubt that when a prisoner gives evidence against a fellow prisoner he forfeits the protection which the Act gives him in respect to cross-examination as to previous character. Obviously the ends of justice would be best served if the prisoner who was attacked was allowed an opportunity of disproving the charge made against him. The ruling of the learned judge was wrong and the conviction should be quashed.

Reg. v. *Martin*, 17 Cox. Cr. Cas. 36, was also referred to.

[KENNEDY, J.—The whole scheme of the Act is to provide for the right to cross-examination. "A person," the section 1 (*f*) says, "charged and called as a witness shall not be asked, or if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless (sub-section 2) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or witnesses for the prosecution, or (sub-section 3) he has given evidence against any person charged with the same offence." In my opinion the Act confers on the prisoner as well as on the prosecutor or witnesses for the prosecution the right of testing the truth of any imputation made against him.]

Harold Thomas (*Milvain, K.C.*, with him), for the prosecution.—The policy of the Act is to enable a prisoner to be a competent witness for the defence, and the contention that one prisoner may be cross-examined by another involves the contrary assumption,—namely, that he may be a witness for the prosecution. That is why cross-examination by the other prisoner was permitted in *Reg.* v. *Woods* and *Reg.* v. *Burditt*, the court there treating the evidence as evidence in support of the prosecution. But a prisoner can only be cross-examined by counsel for the prosecution. [KENNEDY, J.—Why, in common justice, should not the person most interested in testing the truth of the imputation not be allowed to cross-examine?] That it is so is to be gathered from the wording of the Act. Where prisoners are jointly indicted and one on examination by the other becomes "hostile," the other should apply for leave to cross-examine him on the ground of hostility, but there is nothing in the wording of the Act which gives him leave to cross-examine him as of right.

Lord ALVERSTONE, L.C.J.—If the matter had not been pressing, having regard to the general importance of the case, we would have taken time to consider our judgment, but as it is of importance that judgment should be given early, we think it better to express our opinion now. Before we consider how far the principle of the question is covered by authority I think it is important to point out that if the statute does not prevent such a cross-examination it would obviously be in the interests of justice that the other prisoner's counsel should be allowed to cross-examine. I have no doubt in the great majority of cases counsel for the prosecution would test the evidence of the prisoner with a view of eliciting the truth, but of course there might be a case in which the evidence at the disposal of the prosecution was very strong against the second prisoner, and therefore the prosecution might not think it their duty to cross-examine so strictly as the counsel who appeared for the other prisoner. But in addition, inasmuch as the evidence given by the prisoner who had elected to give evidence might start some entirely new point, or deal with some

matter of which counsel for the prosecution might have had no notice, it is probable that the instructions which the other prisoner had given or could give to his counsel might be much more effective material for cross-examining the prisoner who had given evidence and eliciting the truth, than the cross-examination of the prosecuting counsel. Therefore on principle, and in the interests of justice, where evidence is given before the jury which might be treated as evidence against a man, one would wish that every opportunity of cross-examining and testing that evidence should be given.

I think it is convenient to consider how the law stood before the passing of the Act of 1898. It has been decided in two cases reported in Cox's Criminal Cases, that where one prisoner called witnesses for his own defence, and those witnesses implicated or gave evidence against the other prisoner, counsel for the second prisoner so implicated had special rights and was allowed to cross-examine them. In the case of *Reg.* v. *Wood*, two prisoners were indicted for manslaughter, and the counsel for one of them having addressed the jury, counsel for the second prisoner did the same and then called witnesses for the defence whose evidence tended to shew negligence on the part of the first prisoner, and it was held that the counsel for the first prisoner had the right to cross-examine the witnesses called by the second prisoner, and then to address the jury a second time confining his speech to comments on the evidence which the second prisoner had adduced against the prisoner for whom he appeared. In *Reg.* v. *Burditt* it was expressly decided that where two prisoners were indicted jointly and witnesses were called by one of them to incriminate the other, that the latter had a right to re-examine those witnesses. The reasoning of Jervis, C.J., in the latter case affords considerable assistance to us in coming to a conclusion in this case. And it is clear that as the law stood at that time, that the right to cross-examine depended upon the fact whether the witnesses for the prisoner A had given evidence against prisoner B. That being the existing state of the law the Criminal Evidence Act of 1898 was passed to enable prisoners to give evidence on their own behalf, and it recognized very properly that prisoners could not be called without their own consent. Therefore one is not surprised to find in the first section the words "every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged solely or jointly with any other person. Provided as follows: (*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application." I think that it occurred to the Legislature that a case might arise of joint prisoners and of evidence being given which would attack other persons, and accordingly sub-section (*f*) limited the right to cross-examine—perhaps too much so—except in certain events.

Now, the most common and ordinary case of a person giving evidence against some other person charged with the same offence would be where several prisoners were indicted together for the same offence, though there was the probability of the offence having been the subject of other proceedings—but, speaking for myself, unless it were intended to exclude from the provisions of sub-section 3 of section (*f*) what I will call the most ordinary cases of two or more persons being indicted jointly for the same offence, each one of them endeavouring to shift the guilt on to the shoulders of another person, it seems to me exactly the case where general cross-examination ought to be allowed.

But then it is said, it still must be general cross-examination by the prosecuting counsel, and not by counsel for the other prisoners, and it is in that respect that I think the analogy of the judgment and reasoning of the judgment to which I have called attention is of material assistance. Jervis, C.J., and the whole Court of Crown Cases Reserved thought that the reason why the cross-examination should be allowed would be that in effect and in substance the prisoner had given evidence of which the prosecution could avail themselves. That being so, although I agree that the witness was originally called for the defence, yet in fact the witness having given evidence against the other prisoner, I think the witness would be relied on by the prosecution as supporting the case against the other prisoner, or might be.

I come to the conclusion, therefore, both on principle and applying the analogy of previous decisions before the Act that a witness who gave evidence hostile to the defendant did become a witness for the Crown and had in the terms of the section become a witness giving evidence against the person charged with the same offence, and therefore I think such witness ought to be allowed to be cross-examined by the counsel for the other prisoner.

For these reasons the ruling of the learned judge is, in my opinion, wrong, and the appeal must be allowed and the conviction quashed.

LAWRANCE, J.—I am of the same opinion.

WRIGHT, J.—I agree. I can find nothing in the Act except section 1 (*f*) (iii.) which tends to abrogate the ordinary common law rule laid down in *Reg.* v. *Payne*, 20 W. R. 390, L. R. 1 C. C. R. 349; and *Allen* v. *Allen*, 42 W. R. 230, [1894], P. 248, at p. 253, that evidence of one defendant cannot on a criminal trial be received as evidence either for or against another defendant, the reason being that otherwise there would be a great danger that one defendant would be tempted to exculpate himself at the expense of his co-defendant. I had some doubt whether clause (*f*) (iii.) does get over the difficulty, but I think that it can be construed as dealing with evidence given by one prisoner not only in his own defence, but also with the object of making a case against the other prisoner. If that is so, and I am not disposed to decide otherwise, it follows that there may be cross-examination of the one prisoner by the other.

BRUCE, J.—I agree with the Lord Chief Justice for the reasons which he has given.

KENNEDY, J.—I also agree with the judgment of my lord.

Convictions quashed.

Solicitor for the prosecution, *Solicitor to the Treasury.*

Solicitors for the prisoner Hadwen, *Van Sandau & Co.*, for *Mills & Co.*, Huddersfield.

Solicitors for the prisoner Ingham, *Helliwell, Harby, & Co.*, for *Jubb, Booth, & Helliwell*, Halifax.

IN BANKRUPTCY.

K. B. Div. (Wright, J.) June 9, 12.

In re LAWFORD & LAWRENCE.
Ex parte THE TRUSTEE *v.* WARD. (*a.*)

Bankruptcy—Pledge—Property of bankrupt—Relation back of trustee's title—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

A pledgee of goods is bound to return the goods to the pledgor when paid the amount advanced upon them, even though he has notice that the pledgor has committed an act of bankruptcy within three months prior to the date of such return of the goods.

Motion by the trustee in the bankruptcy of Lawford & Lawrence (1) for a declaration that certain cabs delivered by the respondent Ward to the bankrupts on the 26th of October, 1900, formed part of the property of the bankrupts passing to the trustee and had been delivered to the bankrupts after the respondent had had notice of an act of bankruptcy; (2) for a similar declaration as to certain cabs delivered to the bankrupts by the respondent on the 11th of January, 1901, two days after the making of the receiving order and after the respondent had had notice of the receiving order. The notice of motion further asked for an order that Ward should pay to the trustee the difference between the value of the cabs and the amount which the respondent had lent the bankrupts upon them.

The first lot of cabs had been deposited by the bankrupts with Ward to secure an advance of £435 upon the 14th of September, 1900.

The second lot were similarly deposited to secure £120 upon the 27th of September, 1900.

Upon the 26th of October, 1900, the bankrupts repaid the first advance and the respondents delivered the first lot of cabs to them.

They had at this date committed an act of bankruptcy by suffering seizure of their goods and sale of the same upon the 6th of October.

Upon the 9th of January, 1901, a receiving order was made against them, and on the 11th of January they repaid the second loan and the respondent delivered the second lot of cabs to them.

The bankrupts disposed of the cabs for their own purposes before the trustee could intervene, and their value was consequently lost to the estate.

The motion came on for hearing on the 9th of June, when *viva voce* evidence was taken which satisfied the court that Ward had notice of the act of bankruptcy of the 6th of October when he delivered the first lot of cabs to the bankrupts, and of the receiving order when he delivered the second lot.

The case then stood over for further argument.

June 12.—*Muir Mackenzie* and *S. G. Lushington*, for the respondent, argued that Ward, as pledgee, could not have refused to return the goods when paid the money advanced upon them.

They cited *Biddle* v. *Bond*, 13 W. R. 561, 6 B. & S. 225; *Cannan* v. *South-Eastern Railway*, 7 Exch. 843; *Knowles* v. *Horsfall*, 5 B. & Ald. 134.

Carrington and *Frank Mellor*, for the trustee, contended that as the trustee's title related back to the act of bankruptcy of the 6th of October, that the respondent was not protected by section 49 of the Bankruptcy Act, 1883, and the trustee was entitled to recover the value of the goods. The respondent had delivered them to the bankrupts at his own risk.

They cited *Vernon* v. *Hankey*, 2 T. R. 113; *Foster* v. *Allanson*, 2 T. R. 479; *Thorne* v. *Tilbury*, 3 H. & N. 534, 7 W. R. C. L. Dig. 64; *Rogers* v. *Lambert*, 38 W. R. 542, 24 Q. B. D. 573; *In re Pollitt, Ex parte Minor*, 41 W. R. 276, [1893] 1 Q. B. 455; and *In re Lowe, Ex parte Lowe*, 38 W. R. 560, 7 Morr. 25.

WRIGHT, J.—In this case the trustee's title undoubtedly related back to the 6th of October, 1900, and the respondent knowing of the act of bankruptcy of that date was not protected by section 49 of the Bankruptcy Act, 1883. Still, though with great doubt, I think he is not liable to the trustee for the value of these goods. It seems to me that though it is true that the trustee's title related back to the act of bankruptcy of the 6th of October, yet that he took that title and interest subject to the contract of pledge under which Ward held the cabs. Ward committed no wrong, he was guilty of no conversion, he did not retain any property, nor receive any money to the use of the bankrupts. He had no option but to return the cabs when the money was paid; it would have been illegal and wrong, both to the bankrupts and to the trustees through the bankrupts if he had refused to give them up. I think that the case of *Vernon* v. *Hankey* is not in point, and that my judgment must be for the respondent.

Application dismissed.

Solicitor for the trustee, *Cecil F. Jennings.*

Solicitor for the respondent, *George Reader.*

K. B. Div. (Wright, J.) May 29.

In re DRUCKER.
Ex parte BASDEN. (*a.*)

Bankruptcy—Private examination of witness in foreign country—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 27, 105, 118.

The Court has no power under section 27 *of the Bankruptcy Act,* 1883, *to make an order for the private examination of witnesses in a foreign country.*

Ex parte application on behalf of the trustee in the bankruptcy for an order for the private examination of witnesses at Zurich, in Switzerland.

The bankrupt was a naturalized British subject. He had failed to surrender himself for public examination, had gone abroad, and refused to give the trustee any information about his affairs. His mother, who was a foreign subject, had lodged a proof in the bankruptcy for £10,000, which was rejected by the trustee. She lodged an appeal against the decision of the trustee supported by her affidavit. She refused to come to England to be cross-examined on her affidavit at the hearing of the appeal and applied for the appointment of a special examiner to take her evidence at Zurich, and on the 16th of May an order was made appointing a special examiner.

The trustee thereupon applied under section 27 for an order for the examination of the bankrupt and his brother before the same examiner, as it appeared probable that they would be with their mother at the date fixed for her examination.

A. H. Carrington, for the trustee.—I submit that the court has power to make this order under the terms of sub-section 6 of section 27: "The court may, if it think fit, order that any person who, if in England, would be liable to be brought before it under this

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

section, shall be examined in Scotland or Ireland, or in any other place out of England." If, however, the court should entertain any doubt as to its jurisdiction, I should ask for an order for the examination of such persons as may be willing to submit themselves for examination.

WRIGHT, J.—As at present advised I am of opinion that under section 27 I have no power to make the order asked for. Although the words of sub-section 6 of that section are *primâ facie* wide enough to include a place not within the British dominions, yet they must be construed as limited to the British dominions. It seems to me, although I have not had an opportunity of fully considering it, that that restriction is *primâ facie* necessary. It is impossible to suppose the section to mean that the court is to have compulsory power in France or Germany. I cannot compel these persons to come up for examination, nor could I punish them if they refused to come, or came and would not answer. Moreover, it is not even shown that they are in Switzerland, where it is desired to examine them. I regret I cannot make the order. Nor can I make it in the optional form that they should be examined if they think fit to submit. I do not think that is within the function of the court or the kind of thing the section intended at all.

Application refused.

Solicitors for the trustee, *King, Wigg, & Co.*

House of Lords.

From C. A. (England). May 16.

GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP. (*a.*)

Inland revenue—Income tax—Interest arising from foreign securities—Receipt in United Kingdom—Profit and loss—Income Tax Act. 1842 (5 & 6 *Vict.* c. 35), *s.* 100, *Schedule D, Fourth Case.*

The income tax assessed under the Fourth Case of section 100, *Schedule D, of the Income Tax Act,* 1842, *in respect of interest arising from foreign securities which have been or will be received in Great Britain in the current year without any deduction or abatement, should be charged only on the amount of such interest actually received in this country.*

Decision of the Court of Appeal ([1901] 1 *Q. B.* 153, 49 *W. R. Dig.* 77) *reversed.*

This was an appeal from a decision of the Court of Appeal (A.L. Smith, M.R., and Collins and Stirling, L.JJ.), affirming that of Darling and Phillimore, JJ.

The question in dispute was as to whether the society was to be assessed on the amount of interest on foreign investment actually received in this country, or on the amount set out in their accounts of the profit and loss for the year.

The respondent assessed the appellants for the year ending the 5th of April, 1893, as being liable to income tax on a sum of £143,483 7s. 3d. The commissioners claimed that the appellants were liable to pay income tax on the gross amount received by them, whether in Great Britain or abroad. The appellants contended that they were only liable under Case 4, section 100, of 5 & 6 Vict. c. 35, to pay income tax on such part of the interest derived by them from the funds invested in foreign securities as was actually received by them in Great Britain during the year of account. The commissioners held that the said interest was "constructively remitted" to Great Britain and was assessable.

The facts are more particularly referred to in Lord Lindley's judgment.

It was held by the Court of Appeal that the interest was received in the United Kingdom within the meaning of the Fourth Case of section 100 of 5 & 6 Vict. c. 35.

Sir Edward Clarke, K.C., and *Haldane, K.C.* (*Stewart-Smith* with them), for the appellants.

Sir R. B. Finlay, A.G., and *Rowlatt* (*Sir E. Carson, S.G.,* and *Danckwerts, K.C.,* with them), for the respondent.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—The question in this case seems to me to depend upon the actual words used by the Legislature, and I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature. To put the matter shortly, the Legislature has provided that, besides the proper amount of taxation upon the balance of profits and gains by any person resident in this country, he must also pay upon the interest on any investment made in foreign countries, and that, in calculating that amount, the actual amount received on such investments, no calculation or deduction is to be allowed as to the expenses of obtaining such investment, but the duty must be levied upon the actual amount received; but then this impost is only to be levied provided the money is received in this country.

Now, here the money has not actually been received in this country. It is to be observed that the Legislature has assumed, by the distinction which it has made between the mode of ascertaining the amount payable generally upon the balance of gains and profits and the amount taxable in respect of the interest payable upon foreign investments, that it has earmarked that sum and made it subject to distinct and peculiar incidents. The difficulty of identifying the actual sum is no limit on the enactment. The Legislature must be supposed to have contemplated the possibility of drawing a distinction between money received in this country and money accounted for or credited in account. If it were not for the difficulty of earmarking money, I should think no one would have any doubt that the money must be received in this country to bring it within the words of the statute. If it were not money, but some commodity—say tobacco—which a trader carrying on business in London and Paris was accounting for to his London house, no one would say that, though the Paris tobacco was credited in account as a set-off against some expense, or something that the supposed London firm had to set off against the same claim, and that, as the London firm was paid by the Paris tobacco, therefore the tobacco was liable to the import duty on tobacco because it was taken into account in the books of the London firm.

In no way that I can give any reasonable interpretation to has the money reached this country or been received in this country. It, like the tobacco in the case suggested, has not been imported; and if the Legislature had intended that bringing it into account was to be equivalent to its being received, it would have been easy to say so. It cannot be said that the use of artificial meanings to be attached to ordinary language is either unknown or unusual in legislation; and if it was intended to make this special subject of taxation to be taxed whenever and wherever an equivalent amount was credited or

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

booked, or in any other way recognized as having come under the dominion of the owner in this country, nothing could have been easier than to enact it in plain terms.

I decline to go beyond the words used, and I do not think this money was received in this country.

I do not think any amount of book-keeping or treatment of these assets, wherever they may be, will be equivalent or the same thing as receiving the amount in this country. The words are simple, intelligible, and represent an ordinary and simple thing. I cannot think we ought to go beyond the words themselves, and I think this judgment ought to be reversed.

Lord MACNAGHTEN.—I am also of opinion that the judgment of the Court of Appeal cannot be supported.

The question depends upon the meaning of the rule applicable to the Fourth Case of Schedule D. To my mind, the language of the rule is so plain that it is difficult, if not impossible, to add anything which would make the meaning plainer.

The appellants are possessed of foreign securities. The duty to be charged in respect of interest arising from foreign securities is, according to the rule in question, to be computed on a sum not less than the full amount of the sums which have been, or will be, received in the United Kingdom in the current year. I do not understand what is meant by constructive receipt in such a case as this, or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom, or unless there has been a remittance "payable in the United Kingdom," to borrow the language of the rule applicable to the Fifth Case. The circumstance that the business of the society is "one indivisible business," and that the society in the statement of its affairs and in its dealings with its shareholders and customers takes into consideration its foreign assets and liabilities, seems to me to be immaterial to the present question. As my noble and learned friend Lord Robertson, when Lord President, observed in the case of *Forbes* v. *Scottish Provident Institution*, 33 Scot. L. R. 228, 3 Tax. Cas. 443, "Every man and every company having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any statement of affairs which may require to be made up." But that is, as I think, and as the Lord President thought, a very different thing from bringing the interest home—a very different thing from the receipt of the money here, either *in specie* or as represented by a remittance payable in this country.

The difficulty seems to have arisen from a misunderstanding or a misapplication of the judgment in the *Scottish Mortgage Co. of New Mexico* v. *M'Kelvie*, 2 Tax. Cas. 165. That was a very special case. Whether the decision was right or wrong it can have no bearing upon the question now before your lordships. Speaking for myself, I think the decision was right. In that case, as it seems to me, in the transmission to this country of money which the company was free to distribute, and the transmission to America by way of exchange of an equivalent amount which the company were bound to re-invest, the company acted as their own bankers, and did for themselves, by an entry in their books, what might have been done less conveniently and less economically by an ordinary bank or financial agent on their behalf.

I think that the appeal must be allowed.

Lord SHAND.—I am also of opinion that the appeal should be allowed. It is true that the appellants received the interest on their foreign securities by the hands of their agents abroad. But I think it is equally true that, as they left that interest where it was gained, it was never received in this country. When it was entered in the company's balance-sheet in order to the ascertainment of the profits of the year, it was so entered as estate which had not been received in England, but as property belonging to the company which they had acquired abroad, which had not been brought home or received here, but which was part of their foreign assets. Money or securities in that position was properly taken into account in the ascertainment of the year's profits, not because it had been received in England, but because, although not so received, it was part of assets of value which the company had acquired and held abroad.

In the Scottish case of *Scottish Mortgage Co. of New Mexico* v. *McKelvie* the *species facti* was different, for there the company treated the money as received in this country, and merely saved themselves the expense of cross-remittances. It appeared there that the company was not entitled to divide the money earned abroad unless it was received as profits in this country. It was treated as so received merely to avoid the expense and inconvenience of cross-remittances—money sent home and the same amount sent back by cross-cheques or drafts. That was a material point in the decision of the case, as showing that the money had been really received in this country.

Lord BRAMPTON.—It is conceded that no part of the money in question was ever received in the United Kingdom *in specie*, or in any form known to the commercial world for the transmission of money from one country or place to another. But it was argued that, if not actually, it was "constructively" so received in the accounts of the society. I confess I do not like that expression, nor do I quite understand what it means. If a "constructive" is the same thing as an actual receipt, I see no reason for the use of the word "constructive" at all. If it means something differing from or short of an actual receipt, then it seems to me that a constructive receipt is not recognized by the statute, which, in using the word "received" alone, must be taken to have used it having regard to its ordinary acceptation.

The Master of the Rolls (Sir A. L. Smith), in his judgment in the Court of Appeal, while stating that there must be "an actual receipt of the amount," added "but that receipt need not be in specie, it may be in account," and he then proceeded to deal with the accounts of the appellants, set forth in the appendix, and to draw from them the inference that the appellants had actually received and dealt with these foreign dividends in the United Kingdom, and had distributed them as having been so received. Now I am not prepared to deny that accounts may be so worded as to contain admissions justifying such an inference, but I differ with the view he took that such admissions, or anything approaching them, are to be found in the accounts before your lordships.

Those accounts were framed partly to satisfy the requirements of the Life Insurance Companies Act, 1870 (33 & 34 Vict. c. 61), that at the end of each financial year a statement of the company's revenue account and of its balance-sheet in the forms contained in the 1st and 2nd schedules should be furnished to the Board of Trade; and partly in obedience to articles 77 and 78 of the society's deed of settlement, directing books to be kept in which full entries shall be made of all matters which shall properly be the subject of debt or credit account, so that the financial state of the company may at all times appear as

accurately as circumstances will permit; and further directing balance-sheets to be made up yearly and sent to every shareholder. The accounts before your lordships profess to do no more than this, and no inference of fact can be drawn from them other than, or in addition to, those stated in them.

In my opinion, there is a total absence of any evidence to justify a finding that the interest in question has ever been received in the United Kingdom.

For the Crown the case of *Scottish Mortgage Co. of New Mexico* v. *McKelvie* was much relied on. I am not satisfied with the correctness of the judgment in that case. But assuming it to be sound, it was distinguishable from the present, for in paragraph 13 of the printed case before the Court of Session there was an admission that the income charged with income tax had been applied in payment of interest and dividends to debenture and share holders in Glasgow. No similar admission was contained in the case before this House.

The appeal should be allowed with costs.

Lord LINDLEY.—This appeal turns upon the answer to be given to a simple question of fact. Has a certain sum of money entered by the Gresham Society in its accounts as an asset been received in this country by the society, or has it not? If it has, the appeal ought to be dismissed; on the other hand, if it has not, the appeal ought to be allowed.

First let us consider what is meant by the receipt of a sum of money.

I agree with the Court of Appeal that a sum of money may be received in more ways than one—for example, by the transfer of coin or of a negotiable instrument or other document which represents and produces coin and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives it, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction, does not prove any receipt, whatever else it may be worth.

Now in this case the Gresham Co.'s accounts and the statements in the special case clearly establish the fact that the sum of £143,483, sought to be charged with income tax, consists of interest and dividends received abroad by the agents of the company from persons abroad who had paid those agents. The case and accounts do not state the exact mode in which the various sums making up the total of £143,483 were paid to the agents of the company. The payment is admitted, and the receipt of that sum by the company, through its agents, is not in dispute.

But then comes the second question, Has that sum been received in this country by the Gresham Co.? The special case clearly shows that it has not in fact been remitted to this country in any way whatever. Applying the test already suggested, no one here has received that sum; the agents who received it abroad still have it abroad, or have dealt with it otherwise than by sending it to the company here. No account even is forthcoming to show that the sum has ever been treated as remitted here so as to justify the inference that in any commercial sense the sum has been received in the United Kingdom as distinguished from other countries.

What has been done, and all that has been done, is that the Gresham Co., in making up its accounts with a view to ascertain what profits it could divide in a particular year, entered on its asset side the sum of £143,483 as money received during the year. This was obviously right; for the object was not to ascertain the profit made in any particular country, but the profit made by the company on all its transactions all over the world. The company has paid duty on the profit so ascertained, and no question arises as to that. But when required to pay duty on the item of £143,483, on the ground that this sum is made up of interest or dividends received in the United Kingdom, the company objects on the ground that it represents nothing of the sort. Nor does it, in truth.

The fact that the profits shown by the account have been divided amongst the shareholders of the company does not carry the case any further. No part of the £143,483 has come over here, or been in any sense received here, and then applied in payment of dividend. Some interest of dividends received abroad have been remitted here and duty has been paid on them accordingly, but the special case shows plainly that no part of the £143,483 has been so remitted, either for the purpose of paying dividend or for any other purpose.

It must be assumed that the language used by the Legislature in laying down the rules to be observed in the various cases contained in the Income Tax Act, 1842, was carefully chosen, and that there was some good and sufficient reason for confining the duty on interest on foreign securities (mentioned in the Fourth Case falling under Schedule D) to sums which have been or will be received in Great Britain during the year for which the duty is payable. The locality of the receipt is made all-important, and it is only by ignoring it, or by introducing the expression "constructive receipt"—which may mean anything—that the claim of the Crown can be supported.

Schedule D in the Act of 1842 was re-cast in 1853, and was replaced by a new Schedule D; but the cases and rules in the Act of 1842 are applicable to the new schedule: see sections 2 and 5 of the Income Tax Act, 1853.

Authorities have been referred to, and especially the Scotch cases of *Scottish Mortgage Co. of New Mexico* v. *McKelvie*; *Forbes* v. *Scottish Provident Institution*, 33 Scot. L. R. 228, 3 Tax. Cas. 443; and the *Standard Life Assurance Co.* v. *Allan*, 3 Ct. Sess. Cas. 5th Ser. 805. *McKelvie's case* was very peculiar. Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry, but that entry was the business mode of carrying out cross-remittances which it would have been unbusiness-like and really childish to have effected in any other way. But thinking as I do that *McKelvie's case* may be properly upheld, I am not prepared to adopt it as a new starting-point for further inferences. The language of the statute is the true starting-point in each case. *Forbes's case* and the *Standard Life Assurance Co.'s case* were both based on this sound principle, and were in my opinion both clearly rightly decided. The Court of Appeal, in my opinion, considered this case undistinguishable from *McKelvie's*, but I am unable so to regard it. Assuming them to be undistinguishable, it would, in my opinion, be more correct to overrule *McKelvie's case* than to decide the present appeal in favour of the Crown.

In my opinion the appeal should be allowed.

Appeal allowed.

Solicitors for appellants, *Devonshire & Co.*

Solicitor for respondent, *Solicitor of Inland Revenue.*

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 6.

MARSHALL v. RUDEFORTH. (a.)

Master and servant—Employer's liability—Accident—Compensation—Building—"Scaffolding"—Roof of building being repaired by a ladder resting against parapet—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

A workman was employed to repair the roof of a building exceeding thirty feet in height. To do the work he used a ladder, one end of which was on the pavement and the other rested on the parapet at the top of the house. There was no second ladder, crawling board, or other contrivance on the roof. The applicant was injured while carrying slates up the ladder for use on the roof.

Held, that the county court judge was entitled to find as a fact that the ladder was not "scaffolding" within the meaning of section 7 of the Workmen's Compensation Act, 1897, *and therefore that the Act did not apply.*

This was an appeal by a workman from a decision of the learned judge of the Scarborough County Court, who had refused to award him compensation under the Workmen's Compensation Act, 1897.

The accident was caused by the slipping up of a ladder while the applicant was carrying some slates to be used for repairing the roof of the house. In order that the workman might get on the roof the ladder had been placed against the house, one end resting on the pavement and the other leaning on the parapet which ran round the top of the house.

It was admitted that the respondent was the "undertaker" within the meaning of section 7 of the Act, and that the house exceeded thirty feet in height, and that he would be liable to compensate the workman for the injuries he had received if the house was "being repaired by means of a scaffold" within the meaning of sub-section 1 of that section.

The learned county court judge held as a matter of fact that the ladder was not a "scaffolding," and that the applicant therefore could not claim compensation. From that decision the workman appealed, on the ground that the learned judge had misdirected himself.

Longstaffe, for the workman.—The Act speaks of a building being repaired by means of "scaffolding." The term is general and means any contrivance placed against the wall of a building for the purpose of enabling a workman to reach that part of the building upon which he is to work. If the ladder had been a temporary erection of two scaffold poles with boards lashed across, it would have been unquestionably a scaffold. The ladder that was used was simply a portable scaffold, and no logical distinction can be drawn between a scaffold which in the form of a ladder can be quickly put up and taken away and a scaffold which is made by fastening loose boards together for the occasion: *Wood* v. *Walsh*, 47 W. R. 504, [1899] 1 Q. B. 1009; *Maude* v. *Brooke*, 48 W. R. 290, [1900] 1 Q. B. 575; *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, [1901] A. C. 49, were cited.

Ruegg, K.C., for the respondent, was not heard.

COLLINS, M.R.—In this case I am unable to see that the learned county court judge has misdirected himself. He had all the facts before him and he found as a fact that the ladder in the circumstances did not constitute a scaffold, and we cannot interfere with his finding of fact unless we can hold that every ladder is *primâ facie* a scaffold within the meaning of the word as used in the Act of 1897. The admitted facts show that the house in question was over thirty feet in height, and that the roof was being repaired by means of a ladder, and that the workman therefore met with the accident while employed on, in, or about a building under circumstances which, if the ladder is a scaffold, would entitle him to compensation. The important and only question we have to decide is whether this ladder used by itself amounts in law to a scaffold. The decisions in the House of Lords stop us from holding that in law a ladder by itself is a "scaffold," although I confess that after reading them most carefully I have been unable to formulate a definition to the word scaffolding that would cover the decisions and no more of the noble and learned lords. I do not think that as those decisions now stand any definition of a scaffold would necessarily exclude a ladder. But it is a very different thing to lay down that proposition and to lay down as a proposition, as we must do here, if we allow this appeal, that the word scaffolding must necessarily in law include a ladder. We cannot do that, and consequently we cannot say that the county court judge may not find, without misdirecting himself, that the ladder was not a scaffold.

The appeal therefore fails.

MATHEW and COZENS-HARDY, L.JJ., gave judgment to the same effect.

Appeal dismissed.

Solicitors, *Iliffe, Henley, & Sweet*, for *T. Hart*, Scarborough; *Radford & Frankland*, for *J. Whitfield*, Scarborough.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 5.

DUNHAM v. CLARE. (a.)

Master and servant—Employer's liability—Accident—Compensation—Death resulting from injury—Natural or probable consequence—Workmen's Compensation Act. 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1; *Schedule I.*, 1 (a).

Where a workman sustains personal injury by accident arising out of and in the course of his employment and he subsequently dies, it is sufficient for the dependants who claim compensation to show that death in fact resulted from the injury; it is immaterial that death was not the natural or probable consequence of the injury.

Appeal from a decision of the judge of the Walsall County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a workman who met with an accident in the course of his employment and subsequently died. The circumstances were as follows: On the 2nd of September, 1901, the deceased was carrying a heavy pipe up some steps, when the pipe slipped and fell upon his left foot and injured the little toe. He was taken to the hospital and attended to, and was treated as an outpatient for some days. On the 17th of September it was discovered that erysipelas had set in, and on the 27th of September he died. The evidence of the medical man who attended the deceased, and was

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

called on his behalf, was that the cause of death was blood poisoning caused by erysipelas in the wound, the erysipelas being of an uncommon form. He admitted in cross-examination that erysipelas was not a necessary or a usual consequence of a wound of this kind. Medical evidence was given on behalf of the employer to the effect that erysipelas was a very unusual consequence of such a wound, that erysipelas was caused by introduction of germs only, and that it never supervened more than six, or at the most ten, days after the introduction of the germ.

The county court judge found and awarded that the applicant was not entitled to compensation, on the ground that death was not the result of an accident—*i.e.*, not the natural or probable consequence of an accident.

The applicant appealed.

Ruegg, K.C., and *R. J. Lawrence*, for the applicant.—The county court judge did not find that death did not in fact result from the accident, but that it was not the natural or probable consequence of the accident. All that the statute requires is that death should result from the accidental injury: see Schedule I., par. 1 (*a*). *Lloyd* v. *Sugg & Co.*, 48 W. R. 257, [1900] 1 Q. B. 481, shows that this was a case of an accident; and, if the man had not died, the employer could not have avoided paying compensation. The county court judge misdirected himself in asking whether death was the natural or probable consequence of the accident. It was suggested that there was a fresh accident—viz., the introduction of a germ, and that death resulted from that; but there was no evidence to support such a suggestion.

Disturnal, for the employer.—The finding of the county court judge ought not to be interfered with. It is consistent with the evidence that death was due to some cause which intervened after the accident which happened in the course of the man's employment.

He referred to *Sharp* v. *Powell*, 20 W. R. 584, L. R. 8 C. P. 253; *Winspear* v. *Accident Insurance Co.*, 29 W. R. 116, 6 Q. B. D. 42; and *Clark* v. *Chambers*, 26 W. R. 613, 3 Q. B. D. 327.

COLLINS, M.R.—The ground of the appeal in this case is that the county court judge misdirected himself in holding that the death of the deceased was not the result of accident, which he explained to mean not the natural or probable consequence. The deceased met with an accident which caused injury to his toe, and for that injury he was treated, but subsequently erysipelas set in, and he died. I accept the view that at the time of the accident it was improbable that erysipelas would supervene, and perhaps unnatural to expect it. But the question is whether that is the right standard to apply in this case. In my opinion, when it is shown that, in the language of section 1 of the Act, personal injury by accident arising out of and in the course of his employment has been caused to a workman, and that, in the language of Schedule I., death has resulted from the injury, the applicant has done all the statute requires in order to be entitled to an award for compensation. If death in fact resulted, it does not matter how improbable it was that it should so result. The point is—did death result from the accident, or was the chain of causation broken by a *novus actus interveniens*, which gave a new origin to the after consequences? It seems to me to be important to notice that we are dealing here with an obligation created by an Act of Parliament, not with any liability arising out of breach of contract or tort. In cases of breach of contract it is clearly settled that the defendant is liable for the consequences which naturally followed from the breach. In cases of tort the liability is somewhat larger than in contract, but still it is measured by what might have been reasonably anticipated as probable. Both in contract and in tort the standard is—what was reasonably natural and probable. But here I think no such consideration arises. This Act imposes a liability which is entirely independent of negligence. Then has the county court judge applied the right standard in this case? In my opinion to ask whether the death was the natural or probable consequence of the accident was to apply a wrong standard. The fact that death has resulted is quite compatible with its being neither the natural nor the probable consequence. In this case death was the result of the accident, unless some new cause intervened. The applicant is therefore entitled to have an award made in her favour, unless there was some such *novus actus interveniens*. The case must go back to the arbitrator in order that that question may be determined.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors for the applicant, *Rowcliffes, Rawle, & Co.*, for *James F. Addison*, Walsall.

Solicitors for the employer, *Robinson & Bradley*, for *C. & S. Loxton*, Walsall.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 3.

FLETCHER v. LONDON UNITED TRAMWAYS (LIMITED). (*a*)

Master and servant—Employers' liability—Accident—Compensation—Engineering work—Railroad—Tramway—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2.

The word "railroad" in the definition of "engineering work" in sub-section 2 of section 7 of the Workmen's Compensation Act, 1897, *is not limited in its meaning to a "railway" as defined in the same sub-section, but includes a tramway.*

Appeal from a decision of the judge of the Brentford County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman who had suffered personal injury by accident in the course of his employment. The work upon which the applicant was engaged at the time of the accident was the laying down by the respondent company of a line of rails on the Uxbridge High-road between Hanwell and Acton, on which it was intended to run electric cars. It appeared that the respondents had constructed a light railway along the road from Uxbridge to Hanwell, and desired to extend it from Hanwell to Acton. The necessary application for an order authorizing the construction of such an extension was made to the Light Railway Commissioners, by whom the proposal was submitted to Parliament, and in the result the London United Tramways Act, 1900, was passed, which authorized the respondents to make a tramway between Hanwell and Acton. This Act incorporated Parts II. and III. of the Tramways Act, 1870. The line from Uxbridge to Acton, when completed, formed a continuous electric line, the traffic being worked by overhead traction. The same carriages went from one end of the line to the other, and there was nothing to be seen by which anyone travelling on the line could tell when

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

he left the light railway and came upon the tramway.

The question was whether the employment of the applicant was an employment to which the Workmen's Compensation Act applies.

Section 7, sub-section 1, enacts that the Act shall apply to employment by the undertakers on, in, or about (*inter alia*) a railway or engineering work. By sub-section 2, "railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and "railway" and "railway company" have the same meaning as in the said Acts of 1873 and 1896; and "engineering work" means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer.

The county court judge held that the employment of the applicant was not within the Act, and dismissed the application for compensation. He was of opinion, first, that a tramway did not come within the definition of "railway" in sub-section 2; and secondly, that a tramway did not come within the definition of "engineering work," for the word "railroad" in that definition was synonymous with "railway."

The applicant appealed.

Compston, for the appellant.

Ruegg, K.C., and *R. Pike Glasgow*, for the respondents.

The case of *Fullick* v. *Evans*, 84 L. T. Rep. 413, 49 W. R. Dig. 113, was cited.

Collins, M.R.—I am of opinion that this appeal must be allowed. The applicant was at the time of the accident engaged in the work of constructing a part of a continuous electric line, which was subject to different statutory provisions at different parts of its length. One part of it was an electric light railway, another part of it was an ordinary electric tramway. That part of the system on which the applicant was at work was the tramway. The county court judge held that, having regard to the definition clause in the Act, the applicant's employment was not within the Act. It was sought to bring it within the Act as being employment either on a railway or on an engineering work. "Railway" is defined to mean the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and to include a light railway made under the Light Railways Act, 1896. The county court judge held that the part of the system on which the applicant was working, not being the railway of a railway company, and not being a light railway, was outside the definition of "railway." I see no reason to differ from that. But then it was said that he was employed on an "engineering work," which is defined as including "any work of construction, or alteration, or repair of a railroad, harbour, dock, canal, or sewer." The Legislature have here introduced the word "railroad," a different word from "railway," which they had used before. There is no vehement presumption that the Legislature in this Act, when they use different words, mean the same thing. I think they might be entitled to the presumption that when they use different words they mean to express different things. The word "railroad" is clearly capable of including a tramway, and in itself it seems to be a good word for describing a tramway. Why should it not embrace a tramway for the purpose of bringing a tramway within the definition of "engineering work"? A tramway is only sought to be excluded from the definition by the suggestion that the Legislature, in using the word "railroad," must be taken as meaning the same thing as they had previously described as "railway." It seems to me to be clear that they intended to include a railway and something else, that they intended to mean something different from railway, not excluding it, but including a larger ambit. In my opinion the applicant was engaged on an engineering work within the definition—viz., on the construction of a railroad. Coming therefore *primâ facie* within the definition, and there being nothing to exclude him, he is within the Act and entitled to compensation.

Mathew and Cozens-Hardy, LJJ., concurred.

Appeal allowed.

Solicitor for the appellant, *Walter Turner*.

Solicitor for the respondents, *Hugh C. Godfray*.

From Chan. Div. (Collins, M.R., and Sterling and Cozens-Hardy, L.JJ.) — April 29; May 1, 12.

In re Maddock.

Llewelyn v Washington. (a.)

Administration—Order of administration of assets—Insufficiency of personalty—Will—Secret trust of portion of residue—Specific gift debars the will.

A testatrix by her will gave her residuary estate to A., and by a memorandum not admissible to probate and subsequent to the date of the will, but which was acknowledged by A. to constitute a trust binding on her, gave a specific portion of the residue in trust for certain other persons therein specified. The residue, after deducting therefrom the portion bound by the memorandum, proved insufficient to pay the debts and testamentary expenses of the testatrix

Held, that the beneficiaries under the memorandum, though their title was dehors *the will, were entitled to have the residuary personal estate not comprised in the memorandum exhausted to pay the debts and expenses before the property bound by the memorandum was resorted to, as if such property had been specifically bequeathed.*

Decision of Kekewich, J. (ante, p. 54, [1901] 2 *Ch.* 372), *reversed.*

This was an appeal from a decision of Kekewich, J., (reported *ante*, p. 54, [1901] 2 Ch. 372).

By her will, dated the 11th of January, 1897, Sarah Maddock, spinster, appointed the plaintiff Llewelyn and the defendants Susan Washington and J. J. Maddock executors and trustees of her will; and after appointing a certain trust fund, over which she had a testamentary power of appointment, devised all her real estate and bequeathed all the residue of her personal estate to Susan Washington absolutely.

By a memorandum dated the 17th of January, 1897, signed by the testatrix (which Susan Washington admitted to constitute a valid trust), the testatrix requested that a certain person should receive half-yearly the interest arising from all the money she had saved "after being invested by my trustees." "This I leave with my will." And at the death of this person the property was to go to another named person. Susan Washington was witness to this memorandum. The testatrix died on the 14th of December, 1898, and on a summons taken out to determine the scope and effect of the memorandum it was declared that it bound all the testatrix's property at the date of her death except a certain freehold house, her furniture, farming stock, and household goods and effects, and the apportioned income to her death of certain trust

(a.) Reported by H. W. Law, Esq., Barrister-at-Law.

funds of which she was tenant for life. It was found that the residuary personalty unaffected by the memorandum was insufficient to pay the debts, estate duty on the general personalty, and costs of administration; and on a summons taken out to determine (*inter alia*) out of what fund the deficiency ought to be borne and paid, Kekewich, J., held that, although the trust was specific, it was not a specific bequest, since the title of those claiming under it was *dehors* the will, and that the debts, duty, and costs were payable rateably out of the portion of residuary personalty bound by the memorandum and the portion not so bound.

The persons interested under the memorandum appealed. (There was no appeal on the question relating to the payment of estate duty on an appointed fund, also decided by his lordship.)

E. Ford, for the executors and trustees of the will.

Renshaw, K.C., and *F. Vaughan Hawkins*, for the appellant.—The fact that the trust is *dehors* the will does not affect the matter; effect must be given to it in the same way as if it were part of the will: *Jones* v. *Badley*, 16 W. R. 713, L. R. 3 Ch. App. 362. The beneficiaries under the memorandum are entitled to say that the property subject to it must be applied last unless the claims of creditors require otherwise.

They also cited or referred to *Bothamley* v. *Sherson*, 23 W. R. 848, L. R. 20 Eq. 304; *McCormick* v. *Grogan*, 17 W. R. 961, L. R. 4 H. L. 82; *Tombs* v. *Roch*, 2 Coll. C. C. 490; *Drakeford* v. *Wilks*, 3 Atk. 539; *Malim* v. *Barker*, 3 Ves. 150; *Barrow* v. *Greenough*, *ib.* 152; *Irvine* v. *Sullivan*, 17 W. R. 1083, L. R. 8 Eq. 673; *Wallgrave* v. *Tebbs*, 4 W. R. 194, 2 K. & J. 313; *Cullen* v. *Attorney-General for Ireland*, 14 W. R. 869, L. R. 1 H. L. 190; *Lady Langdale* v. *Briggs*, 4 W. R 703, 8 De G. M. & G. 391; and *Clifton* v. *Burt*, 1 P. Wms. 678.

Warrington, K.C., and *T. H. Carson, K.C.*, for Susan Washington.—If the appellants are right in their contention that the memorandum must be treated as a specific bequest, no doubt they are right in contending that these sums must be paid primarily out of the residue not bound. We admit also that the terms of the memorandum would constitute a specific bequest if it were inserted in the will. But though Miss Washington is not entitled to take any personal benefit from the property bound by the memorandum, and the court will enforce the obligation imposed by it, there is no authority for the contention that the rest of the estate must be diminished for the benefit of those named in the memorandum, nor is this a fair construction of the testatrix's wishes. The cases cited on the other side are either not in point or else the trust was to pay a sum of money. In *Drakeford* v. *Wilks* the whole question was with regard to the specific gift, and this point therefore did not arise.

Vaughan Hawkins in reply.

Cur. adv. vult.

May 12.—The following judgments were delivered:

COLLINS, M.R., after stating the facts continued: The learned judge has arrived at this conclusion on the ground that, as stated by Lord Westbury in *Cullen* v. *Attorney-General for Ireland*, the obligation imposed by the memorandum is entirely *dehors* the will, and that it can therefore have no operation except upon such part of the residuary personal estate as comes to the hands of the legatee after the estate has been administered and all liabilities discharged in ordinary course without any regard whatever being had to the existence of the obligation created by the memorandum. It is obvious that if this view be right the obligation imposed on the conscience of the legatee by the memorandum might not come into operation at all until the greater part or even the whole of the fund made specifically subject to it had been exhausted, and that the person bound thereby would nevertheless be entitled to insist upon a mode of administration which for his own advantage might defeat the purpose of the testator in imposing the obligation. This would be a somewhat startling conclusion for that court to accept which long ago had found means, notwithstanding statutory difficulties, to reach the conscience of legatees and compel performance of trusts. Having taken so bold a step to compel justice to be done, it would be strange if it were compelled to admit its impotence to interfere until after its intervention had been futile, as it well might be, if the legatee were insolvent and dishonest. It seems that the precise point involved in this case has never been raised before and the question is whether the principle on which the court has intervened in similar cases to give effect to the intention of the testator is not large enough to cover it. The principle is well established and is expounded in numerous cases which were cited in argument, from *Drakeford* v. *Wilks*, decided by Lord Hardwicke in 1747, onwards, but it seems to be nowhere more clearly stated in recent times than by Lord Cairns in *Jones* v. *Badley*, adopting and enlarging the explanation given by Wood, V.C., in *Wallgrave* v. *Tebbs*.

It is not denied that, had the memorandum been actually added in the form of a codicil to the will its effect would have been that contended for by the appellants. The unappropriated residue of the personalty would have been applied first, and then the specific legatee under the codicil and Miss Washington as the specific devisee of the house would have contributed *pro rata* to the balance. The present case is free from the complication of any other legatee being concerned in the distribution. On what ground, then, must the court hold its hand and refrain from insisting on equity being done. The fact that the memorandum creates an obligation *dehors* the will and cannot be enforced as part of the will does not seem to me to be at all inconsistent with the right asserted by the court on the principle above stated to intervene to prevent an unrighteous insistance upon a *primâ facie* legal right. The court does not wait to give effect to an equity which displaces the Statute of Frauds until after the rights of the parties have been disposed of on the footing of the statute. So it seems to me to be wholly consistent with the admission that nothing *dehors* the will can be treated as part of the will that the court should intervene to prevent a legatee from committing a fraud by insisting on his rights under the will to the prejudice of his *cestui que trust*. Why should the court renounce its jurisdiction over the legatee to compel him to perform his trust because he is engaged in assisting at the distribution of assets under the will? He is not emancipated from its jurisdiction because he is engaged in that process, and the court will not. I should hope, be deterred from exercising this collateral jurisdiction by the fear that in so doing it may indirectly give effect to the well-ascertained intention of a testator not expressed on the face of the will, but not inconsistent with it. I think that the contention of the appellants must prevail, and that this appeal must be allowed.

STIRLING, L.J.—There can be no question that upon the principle stated by Lord Hatherley (then Wood, V.C.) in *Wallgrave* v. *Tebbs* in a passage quoted with approval by Lord Cairns in *Jones* v. *Badley*, Miss Washington is in equity subject to a personal obligation to dispose of the property mentioned in the memorandum of the 17th of June, 1897, in accordance

with the directions therein contained. The precise nature and extent of the obligation must depend upon the true meaning and effect of that document. It was properly admitted at the bar that if the memorandum had been duly executed and admitted to probate as a codicil to the will, such property (which I will call the savings) would have been specifically bequeathed by the testatrix, and would consequently have been exempted from payment of funeral and testamentary expenses, debts, and legacies, if the personal estate not specifically bequeathed was sufficient to pay the charges. The principle of the exemption is (as pointed out by Lord Selborne in *Robertson* v. *Broadbent*, 32 W. R. 205, 8 App. Cas. 812, at p. 815) "that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally, and in *statu quo*, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors the testator cannot wholly release it from liability for his debts; but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate, the fund out of which pecuniary legacies are in ordinary course payable. Inasmuch as the memorandum was not executed as a codicil, this reasoning cannot be applied without some qualification. If, for example, the testatrix had by her will made specific or pecuniary bequests, the legatees would have been entitled to say that their rights could not be affected by a document which did not satisfy the requirements of the Wills Act, and to insist that the estate should be administered (so far as they were concerned) without regard to it; and consequently the savings as well as the other property devised and bequeathed to Miss Washington would remain subject to those rights, as in any case all such property would be to the rights of creditors. But, as between Miss Washington and the beneficiaries under the memorandum, the savings have been separated from the general mass of the estate and made subject to the dispositions contained in the memorandum. *Primâ facie*, therefore, it seems to me that as between Miss Washington and those beneficiaries the principle laid down by Lord Selborne applies, and that the savings ought, as between that property and the other property given to her, to be held exempted from the charges which fall primarily on the personal estate not specifically bequeathed. The memorandum itself, when carefully examined, seems to me to contain much which serves to indicate that this was the intention of the testatrix. She states that she leaves the document "with her will"; she desires the fund to be invested by her trustees. In my opinion this indicates her meaning to be that the memorandum should (as between the beneficiaries themselves and Miss Washington) be taken as forming part of her testamentary dispositions, and that (as between the same parties) it should take effect as if it had been a duly executed codicil, and the like consequences as regards the administration of the estate must follow. Kekewich, J., has based his decision on the ground that the title of the beneficiaries under the memorandum was *dehors* the will. This is undoubtedly true, but it does not seem to me to conclude the case. If Miss Washington had died before the estate of the testatrix was fully administered and had made a will bequeathing the savings in the terms of the memorandum her legatees would have derived title *dehors* the will of the testatrix, but the case of *Lady Langdale* v. *Briggs* would, I think, have been, direct authority in favour of the exemption of the savings from the funeral and testamentary expenses and debts of the testatrix. In that case a testator specifically bequeathed certain leaseholds, which formed part of the general personal estate of a prior testatrix whose estate was not completely administered at the death of the testator, and it was contended that the leaseholds were subject to the payment of the funeral and testamentary expenses, debts, and legacies of the testatrix. Turner, L.J., says (8 De. G. M. & G. 391, at pp. 434-5): "It was . . . insisted that the whole or some part of the funeral and testamentary expenses, debts, and legacies . . . ought to be made good out of these leasehold estates. But as to the funeral and testamentary expenses, debts, and legacies there were other assets . . . out of which they could be and were ultimately paid. And surely if these leaseholds were well bequeathed by the will of the testator it was the duty of his executors to take care that they were not unnecessarily sold for the purpose of making these payments." So here it seems to me that Miss Washington came under an obligation to take care that (as between herself and the beneficiaries under the memorandum) the savings were not unnecessarily resorted to for the purpose of answering the funeral and testamentary expenses and debts of the testatrix. Finally I may observe that the view which I have taken does not conflict with any decision and is in accordance with what was done by Lord Alvanley, M.R., in *Barrow* v. *Greenough*, and by James, V.C., in *Irvine* v. *Sullivan*. For these reasons I think that the appeal ought to be allowed.

COZENS-HARDY, L.J., after stating the facts, continued: It is necessary to consider upon what principle the undoubted rule of the court that effect is to be given under certain circumstances to declarations in writing not properly attested is based. It is clear that no unattested document can be admitted to probate or treated as part of the will. It is established that a devisee or legatee who is entitled absolutely under the terms of the will is in no way affected by the existence of a document showing that he was not intended to enjoy beneficially if he had no knowledge of the document, till after the testator's death. Such a memorandum may or may not influence him as a man of honour, but no legal effect can be given to it. If, however, the devisee or legatee is informed of the testator's intention either before the will in her favour is made, or at any time afterwards before the testator's death, different considerations arise. It is sometimes said that under such circumstances a trust is created in favour of the beneficiaries under the memorandum. At other times it has been said that the devisee or legatee is bound by contract, express or implied, to give effect to the testator's wishes. Now the so-called trust does not affect the property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir-at-law or next-of-kin or residuary devisee or legatee. The case of *Tee* v. *Ferris*, 4 W. R. 352, 2 K. & J. 357, is instructive on this point. There a testator by his will gave his residue to Ferris and three other persons as tenants in common. By a memorandum of even date, not attested as a codicil, he expressed his confidence that the four persons would appropriate the residue to charitable

objects. Ferris alone was informed of this in the testator's lifetime, and Wood, V.C., held that Ferris's quarter was affected by the memorandum, but that the other three quarters were not. At p. 363 he says: "It is well settled law that if the testator had read over to Ferris his will, and also the letter of the 18th of August, 1846, and said, 'Mr. Ferris, I have made that will and written that letter expressing my intentions in making it,' and Ferris had said nothing in reply, he would in this court have been taken to have contracted to carry those intentions into effect." He then held that, although Ferris did not know of the memorandum for sixteen months, and shortly before the testator's death, he could be in no better position. "That being so, it is impossible to contend that a beneficiary, placed in such a position, is at liberty to stand by and say nothing; and having so stood by and said nothing, is then to be at liberty, after the testator's death, to turn round and claim the benefit given him on the face of the will as if it had been given to him absolutely." In other words, a person to whom the testator's wishes are thus indicated is held to, in effect, contract that in consideration of the testator giving him the property absolutely, or if already given to him absolutely, not revoking it, he, the legatee, will give effect to the testator's wishes to the same extent and in the same manner as if those wishes had been formally expressed in a testamentary document admitted to probate. In *Tee* v. *Ferris* the declaration in the decree was that the quarter share given to Ferris was "effected by the trust thereof declared by the letter so far as such trusts are valid." And the decree went on to declare that so far as the real estate and impure personal estate were concerned, the trusts were invalid, and that the heir-at-law and next-of-kin were respectively entitled. The obligation imposed upon Ferris was, to treat his quarter exactly as if it had been in terms given by will or codicil for the charitable purposes mentioned in the letter, the result being that the heir-at-law and next-of-kin, who certainly were not intended to benefit, did in fact benefit. There is thus created what Lord Cairns in *Jones* v. *Badley* (adopting the language of Wood, V.C.) calls "in effect a case of trust"; and the court will not allow the devisee or legatee to set up the Wills Act. Another way of arriving at the same conclusion is to say that the devisee or legatee is estopped by his conduct from denying that the memorandum is part of the will. But whether the true principle be trust, contract, or estoppel, it seems to me that as between the devisee or legatee and the persons entitled under the memorandum, all the same consequences must follow as would follow if that interest formed part of the will.

Applying these principles to the present case, Miss Washington, who attested the memorandum, must be taken to be subject to a personal obligation to give effect to the memorandum precisely as if it had been duly executed as a codicil and admitted to probate.

It was faintly argued that the memorandum, if admitted to probate, would not have amounted to a specific bequest, but upon the language of the memorandum I can feel no doubt on this point. The result is that Miss Washington in dealing with the residuary real and personal estate given to her by the will must treat the property comprised in the memorandum as though it had been specifically bequeathed, and it follows from this that the residuary personal estate not comprised in the memorandum must first be exhausted to pay debts, &c., and that any deficiency must be borne rateably by the property comprised in the memorandum and by the real estate devised to Miss Washington. Kekewich, J., seems to consider the memorandum only operated as a gift of a portion of the residuary estate after the entire residue had been properly administered. But for the reasons I have stated I think this view is not correct. As against creditors, of course, the property is available. If there were any specific legatees or devisees other than Miss Washington this property must be exhausted before the properties bequeathed or devised to them could be touched. But as against Miss Washington this must be regarded as property specifically bequeathed.

The result is that the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Ridsdale & Son*, for *Heaton & Son*, Burslem.

Solicitors for the respondent, *Hicklin, Washington, & Pasmore.*

High Court of Justice.

Chan. Div. Kekewich, J. — June 11, 18.

Jarrah Timber and Wood Paving Corporation (Limited) v. Samuel. (a.)

Mortgage — Redemption action — Security for loan — Stipulation that mortgagee may purchase mortgaged security at fixed price within definite time — Clog on equity of redemption.

A stipulation in a mortgage that the mortgagee shall have the option to purchase the whole or any part of the mortgaged security at a fixed price within a definite time is invalid as a clog on the equity of redemption.

Witness action.

The question raised in this action was whether a certain stipulation in a mortgage of debenture stock (*i.e.*, that the mortgagee should have the option to purchase the stock at a given price within twelve months of the date of the mortgage) was void as against the mortgagors, as being a clog on the equity of redemption.

In the year 1901 the plaintiff company entered into negotiations with the defendant for a loan of £5,000.

On the 11th of June, 1901, the defendant wrote a letter to the plaintiffs which, so far as material to be here set out, was as follows:

"With reference to various conversations I have recently had with Mr. Bateman, one of your directors, who is, I understand, authorized to negotiate a loan to your company upon the security of £30,000 of its first mortgage debenture stock, I request that you will be good enough to inform your board that I am willing to advance the company at 6 per cent. per annum the sum of £5,000 sterling forthwith against transfer to me of such stock as collateral security, subject to your directors electing my nominee upon the board, to my having the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months, and, in the event of the company at any time hereafter electing to raise any further capital or to sell its undertaking by way of amalgamation, or in any other manner for shares or stocks in another company, to my having the refusal of underwriting, by way of guaranteeing the taking up of such new capital, shares, or stock at a commission of 10 per cent. thereon; the advances to become due and payable on thirty days' notice on either side."

(a.) Reported by C. B. Camm, Esq., Barrister-at-Law.

On the 14th of June, 1901, the secretary to the plaintiff company wrote to the defendant accepting his offer, and the certificate for £30,000 First Mortgage Debenture Stock was handed to the defendant in exchange for the £5,000.

On the 27th of February last the plaintiffs were desirous and offered to pay off the mortgage immediately, together with interest for thirty days in lieu of notice, but the defendant insisted that due notice should be given, and thereupon the defendant gave notice to the plaintiffs of his intention to exercise his option to purchase the stock. The plaintiffs thereupon commenced this action, asking for a declaration that the option was void, and that they were entitled to redeem upon payment of £5,000 at 6 per cent. per annum and thirty days' interest at the like rate in lieu of notice and costs, or alternatively were entitled to redeem the said debenture stock upon giving thirty days' notice.

The defendant, by way of counterclaim, asked for specific performance of the option to purchase.

Warrington, K.C., and *Martelli*, for the plaintiffs.—The stipulation as to mortgagee having an option to purchase is a clog on the equity of redemption and is void. If it were valid, the mortgagor could not, upon redemption, receive back the property as it was at the date of the mortgage; and that would be a clog on the equity of redemption: *Noakes & Co.* v. *Rice*, *ante*, p. 305, [1902] A. C. 24. The mortgagor is at liberty to pay off at any time on giving thirty days' notice, and if he prefers to pay off immediately, he is at liberty to do so upon paying interest for thirty days in lieu of such notice. The mortgagor is still entitled to redeem, whether mortgagee has given notice of his intention to exercise the option or not. The exercise of the option by the mortgagee, unless complete before redemption, is incompatible with the mortgagor's right to redeem, and is therefore invalid: *In re Edwards' Estate*, 11 Ir. Ch. Rep. 367. *Lisle* v. *Reeve*, *ante*, p. 231, [1902] 1 Ch. 53, is distinguishable, as this is an equitable mortgage. Even if I am not entitled to redeem at once, I am entitled to a declaration that I am entitled to redeem upon giving thirty days' notice.

P. O. Lawrence, K.C., and *J. W. Manning*, for the defendant.—This option does not come within the class of cases dealing with a clog on the equity of redemption, for all these cases are founded on the default of the mortgagor, and that is not the case here. This is a collateral bargain to the mortgage, such as is recognized in *Noakes & Co.* v. *Rice* to be good, and is a commercial transaction, which the plaintiffs do not allege to be an "unconscionable bargain." It amounts to a conditional sale, and is not really a mortgage at all: *Carritt* v. *Bradley*, 49 W. R. 593, [1901] 2 K. B. 550. Under contract no right of redemption *in presenti* exists until notice is given, and no notice can be given after the option to purchase is exercised.

Warrington, K.C., in reply.—This is not a conditional sale. [KEKEWICH, J.—You need not reply on that point.] I rely on *Noakes & Co.* v. *Rice*. *Carritt* v. *Bradley* is distinguishable, as in that case the mortgaged property was not affected. The stipulation here is void *ab initio*, as being a collateral bargain such as the mortgagee cannot bargain for: *Noakes & Co.* v. *Rice*. I submit that the mortgagee cannot give any notice which would affect mortgagor's right to redeem.

Cur. adv. vult.

KEKEWICH, J.—The question on which judgment was reserved is whether a particular stipulation in the contract between the parties which is contained in the letter of the 11th of June, 1901, is a clog on the plaintiffs' equity of redemption under that contract, and is therefore void. I dealt with the facts and with some subsidiary points at the trial, but it may be convenient here to repeat my conclusions. It was contended on behalf of the plaintiffs that they had tendered the money due on the 27th of February, 1902—that is, before the letter of the same date by which the defendant gave them notice of exercise of his option of purchase. My opinion on the evidence is that no tender was in fact made, but the point is immaterial, because, by the terms of the contract, thirty days' notice of payment was required and was not given, and it is admittedly clear that, without that, the plaintiffs could not insist on immediate redemption. The suggestion that the defendant was bound to accept interest in lieu of notice has and was really admitted at the bar to have no foundation. But it is said that what took place at the interview of the 27th was equivalent to notice, or at least was an intimation by the plaintiffs to the defendant that they wished to pay him off, and that after that intimation was received the defendant could not exercise his option of purchase. I do not think that what passed can be treated as equivalent to the notice required by the contract, but if it were such notice would not in my judgment defeat the defendant's right according to the terms of the contract. It seems to me that the option of purchase was reserved to him at least so long as the mortgage continued, and that an intention to redeem, even though formally notified, could not defeat it. There is no occasion to say more on these points, and I can now proceed directly to the main question.

The transaction was shortly this. The defendant advanced £5,000 to the plaintiffs, and they agreed to secure the repayment, with interest, by the transfer of £30,000 debenture stock. The defendant stipulated, first, that a nominee of his should join the plaintiffs' board; secondly, that he should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months; and thirdly, that in the event of the plaintiffs' undertaking being disposed of, he should be entitled to underwrite new capital at a fixed commission. We are not concerned with the first or third of these stipulations, the question arising entirely on the second. Was that a clog on the equity of redemption?

It may be that the contract means that the option of purchase shall not be exercisable after repayment of principal and interest. If the contract means this, the case would be brought within the doctrine laid down by Buckley, J., in *Lisle* v. *Reeve*, but in the first place I do not myself think that this is the true meaning of the contract; and secondly, having regard to what was said in the Court of Appeal in the same case of *Lisle* v. *Reeve*, Buckley, J.'s, decision cannot be regarded as sound. For that I rely on the judgments in the Court of Appeal, and comments of my own would be impertinent. As regards the meaning of the contract, I need only say that there is not a word in it indicating that the option to purchase was not intended to be exercisable at any time within twelve months whatever happened in the interval, and I cannot see that the nature of the contract itself in anywise precludes the literal construction. When the defendant, on the 27th of February, was asked to retransfer the stock on payment of principal, interest, and costs he insisted on this view of the contract, and I think he was right. The question is whether the law allows it.

Taking the contract to mean what I say it does mean, the stipulation that the defendant shall, for

twelve months, have an option to purchase the mortgaged stock at a certain price is, in my opinion, a clog or fetter on the plaintiffs' right to redeem. Some other cases have been referred to, but it is better to be content with the recent case of *Noakes & Co.* v. *Rice*, because it is a decision of the House of Lords, and the doctrine here sought to be applied is there stated in a manner which can leave no possible room for misunderstanding. It would be easy to quote the language of more than one learned lord who took part in the decision in order to show what test is to be applied here, but I will take one passage only from the judgment of Lord Davey, who, on p. 34 says: "The principle is this, that a mortgage must not be converted into something else, and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan." It is really not arguable that the stipulation in question was not part of the mortgage transaction and part of the security. It is expressed on the face of the contract, in which the defendant expresses his willingness to advance the money, subject to, among other things, his having this option to purchase. And of course it was for the benefit of the mortgagee. Therefore, to use Lord Davey's phrase, it necessarily comes to an end on payment off of the loan. There was nothing to prevent the plaintiffs giving the thirty days' notice immediately after the advance—that is to say, they might by their act have determined the loan at the expiration of a month—and yet, according to the express bargain, the defendant might for eleven months from that time have had the right to prevent the plaintiffs from dealing with the debenture stock, because he had during that period the right to say that if he pleased he would purchase it at a fixed price. Thus regarded it is rather an extravagant instance of a clog or fetter of a right to redeem, inasmuch as it interferes with the ownership of the very property which is made the security of the loan. In this respect the transaction bears a close resemblance to that in *Noakes & Co.* v. *Rice*, where the mortgagee sought to impose a tie on a public-house after redemption.

The plaintiff will therefore have a declaration that the stipulation giving the defendant an option to purchase at any time within twelve months at 40 per cent. is void, and that they are entitled to redeem and have the stock transferred as they shall direct on payment of whatever is due for principal, interest, and costs, with consequent relief.

Solicitors, *H. P. Becher; Dale, Newman, & Hood.*

Chan. Div.
Swinfen Eady, J. } March 26.

THE GOPHIR DIAMOND CO. (LIMITED) v. WOOD. (a.)

Contract—Restraint of trade—"Interested in" similar trade—Servant at a salary.

The manager of a jewellery business entered into a covenant with the proprietors of the business that he would not become interested in, either directly or indirectly, a similar trade or business to that carried on by the said proprietors. Subsequently he entered the employment of a firm in a similar business as an assistant at a fixed salary.

Held, that there was no breach of the covenant, as he had no "proprietary or pecuniary" interest in his new employment.

Motion.

This was a motion for an interim injunction brought by the Gophir Diamond Co. (Limited) to restrain Algernon Hayford Wood, the defendant, from remaining in the employment of Messrs. Goldstein & Co., who carried on a business similar to that of the plaintiffs.

The plaintiffs had shops at Nos. 145, 95, 176, 61, and 124, Regent-street, and Messrs. Goldstein's shop was at No. 99, Regent-street.

It appeared that in April, 1900, Wood, who was then acting or about to act as manager of the plaintiffs' establishment at 158, Regent-street, was a party to an agreement with the plaintiffs, which agreement contained the following clause: "The manager will not after the termination by notice or otherwise of his engagement, either alone or jointly with or as agent or otherwise for any person or persons, directly or indirectly solicit the custom of any of the customers of the company, or set up or become interested in, either directly or indirectly, a similar trade or business to that carried on by the company within a distance of twenty miles from Regent-street aforesaid, nor in any wise set up or become interested in, either directly or indirectly, any trade or business in opposition to, nor in any way interfere with, the trade or business of the company during the term of three years from the date of the determination of his engagement."

The defendant's engagement with the plaintiffs was terminated in April, 1901.

In March, 1902, defendant entered the employ of Messrs. Goldstein as assistant salesman.

The plaintiffs now asked for an interim injunction to restrain him from continuing in the employ of Messrs. Goldstein till the hearing of the action.

Buckmaster, for the plaintiff company.

Martelli, for defendant, argued that defendant was not "interested" in the sense that he had a proprietary or pecuniary interest in Messrs. Goldstein's business. He was simply a salesman at a salary.

Counsel quoted *Smith* v. *Hancock*, 42 W. R. 465, [1894] 2 Ch. 377, and *Hill & Co.* v. *Hill*, 35 W. R. 137.

Buckmaster replied.

SWINFEN EADY, J., said that the question to be determined was whether the defendant was "interested" in Messrs. Goldstein's business within the meaning of the clause in the agreement. Did the covenant entered into by the defendant with plaintiffs cover his present position? The covenant as set out differed materially from the common form. It did not provide that the defendant should not be "engaged or concerned or interested" in a similar business, but simply that he should not be "interested" therein. If it was the plaintiffs' intention to prevent the employment of the defendant in a similar business it would have been easy to say so.

In *Smith* v. *Hancock* the word "interested" was treated as referring to proprietary or pecuniary interest. In the present case the defendant was employed as a servant at a salary, and his remuneration did not depend on the profits or gross returns. There was therefore no breach of the covenant, and the motion would be refused.

Solicitors for the plaintiffs, *Downey & Linnell.*

Solicitor for the defendant, *E. W. Pheasant.*

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) May 3.

MANNERS v. TYLER. (a.)

Adulteration—Sale of milk—Successive warranties—Jurisdiction of magistrates—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 25, 27—*Sale of Food and Drugs Act,* 1899, *s.* 20, *sub-sections* 5, 6.

The magistrates, in cases where the sale and delivery has taken place outside the jurisdiction of the court, have no jurisdiction to deal with a case of giving a false warranty, unless the warranty was given to the person from whom it was purchased for analysis.

Case stated by magistrates.

This was an appeal by the respondent against a conviction for selling milk with a false warranty contrary to the provisions of the Sale of Food and Drugs Act, 1875, s. 27, as amended by section 20 of the Sale of Food and Drugs Act, 1899.

The following facts appear from the special case as being proved before the magistrate:—

On the 14th of September, 1901, the appellant, who is a farmer, supplied to the Great Western and Metropolitan Dairies Co. (Limited), a churn of milk bearing the label "Warranted pure milk with all its cream." The milk was delivered to the company at Paddington, and they then removed the label.

On the 15th of September the milk was sent by a carman of the Dairies Co. to one Martha Dew, who carries on business as a milk seller at 5, Bechlow-road, Uxbridge. On the same day a pint of milk was purchased from Martha Dew by the respondent (who is an inspector under the Food and Drugs Acts), and on being analyzed was found to be adulterated with 8 per cent. of water.

On the 17th day of October Martha Dew was summoned before the magistrates under the Food and Drugs Acts for selling new milk not of the nature, substance, and quality demanded by the purchaser, but the summons was dismissed by the magistrates on her proving (in accordance with section 20 of the Act of 1875 as amended by section 26, sub-section 4 of the Act of 1899) that she had purchased the milk under a written contract, and that she had sold it in the same state as when received.

Notice of these proceedings was given to the Dairies Co., but no notice was given to the appellant. Proceedings were then taken on the 17th of October against the Dairies Co. for giving a false warranty contrary to section 27 of the Act of 1895 as amended by section 20, sub-section 6 of the Act of 1899.

This summons was dismissed on the ground that the company were entitled to the protection of section 25 of the Act of 1875, as amended by section 20, sub-section 6, of the Act of 1899, they having given the notices required by that section.

The present summons was then issued against the appellant.

It was contended on behalf of the appellant, *inter alia*, that he had not committed any offence within the jurisdiction of the court at Acton.

On behalf of the respondent reliance was placed on the provisions of section 20, sub-section 5, of the Act of 1899, which provides that "when the defendant in a prosecution under the Sale of Foods and Drugs Acts has been discharged under the provisions of section 25 of the Sale of Foods and Drugs Act, 1875, as amended by this Act, any proceedings under the Sale of Foods and Drugs Act for giving the warranty relied upon by the defendant in such prosecution may be taken as well before the court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given."

Morton Smith, for the appellant.—The justices were wrong in convicting the appellant. The sale and delivery took place outside the jurisdiction, and the defendant is not therefore liable: *Reg.* v. *Smith*, 44 W. R. 492, [1896] 1 Q. B. 596. Section 20, sub-section 5, of the Act of 1899 only applies to the immediate warranty given to the purchaser, and there is no similar provision in sub-section 6.

L. A. Richards (*J. C. Earle* with him), for the respondent.—The magistrates were right. This was a prosecution under section 25 of the Act of 1875, and as they were discharged under that section the case is within the Act of 1899, s. 20, sub-section 5.

Lord ALVERSTONE, L.C.J.—This is an important question on the construction of section 20, sub-section 5 of the Act of 1899, and it is of course desirable that in these milk cases the same magistrates should decide the question. In *Reg.* v. *Smith* it was held that in cases under section 27 the magistrate had no power to hear the case when the sale and delivery took place outside his jurisdiction. Then there came section 20, sub-section 6 of the Act, which provides that when a defendant in a prosecution under the Sale of Foods and Drugs Act has been discharged under the provisions of section 25 of the Sale of Foods and Drugs Act, 1875, any proceedings under the Sale of Foods and Drugs Act for giving the warranty relied upon by the defendant relied upon in such prosecution may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased as before a court having jurisdiction in the place where the warrant was given.

The objection raised by the appellant that this sub-section only applies to cases where there has been a prosecution for the immediate warranty.

Turning back to section 25 of the Act of 1875, as amended by section 20, sub-section 6, of the Act of 1899, it provides that if the defendant in any prosecution under this Act prove that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, he shall be discharged from the prosecution.

I think, therefore, that under that section no second proceeding could be taken. The proceedings against the dairy company were in fact taken under section 27 of the Act of 1899, as amended by section 20, sub-section 5, of the Act of 1899, and there are no corresponding words in that sub-section which will give the magistrates jurisdiction. I think it is also important to notice that the defence differs, as the defence under sub-section 5 is that they had reason to believe the statements were true. Although the magistrates thought they were acting under section 25 of the Act of 1875 they were really acting under section 20, sub-section 5, of the Act of 1899, and they had, therefore, no jurisdiction to entertain this case.

DARLING, J.—I agree.

CHANNELL, J.—I also agree. This section of the Act of 1899 was passed to remedy the defect in *R.* v. *Smith*, which raised a difficulty in the case of proceedings in the respect of a false warranty originally relied upon by the defendant. They did not think of the cases of successive warranties.

Appeal allowed.

Solicitor for the appellant, *W. T. Ricketts.*

Solicitor for the respondent, *Sir R. Nicholson.*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) Feb. 26.

PEARKS, GUNSTON, & TEE (LIMITED) (*Appellants*) v. HOUGHTON (*Respondent*). (a.)

Adulteration—Butter—Process of blending milk with butter—Increased percentage of water—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

A purchaser, acting on behalf of an inspector under the Sale of Food and Drugs Act, asked for and purchased from the appellants, grocers, half a pound of one shilling butter, which on analysis was proved to contain 7·8 per cent. more water than the limit of 16 per cent natural to butter. This excess of water was caused by a process adopted by the appellants of blending milk with butter. On the wall behind the butter counter in the appellants' shop there was a notice in large letters that the butter sold by them was "choicest butter blended with pure English full cream milk by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture." This notice was visible to anyone going into the shop, though the purchaser in this case did not observe it, nor was his attention called to it.

Held, that, as an ordinary purchaser entering the shop would see, and must be taken to have seen, the notice, the sale took place upon the notice, and was a sale of blended butter and not ordinary butter, and that, therefore, the sale could not be considered a sale to the prejudice of the purchaser within the meaning of section 6 of the Sale of Food and Drugs Act, 1875, *and that, therefore, no offence had been committed under that section.*

This was a case stated by justices of the peace acting in and for the borough of Richmond in the county of Surrey.

At the petty sessions held at Richmond on the 8th of August, 1901, an information preferred by Robert Houghton (the respondent) against Pearks, Gunston, & Tee, Limited (the appellants) under section 6 of the Sale of Food and Drugs Act 1875, charging that the appellants on the 12th of July, 1901, did unlawfully sell to the prejudice of the purchaser half a pound of shilling butter, which was not of the nature, substance and quality demanded, the same having had water added thereto to the extent of 7·8 per cent. of water beyond the usual limit of 16 per cent. of water natural to butter, was heard and determined, and the appellants were duly convicted of the said offence and ordered to pay a penalty of £20 and costs.

From the facts stated in the case it appeared that the appellants were grocers and provision merchants, and carried on business, amongst other places, in the borough of Richmond.

The respondent was an inspector under the Sale of Food and Drugs Act for the said borough.

On the 12th of July, 1901, the respondent caused Alfred Houghton to ask for and purchase on his, the respondent's, behalf, at the appellants' shop a half-pound of one-shilling butter for the purpose of analysis.

The public analyst certified that the butter contained 23·8 per cent. of water, which was 7·8 per cent. more water than the extreme limit of 16 per cent. natural to butter.

The butter so purchased was handed by the appellants' assistant to Alfred E. Houghton, and by him to the respondent, wrapped in two pieces of paper. On the inside wrapper or paper there was printed in large type the words "Pearks' Butter," and underneath this in much smaller type, "This is choicest butter, blended with pure English full cream milk, by new and improved machinery, whereby it retains about twenty to twenty-four per cent. of moisture, and acquires that delicacy of flavour which has made Pearks' Butter so famous."

When the respondent took off the outside paper wrapper in the appellants' shop in order to divide the butter into three parts for the purpose of analysis, he saw that there was something printed on the inside wrapper, but he did not read it and his attention was not called to it.

It was proved by the appellants that it is a common practice in the trade to blend different kinds of butter, and that the process adopted by the appellants was to put the butter into a churn with full cream milk and this was rechurned. Any excess of water in the butter in question was derived solely from the milk so added during this process of blending. No water was separately added to the butter.

It was stated in evidence on behalf of the appellants that the object of blending the butter with milk in this way was to give it uniform colour and flavour and to give it freshness, but there was no evidence that the milk was so added to the butter because it was required for the preparation of the butter as an article of commerce fit for carriage and consumption.

The price of full cream milk is three farthings a pound.

In a frame on the wall behind the butter counter in the shop there was a printed notice in large letters to the same effect as the notice on the inside wrapper. The butter counter faced the front of the shop, and this notice was visible to anyone going into the shop, but the respondent did not observe it and his attention was not called to it.

It was contended on behalf of the appellants that thd inside paper wrapper was a label within the meaning of section 8 of the Sale of Food and Drugs Act, 1875, that the printed notice in the shop was sufficient notice to the respondent, apart from the label, and that there was no evidence of fraud. Further, that as such wrapper and printed notice accurately stated the nature and composition of the article sold, there was no evidence of a sale to the prejudice of the purchaser within the meaning of section 6 of the said Act.

It was contended by the respondent that the sale was complete before he entered the shop, and that notice by label or otherwise was then too late.

That as the butter was delivered in a piece of plain opaque paper, which prevented the printing on the inside wrapper being visible until removed, and as in fact the respondent did not read it and did not purposely refrain from reading it, and his attention was not called to it, the inside wrapper did not constitute notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of section 8 of the said Act; and that as he did not observe the notice on the wall, and his attention was not called to it, it was no notice to him at all.

The justices were of opinion (1) That the printed matter on the inside of the wrapper was in its terms inaccurate and misleading, and, on that ground, was not a sufficient notice by label within the meaning of section 8, inasmuch as it stated the result of the blending to be to "retain" in the butter about 20 to 24 per cent. of moisture, whereby it acquired delicacy of flavour, whereas the true and only result was to add 7·8 per cent. of water to the extreme limit of 16 per cent. natural to the butter.

(2) That for the like reasons the notice on the wall of the shop was not a sufficient notice.

(3) That as the butter was delivered in a plain piece of opaque paper, which until removal effectually concealed the inside wrapper and the printing thereon,

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and as the respondent did not in fact read the printing and did not purposely abstain from so doing, and having regard to the nature of the article asked for and to the fact that his attention was not called to the printing, the inside wrapper did not constitute a notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of section 8.

(4) That as the respondent did not observe the printed notice on the wall in the shop, and having regard to the nature of the article asked for and the fact that his attention was not called to the said notice the same was no notice to him at all.

(5) That the sale of the article was complete before the respondent entered the shop and that notice by label or otherwise was too late.

(6) That the excess of 7·8 per cent. of water found in the butter was added fraudulently to increase the bulk and weight, and that on that ground also notice by label or otherwise was no protection to the appellants.

They therefore convicted the appellants.

The questions for the opinion of the court were:

(1) Whether the inside wrapper in which the butter was delivered was a sufficient notice by label within the meaning of section 8 of the Sale of Food and Drugs Act, 1875.

(2) Whether upon the facts stated there was sufficient notice otherwise than by label to the purchaser of what he was purchasing.

(3) Whether upon the facts stated there was any evidence that the excess of water in the butter was added fraudulently to increase the bulk or weight.

Asquith, K.C. (*Avory, K.C.*, and *H. D. Bonsey* with him), for the appellants.—The only offence created by section 6 is selling to the prejudice of the purchaser, and unless that can be shewn no offence is committed within the section: *Sandys* v. *Small*, 26 W. R. 814, 3 Q. B. D. 449. It cannot be said that the sale is to the prejudice of the purchaser when he knows that the article is mixed. In the present case the purchaser must be taken, owing to the notice on the wall, to have had such knowledge. Further, the inside label is sufficient notice, and complies with the provisions of section 8: *Jones* v. *Jones*, 58 J. P. 653; *Platt* v. *Tyler*, 58 J. P. 71. There is also no evidence of fraud, and there has been full disclosure as to the nature of the article sold: *Spiers & Pond* v. *Bennett*, 44 W. R. 510, [1896] 2 Q. B. 65; *Pope* v. *Tearle*, 22 W. R. 950, L. R. 9 C. P. 499.

Alex. Glen, for the respondent.—There is ample evidence to support the finding of fraud. The purchaser asked for one-shilling butter, not Pearks's butter which is admitted not to be pure butter. The article was handed to him in a double wrapper, and there was no evidence he saw either the label on the inner wrapper or the notice on the wall. The milk blended with the butter was used fraudulently to increase the weight: *Liddiard* v. *Reece*, 44 J. P. 233; *Horder* v. *Meddings*, 44 J. P. 234; *Pearks* v. *Knight*, *ante*, p. 104, [1901] 2 K. B. 825. It was for the defendant to prove that there was no intent to defraud (see section 24), that he did not do and, therefore, the magistrates were compelled to find there was fraud. The word "retains" in the notice suggests that by the process of blending the butter retains moisture which otherwise would have evaporated, whereas, in fact, this excess of moisture is added in the process. That taken together with the relative price of the added material is sufficient to enable the magistrates to conclude that there was a fraudulent intent.

Asquith, K.C., replied.

Lord ALVERSTONE, L.C.J.—This case is not stated in a satisfactory way, and in the judgment I am about to deliver I wish only to speak for myself. If the court were satisfied that this compound had been sold as butter and nothing else said about it, there would be evidence of an offence under section 6. I think that was practically decided in the case of *Pearks & Co.* v. *Knight*, and I should have come to the same conclusion, but certainly that is not the way in which we ought to regard this case. Here the purchaser asked for half a pound of shilling butter. Now if it should turn out that there were various classes of butter in the appellants' establishment and that this was merely butter at a different price from the other butters notice ought to be given, but I understand the facts in this case to be that the appellants are selling one sort of butter only—viz., "blended butter." That is the conclusion I draw from the facts, and I do not intend anything I now say to apply to a case where different kinds of butters are sold. There are three questions left for us to decide. (1) Whether the inside wrapper delivered was a sufficient notice within section 8? (2) Whether upon the facts stated there was sufficient notice otherwise than by label to the purchaser of what he was purchasing? And (3) whether upon the facts stated there was any evidence that the excess of water in the butter was added fraudulently to increase the bulk or weight? Speaking for myself, I am not satisfied that if an offence had been made out under section 6 that the label would have protected the appellants. Section 8 provides that a person shall not be guilty of such an offence in respect of the sale of an article not intended fraudulently to increase the bulk if at the time of delivery he shall supply the purchaser receiving the same with notice or label. If we were dealing with that section only we should undoubtedly have to consider to a greater extent the words "intended fraudulently to increase its bulk," and we should have to say whether or not at the time of delivering such article the person was supplied with notice. I, myself, have very grave doubt whether delivering an article such as in this case with notice on an inner wrapper would be supplying the purchaser with a notice or label at the time of delivery of the article. I do not think *Jones* v. *Jones* is sufficient authority on the facts of this case.

The second question is a most important one—*i.e.*, whether there was sufficient notice otherwise than by label. It is found as a fact that the big notice was hung in the shop behind the butter counter and visible to everyone going into the shop. That is a finding that an ordinary purchaser going in to buy this butter would see this notice, and that finding is not at all qualified by the statement that the respondent did not see it and that his attention was not called to it. I think it is quite impossible in face of that notice to assume that it only applied to one kind of butter sold in the shop.

I have come to the conclusion that it cannot be taken from the facts as stated that there was a sale of one of several classes of butter at varying prices, but that there was a sale of Pearks's butter only, namely, the same article as described in the notice. That being so I think we are bound by the case of *Sandys* v. *Small* and the case of *Spiers & Pond* v. *Bennett*, which I understand lay down the proposition that if a purchaser is told at the time of purchase and it is brought to his knowledge that the article sold is a blended article it cannot then be said that the thing is being sold to the prejudice of the purchaser. Here I think no question arises under section 24 and the prosecutor has to prove that there is a sale to the prejudice of the purchaser. It is good law and good sense that when a man is

told he is buying butter blended with something else he is not entitled to come to us and say that he thought he was buying butter not mixed with anything. As to the terms of the notice they are not particularly happy. I think that to the person who understands the chemistry of butter and knows that it ordinarily contains only sixteen per cent. of moisture it would be wrong to say that it retains about twenty to twenty-three per cent. of moisture, but to the ordinary purchaser—who within the ruling of *Sandys* v. *Small* has to be considered—the notice is a statement that the butter is mixed with milk and that it has in it 23 per cent. of moisture. I do not think any misleading statement in that notice can do away with the broad statement that the butter sold at that shop is in accordance with the notice. I think, therefore, that the answer to the second question is in favour of the appellants and that there is no evidence of an offence under section 6. There remains the third question, which has become immaterial. When once you arrive at the fact that there is no offence under section 6 the question of supposed fraudulent addition does not arise at all, and it is only because the magistrates have overlooked the true view of the law, having regard to *Sandys* v. *Small*, that they have left this question to us. I think this case comes within the definition of Cockburn, L.C.J., and Lord Russell of Killowen, L.C.J., and that there was no sale to the prejudice of the purchaser, and that this appeal should be allowed.

DARLING, J.—I am of the same opinion. In what the appellants have done here they have sailed exceedingly near the winds. In my view they are only saved by the large notice which they had put up in the shop. If it had not been for that, and they had relied simply upon the labels, my opinion is that they would not have brought themselves within the protection of the statute. I do not desire to say a word against *Jones* v. *Jones* because I do not think that what was done here comes within the rule in that case. There the paper covering was the usual way of delivering the article to the purchaser. I do not think that anyone could say that the usual way of selling butter is to put it in a piece of paper on which it is stated that the butter is mixed with something else and then to wrap round it a piece of opaque paper which prevents the purchaser from reading what is on the inner wrapper. I should not think of saying that there was no label. There was a label but it was wanting in all the elements present in *Jones* v. *Jones*. The label was not, I gather, put round the butter at the time of delivering it to the purchaser; I understand the butter was kept wrapped up in the paper with the printed notice on and then had the thick outer wrapper put round it. With regard to the large notice put up in the shop I think the wording is very suspicious, but to say that it makes one suspect the article which it praises is one thing, to say that it convinces one it is prepared fraudulently to increase its bulk is another, and, except this, I cannot see any evidence that the preparation was made fraudulently to increase the bulk and measure. The wording is suspicious, because it says: "Made by improved machinery whereby it retains moisture and acquires delicacy." That does not express the thing accurately. To my mind the words "whereby it acquires moisture and delicacy" would better meet the facts of the case.

CHANNELL, J.—This article is a perfectly legitimate article, but it is not butter, and therefore the court in the case of *Pearks & Co.* v. *Knight*, where it was sold as butter, decided that there was an offence against section 6, inasmuch as there was the selling a thing not of the nature, substance, and quality demanded. But this article is one which it is legitimate to sell as blended butter. Whether there is sufficient evidence of a sale to the prejudice of the purchaser seems to depend upon whether it was in fact sold as blended butter or as butter, and it is obvious that after the decision in *Pearks & Co.* v. *Knight* the appellants here took steps intended to meet that decision and to protect themselves by selling this article solely as blended butter. Both these notices may be criticized, but they both begin by saying that the article is choicest butter blended and then go on to say that it contains more than the ordinary amount of moisture. Consequently if the sale took place upon these notices it is a sale of blended butter and not of ordinary butter. The difficulty in dealing with these cases as to prejudice always arises from the fact that the purchaser before the court is nearly always an inspector who is buying for the purpose of analysis and not for his own consumption, and so you have to look at the circumstances and see whether, if he had been an ordinary purchaser, he would have been prejudiced. There always arises the difficulty when there is a notice in the shop as to whether an ordinary purchaser would have seen it. An inspector is not likely to go searching about for a notice; we have to consider what an ordinary purchaser would do. In this case there was a large notice in a conspicuous place so that anyone would see it. That brings this case within the decision of *Spiers & Pond* v. *Bennett*, which says that under such circumstances as that the sale could not be considered to be to the prejudice of the purchaser. That sufficiently disposes of this case. The process was carried out in order to increase the weight, bulk, and measure of the article, but it does not necessarily follow that that was done fraudulently. If it was done with the honest intention of selling the article as what it was—namely, blended butter, there was no fraud in doing something which would increase its weight and bulk.

Appeal allowed; conviction quashed.

Solicitors for the appellants, *Neve, Beck, & Kirby*.

Solicitor for the respondent, *T. W. Weeding*, Kingston-upon-Thames.

Prob. Div. & Adm. Div. } March 13, 1900;
Probate. } March 10; June 2.

E. v. E. (OTHERWISE T.). (*a*.)

Nullity of marriage—Frigidity—Refusal to allow intercourse—Six months' cohabitation—Variation of settlements.

Where the respondent resisted all attempts at intercourse for a period of six months.

The Court annulled the marriage and varied the marriage settlement, ordering the respondent to pay an annual sum to the petitioner.

This petition alleged that by reason of the frigidity, impotence, or malformation of the respondent, or by some other physical defect which existed at the time of the first ceremony of marriage (there were two, one civil and one religious) the petitioner had been and still was wholly unable to consummate the marriage, and that such frigidity, impotence, or malformation was incurable by skill.

The respondent in her answer did not admit the allegations of the petition.

(*a*.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Inderwick, K.C., and *Low*, for the petitioner.—In examination in chief the petitioner deposed that he had made the acquaintance of the respondent in January, 1898, she being then about 22 years old, and in June, 1898, he became engaged to her, and on the 7th of November, 1898, they were married. There was no cohabitation of the parties until the 29th of March, when there was a religious ceremony, and the respondent's father gave her away. The parties travelled straight through to Rome after the marriage ceremony, and on the first night after their arrival there the petitioner attempted to consummate the marriage. The respondent objected very strongly and made the excuse that she was very tired, and the petitioner desisted from further attempt. The following night a second attempt was made, but the respondent screamed and resisted all attempts for nearly an hour by putting herself into an impossible position, alleging that it made her sick. Further attempts were made about three times a week, but in Naples, where the parties travelled to after they had spent a week in Rome, the respondent insisted on having a separate bedroom, and despite persuasion and reasoning, the respondent refused the petitioner, calling him a beast and a brute, and told him that no honourable man would put his wife to such indignities and insults. As she asked the petitioner to put it off, no further attempts were made until the return of the parties to this country, about the 3rd or 4th of May. Another attempt was then made, but was again frustrated by the respondent. Within a fortnight of the marriage she had threatened the petitioner that if he persisted she would leave him. Her resistance prevented full but not partial intercourse. A female relative of the respondent, at the request of the petitioner, spoke to her about the matter, and the respondent, in reference to that conversation, told the petitioner that the lady in question was "a thousand years behind the times," and that she (the respondent) had "no intention of having children." The petitioner talked and reasoned with the respondent and continued to attempt intercourse, but the resistance got worse. And on the 10th of October the respondent went to her parents on the understanding that it was a short visit. On the 13th of October the petitioner wrote to her saying: "I have told you over and over again in my opinion the root of the whole difficulty is that no married couple, at least no young married couple can live in happiness without what is the one essential thing to a perfect union. I have continually and persistently tried by every means in my power (short of force) to induce you to allow me what it is your duty and what the instincts of nature should make it your pleasure to give. I have appealed to you with loving and passionate words, also with quiet reasoning and entreaty, but in spite of all our marriage has never been consummated owing to your persistent objections and strenuous opposition, and after our six months of married life—unhappy months they have been to me—I can only assume the reason you refuse to countenance anything of the kind is that you unfortunately are subject to or are suffering from some physical incapacity. Now that you are at home once more I urge and implore you once more to consult your own friends and your own doctor so that this cloud may be cleared away. For if we are to live happily together you must get over those objections to consummation, and you must really try to fulfil those other duties which a wife owes to her husband. . . ." On the 24th of October the respondent replied: "I did not see that your letter needed an immediate answer, and as I went home to avoid family troubles I did not wish to be pursued by them there. I am extremely annoyed that you are behaving in this silly, babyish way. I suppose you think it is amusing; I don't. I am in no hurry to return, and shall do so at my leisure, and hope to find you in a better temper. . . . Yours truly, ——." Finding that nothing could be done, the husband presented this petition, and on the 1st of November, 1899, the usual order for inspection was made, and the respondent declined to submit. Dr. Garlick, one of the examiners appointed, was called, and put in the certificate as to the petitioner's ability.

Priestley, for the respondent.—I ask nothing.

JEUNE, P.—I do not think anybody else need be called. I think it is sufficient. I see no reason to disbelieve the husband, and he is confirmed by the examination. Therefore there will be a decree *nisi*, with costs.

On the 29th of October, 1900, the decree *nisi* was made absolute.

March 2, 1902.—Motion to vary the report of the registrar on variation of settlements.

A settlement had been executed on the 24th of October, 1898, by which the respondent assigned to trustees the sum of £50,000, to be raised out of the share, estate, or "interest" of the respondent, whether vested or contingent under or by virtue of the will of her grandfather as soon as might be thereafter the same share and promises should fall into possession and be paid to the trustees. And, further, all the annual or other income which, pending the falling into possession of the share and premises, should, from the solemnization of the said intended marriage, be payable to the respondent.

Inderwick, K.C., and *Low, K.C.*, for the petitioner.—The registrar was wrong in reporting that having regard to the petitioner's position there should be no application of the settled property for his benefit. The settled funds ought to have been charged with a sum of money in favour of the petitioner to compensate him for the loss caused to him by the conduct of the respondent. Alternatively the registrar ought to have reported in favour of some annual sum being paid to the petitioner out of the income of the settled funds during his life as compensation. It was a moot point whether in cases of nullity the settlement became absolutely *ipso facto* void or not. The idea formerly was that the settlement remained until it was set aside by the order of the court either wholly or in part.

JEUNE, P.—*Dormer* v. *Ward*, 49 W. R. 149, [1901] P. 20, does not appear to decide the point.

Inderwick, K.C.—No. *A. (otherwise M.)* v. *M.*, 10 P. D. 178, is always referred to in such circumstances, but the case does not bear out the head-note. The head-note runs, "A marriage having been annulled, the court ordered all the property of the alleged wife to be reconveyed to her freed from the trusts of the settlement upon the alleged marriage." Butt, J., in that case acted upon the authority of *Chapman* v. *Bradley*, 12 W. R. 140, 4 De G. J. & S. 71. Although a settlement may be regarded as not continuing after the decree, yet the property in the settlement may be dealt with by the court as if the decree had set aside the settlement.

Bargrave Deane, K.C., and *Priestley*.—The settlement came to an end when the decree was made absolute. The settlement provides that if the intended marriage should not be solemnized within six calendar months the settlement should be void and the trust premises be reconveyed and reassigned or released to the respondent. The decree absolute declared the marriage null and

void, and therefore the marriage had never been validly solemnized. If the court has jurisdiction, even then the only property which can be dealt with by the court is the income of the respondents share of her grandfather's estate to the extent which she enjoyed the same prior to the date of the decree absolute and not the capital or further income of which during her father's and the executor's lives she is not in possession or enjoyment. This case is not covered by *Dormer* v. *Ward*.

JEUNE, P., held that the effect of the deed so far as it referred to the £50,000 was clearly to settle the property, and what actually passed into the hands of the trustees was the sum to be raised hereafter, and therefore there was that reversion in the hands of the trustees. It was a settlement of the expectancy. Taking into consideration the income of the respondent and the average income of the petitioner, the court ordered the respondent to pay £200 a year for life to the petitioner, the deed securing the same to be settled by conveyancing counsel.

Solicitors, *Nicholson, Graham, & Graham; Mather, Smith, & Bell*, for *Fowler, Langley, & Wright*, Wolverhampton.

Court of Appeal.

From K. B. Div. (In Bkcy.) (Vaughan Williams, Romer, and Stirling, L.JJ.) June 6, 10, 20.

In re A DEBTOR.
Ex parte THE JUDGMENT CREDITOR. (a.)

Bankruptcy notice — Judgment creditor — Seizure by sheriff under fi. fa.—*Withdrawal without return to writ—Right to issue notice—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), s. 4 (1) (g).

A judgment creditor issued a writ of fi. fa. *against the judgment debtor's goods, but, on learning that all the goods at the debtor's residence were claimed by third parties, directed the sheriff to withdraw, which the sheriff did without making any return to the writ. The judgment creditor then issued a bankruptcy notice for the amount of the debt against the judgment debtor.*

Held, on the evidence, that the sheriff was never in possession of any goods of the judgment debtor, and that the judgment creditor accordingly had a right to issue the bankruptcy notice, since there was no stay, express or implied, nor had the sheriff realized anything by the seizure or sale of the goods of the debtor, for which he was bound to account or make a deduction from the judgment debt.

Order of the registrar discharged.

Miller *v.* Parnell, 6 *Taunt.* 370, *discussed.*

This was an appeal from an order of Mr. Registrar Brougham setting aside a bankruptcy notice with costs.

The facts were as follows:

In January, 1902, a creditor obtained a judgment against a debtor for a sum of over £400, and on the 11th of February he issued a writ of *fi. fa.* against the debtor's goods.

The sheriff seized certain goods at the house where the debtor resided with his wife; but three days afterwards a firm of solicitors acting for the wife gave notice by letter that the lease of the house was in her name and that she claimed most of the goods in it as her absolute property, while the remainder were vested in the trustees of her marriage settlement, one of whom was a member of the firm of solicitors. [The evidence of the debtor and of the sheriff's officer as to the goods seized is referred to in the judgment.]

On the receipt of this letter the creditor directed the sheriff to withdraw, which he did on the 18th of February; and the creditor immediately thereupon issued a bankruptcy notice against the debtor for the whole of the judgment debt.

The debtor applied to set it aside on the ground that it was issued in bad faith.

The registrar held that this had not been made out, but as it appeared that the sheriff had made no return to the writ he set aside the notice on that ground, on the authority of an unreported case of *In re Cochrane*, decided by the Court of Appeal on the 9th of March, 1900.

H. Reed, K.C., and *Bartley Denniss*, for the appellants.—Though the creditor directed the sheriff to withdraw, he could have obtained another writ in another county without a return to the first writ, and seizure under the second writ would not be unlawful. There is nothing in this case which prevents a bankruptcy notice from being issued. The respondent must show that execution had been stayed; and the authorities only show that there is a stay if the creditor is not in a position to enforce execution. Here there had not been a levy of a single penny; there had been a mere seizure. The writ here is still a lively one.

They cited or referred to *In re Follows*, [1895] 2 Q. B. 521, 44 W. R. Dig. 12; *Ex parte Phillips*, 5 Morr. 40; *Edmond* v. *Ross*, 9 Price 5; *Dicas* v. *Warne*, 10 Bing. 341; *Lee* v. *Dangar, Grant, & Co.*, [1892] 1 Q. B. 231, and in C. A. 40 W. R. 469, [1892] 2 Q. B. 337; *Ex parte Williams*, 20 W. R. 430, L. R. 7 Ch. App. 314; *Walker* v. *Hunter*, 2 C. B. 324; *Ex parte Chinery*, 32 W. R. 469, 12 Q. B. D. 342; and *Ex parte Woodall*, 32 W. R. 774, 13 Q. B. D. 479.

M. Mackenzie, for the respondent.—The case is brought within *In re Follows* and *In re Cochrane* by the letter from the wife's solicitors. A creditor issuing a bankruptcy notice must be in a position to enforce judgment by execution. There was an actual levy under the writ, and having seized and abandoned the goods the creditor could not re-enter for the whole amount.

He cited *Clerk* v. *Withers*, 1 Salk. 322; *Knight* v. *Coleby*, 5 M. & W. 274, approving the rule laid down in *Miller* v. *Parnell*, 6 Taunt. 370; *Percival* v. *Stamp*, 2 W. R. 14, 9 Exch. 16; *Levi* v. *Abbott*, 4 Exch. 588; and *Chapman* v. *Bowlby*, 8 M. & W. 249.

Denniss, in reply.—The seizure was a seizure of a stranger's goods, and therefore no seizure at all. In *Clerk* v. *Withers* the judgment creditor had made his election to hold to the goods.

He cited *Angell* v. *Baddeley*, 26 W. R. 137, 3 Ex. D. 49; *Shaw* v. *Kirby*, 52 J. P. 182.

[STIRLING, J., referred to *Bagshawes (Limited)* v. *Deacon*, 46 W. R 618, [1898] 2 Q. B. 173.]

Cur. adv. vult.

June 20.—VAUGHAN WILLIAMS, L.J., delivered the judgment of the court as follows: In this case the question is whether a bankruptcy notice ought to be set aside on the ground that at the time of the service of the notice a writ of *fi. fa.* had been delivered to the sheriff and seizure had been made thereunder, and no return had been made by the sheriff. Now *Miller* v. *Parnell* is a plain authority for the proposition that if a judgment creditor does cause the sheriff to execute his *fi.* [illegible] re he

(a.) Reported by H. W. LAW, Esq., Barrister-at-Law.

cannot have a writ of *ca. sa.* till the *fi. fa.* is completely executed and returned, and that this is so even though the execution creditor abandons the seizure of the goods. *Miller* v. *Parnell* was recognized as good law in *Chapman* v. *Bowlby*, and by Pollock, C.B., and Martin, B., in *Andrews* v. *Saunderson*, 5 W. R. 317, 1 H. & N. 725, in which latter case it was strenuously argued, but unsuccessfully, that the rule against the issue of a new *fi. fa.* had no application unless something had been realized under the first execution. But it is to be observed that in *Peploe* v. *Galliers*, 4 Moore 163, in the Court of Common Pleas, on a special demurrer to a plea to a declaration in *scire facias*, the court held the plea bad because it merely stated that the sheriff seized the debtor's goods and took them in execution, and did not proceed to state that the sheriff had returned the writ. The goods might have been restored to the defendant, and on this ground the plaintiff was entitled to judgment. This case certainly seems to assume that there may be a second writ if the goods seized under the first writ had been restored to the judgment debtor. But be this how it may, this case, decided on special demurrer, cannot be taken to overrule *Miller* v. *Parnell*, which was acted on in *Andrews* v. *Saunderson* and many other cases since *Peploe* v. *Galliers*, but of course might nevertheless fortify this court if we were disposed to review *Miller* v. *Parnell*. There is one more observation we would wish to make on *Miller* v. *Parnell*, and that is that its authority does not seem to us to be impaired by the decision of the Court of Appeal in *Lee* v. *Dangar, Grant, & Co.* In that case the two writs of *fi. fa.* in the City of London and London County were issued concurrently, and not in succession, and *Miller* v. *Parnell* had, therefore, no application. Although we have thought it right, having regard to the argument before us, to make these observations on the authority of *Miller* v. *Parnell*, we do not think that on the facts of the present case *Miller* v. *Parnell* has any application. It seems to us, on the evidence, that no goods of the debtor were seized. The debtor says so himself, and although he goes on in his evidence to say that there were in the house pictures and personal property of his own, and although the sheriff's officer's evidence is not inconsistent with his having seized everything in the house, yet we do not think that it is open to the debtor to contend that property of his was seized, because we think that the right conclusion in fact is that the debtor, knowing of the claim of the trustees of the marriage settlement and of his wife—which covered everything in the house, although he might not know in what proportions his wife and the trustees respectively might claim—deliberately allowed the execution creditor to withdraw the execution and seizure and restore these goods to the claimant. Now *Miller* v. *Parnell*, in our judgment, only applies in cases in which there has been a seizure of goods of the judgment debtor—that is to say, of goods which the writ directs and authorizes the sheriff to seize—and has no application if the seizure of the goods of a stranger. If the seizure is of goods which the sheriff is directed to seize under the *fi. fa.*, the sheriff, if an action of trespass were brought for the seizure, would require the return to the writ to enable him to justify under the *fi. fa.* (*Hodgkinson* v. *Whalley*, 2 Cr. & J. 86); and in *Andrews* v. *Saunderson*, Pollock, C.B., pointed out that on the question whether a second writ of execution can issue without a return to the first, the test is not whether there was a substantial levy, but whether anything has been done which renders the existence of the writ necessary for the justification of the sheriff. It follows from this that the principle of *Miller* v. *Parnell* will not make the issue of a second writ of *fi. fa.* illegal or irregular in a case where the seizure has been the seizure of goods other than the goods of the judgment debtor; for neither the writ nor anything which the sheriff purports to do under it can justify the sheriff if he has seized the goods of a stranger. In our judgment the seizure by the sheriff of the goods of a stranger not only does not make the issue of a fresh writ, say, in another county, wrong, but also does not in any way interfere with the seizure by the sheriff, under the existing writ of *fi. fa.*, of any goods within his bailiwick which are the goods of the defendant, and consequently fall within the direction in the writ of *fi. fa.* The seizure of the goods of a stranger may, of course, prevent the issue of a fresh writ or further proceedings under the existing writ in a case where the sheriff interpleads, because in such a case there is either an express stay by the interpleader order or an implicit stay by the pendency of the summons. The result is that in our judgment the judgment creditor in the present case had a right to serve the bankruptcy notice, for there was no stay, express or implied, and the sheriff had not realized anything by the seizure or sale of the goods of the debtor for which he was bound to account or make a deduction from the judgment debt mentioned in the bankruptcy notice; nor was the sheriff in possession of the goods of the judgment debtor, nor had he ever been so. We think this appeal must be allowed and the registrar's order discharged with costs both here and below.

Appeal allowed.

Solicitors, *J. Westcott; G. Twynam.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 4.

CLATWORTHY v. R. & H. GREEN (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Payment into court—Stay of proceedings—Costs up to payment into court—Jurisdiction of arbitrator—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule II., par.* 6—*Workmen's Compensation Rules*, 1898, *r.* 5 (3).

The employers of a workman who met with his death by accident in the course of his employment agreed with his widow as to the amount of compensation to which she was entitled under the Workmen's Compensation Act, 1897, *but refused to pay her the amount because she had not taken out letters of administration. She commenced proceedings under the Act, and thereupon the employers paid the amount into court.*

Held, that, though by rule 5 (3) *of the Workmen's Compensation Rules*, 1898, *the payment into court operated as a stay of proceedings, the county court judge had jurisdiction to make an order allowing the widow her costs up to the payment into court and also her costs of the application for costs.*

Appeal from an order of the judge of the Bow County Court in an arbitration under the Workmen's Compensation Act, 1897.

A workman in the service of the employers sustained personal injury by accident in the course of his employment, which resulted in his death.

He left a widow and children wholly dependent on his earnings at the time of his death. The employers admitted that the widow was entitled to be paid

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

£300, the maximum amount of compensation awardable under the Act, for the benefit of herself and her children; and they said that they would pay that sum to the widow when she had taken out letters of administration. She did not take out letters of administration, and the employers refused to pay her the amount.

The widow then filed a request for arbitration under the Act, and thereupon the employers paid the sum of £300 into court.

An application was made by the widow to the county court judge for an order for her costs up to the payment into court and of the application.

By paragraph 6 of the Second Schedule to the Act "the costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator."

Rule 5 of the Workmen's Compensation Rules, 1898, provides as follows: "(1) In any case in which the amount payable as compensation to the dependants of a deceased workman has been agreed upon or ascertained, but any question arises as to who are dependants, or as to the amount payable to each dependant, an application for the settlement of such question by arbitration may be made either by the legal personal representative (if any) of the deceased workman on behalf of the dependants or any of them, or if there is no legal personal representative, by such dependants or any of them against the other dependants and the persons claiming to be dependants, but as to whose claim to rank as such a question arises. . . . (3) In any such case the employer, if made a respondent, may pay the amount of compensation in his hands into court, to be dealt with as the judge or arbitrator shall direct, and thereupon further proceedings against him shall be stayed."

It was contended on the part of the applicant that she had taken the proper steps to enforce her claim in accordance with the provisions of the Act, and that she was therefore entitled to her costs.

It was contended on the part of the employers that the effect of rule 5 (3) was that the county court judge had no jurisdiction to make any order as to costs in this case.

The county court judge was of opinion that the costs incurred by the applicant were properly incurred and he ordered them to be paid by the employers, and he further ordered the employers to pay the costs of the application.

The employers appealed.

Arthur Powell, K.C., and *W. Addington Willis*, for the employers.

Chester Jones, for the applicant.

COLLINS, M.R.—This is an appeal from the exercise of the discretion of the county court judge ordering the employers to pay the applicant her costs up to payment into court and also her costs of the application for costs. The case seems to me to be a very simple one, and when it is rightly understood I think there is no ground for the contention of the appellants. The applicant is a widow who claimed compensation on behalf of herself and her children in respect of the death of her husband, who was killed by an accident in the course of his employment. The employers agreed with the applicant as to the amount of compensation to which she was entitled, but refused to pay it unless she took out letters of administration. That she has not done. Had the employers the right to insist on this, to impose on her the obligation of taking out letters of administration as a condition precedent to her right to receive payment of the amount to which it was agreed that she was entitled? In my opinion they certainly had no such right. Under these circumstances she took proceedings to recover compensation under the Act, and then the employers paid the sum of £300 into court. That operated as a stay of further proceedings under rule 5, sub-rule 3, of the Workmen's Compensation Rules, 1898. But what of the costs up to that time? Paragraph 6 of Schedule II. to the Act provides that the costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The county court judge therefore clearly had jurisdiction over the costs of the arbitration, and he had before him the fact, which he was entitled to take into consideration, that everything was agreed between the parties except as to a condition which ought not to have been imposed. It is to be noticed that it was not till the applicant's attempt to obtain compensation by agreement had failed that she took proceedings under the Act, as indeed she was then obliged to do, and upon that the employers paid the money into court. It seems to me to be obvious that the county court judge had a discretion to deal with the costs up to the time of payment into court. But it is said that he had no right to order the employers to pay the applicant's costs of the application for costs. I cannot agree with that suggestion. In my opinion the provision in rule 5 (3) as to payment of money into court operating as a stay did not prohibit the county court judge from giving the applicant her costs up to the time of payment into court, and also the costs of her application.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the employers, *Treadwell & Aylwin.*

Solicitors for the applicant, *Shaen, Roscoe, Massey, & Co.*

High Court of Justice.

Chan. Div. Byrne, J. — May 31.

JARRED v. CLEMENTS. (a.)

Vendor and purchaser—Equitable mortgage—Notice—Forged signature—Legal estate—Title deeds.

A purchaser who had notice of an equitable mortgage on a property, paid the purchase-money for the same upon a receipt for what was due on the equitable mortgage being handed to her solicitors. The purchaser acquired also the legal estate and the title deeds. The signature to the receipt was forged.

Held, in an action brought by the equitable mortgagee, that the equitable mortgage must be enforced against the purchaser.

Trial of action.

This was an action in which the plaintiff Nathaniel Jarred claimed as against the defendant an account of what was due to him on an equitable mortgage on two semi-detached villas, 3 and 4, Mornington-villas, Mornington-road, Woodford Wells, Essex, and in default of payment foreclosure or sale and for the delivery to him by the defendant of the title deeds and writings relating to the mortgaged premises.

The facts of the case are as follows:

On the 15th of January, 1897, a Mr. Joseph Taylor, in consideration of the sum of £450 advanced to him by the plaintiff, signed a memorandum of deposit,

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

and deposited the title deeds and writings relating to the property with the plaintiff.

In September, 1898, a receiving order in bankruptcy was made against Taylor, who, in his amended statement of affairs, verified on oath, stated that the plaintiff was a fully secured creditor of his for £450 and that the particulars of his security were "Mortgage of 3 and 4, Mornington-villas, Woodford," &c.

The said receiving order was rescinded in January, 1899.

On the 13th of July, 1899, the two houses were put up for auction by Taylor, but were bought in by him.

The defendant in the action, Mrs. Emma E. Clements, who was present at the auction, subsequently entered into negotiations with him for the purchase of the said houses, and on the 17th of July, 1899, entered into a contract to purchase them free from incumbrances for £630.

An abstract of title was furnished to the defendant's solicitors by Charles Parr, Taylor's solicitor, which did not disclose the equitable charge. The defendant's solicitors, however, inspected the record of Taylor's bankruptcy proceedings, and ascertained the existence of the said mortgage. Thereupon they wrote to Parr as follows: "We have to-day made the usual searches; but we thought it necessary to inspect the bankruptcy proceedings to see that the receiving order that had been made had been discharged. We see that in these proceedings it was stated that Nos. 3 and 4, Mornington-villas were subject to a mortgage for £450. Please let us have an abstract of this mortgage and of the discharge of it." To this letter they received from Parr, on the 5th of August, 1899, the following reply: "I am in receipt of yours of yesterday, and as I informed you on the telephone this morning, the mortgage you refer to is a mere memorandum of deposit of deeds, and I shall be pleased to hand you the same with receipt indorsed on completion. I trust you will be able to arrange for completion one day during next week, as I want to get away by the 14th." The defendant's solicitors were satisfied with this assurance, and completion took place in due course on the 10th of August, 1899, when an assignment of the property by Taylor to the defendant passing the legal estate was duly executed. At the same time the memorandum of deposit with what purported to be an added receipt dated the 10th of August, 1899, in due form for all moneys due on the security, signed by the plaintiff, was handed over to the defendant's solicitors, together with the title deeds and papers relating to the property.

The signature was not in fact that of the plaintiff, but was forged by Parr, who was also at that time the plaintiff's solicitor, and with whom the plaintiff had left the title deeds of the property for safe custody. Parr had, however, received no authority from him to deal with them in any way. The plaintiff knew nothing of the transaction, and on ascertaining the facts commenced his action. His lordship considered that no reasonable precaution was omitted by the defendant or her solicitors, nor was the plaintiff guilty of any negligence or misconduct.

Norton, K.C., and *T. T. Methold*, for the plaintiff.—The defendant is not in the position of a purchaser for value without notice. Her solicitors were aware of the existence of the equitable mortgage. Under these circumstances she is not protected by having the legal estate and the possession of the deeds.

Rowden, K.C., and *W. H. Cozens-Hardy*, for defendant.—This is a case between two innocent parties whose equities are equal. The defendant has the legal estate and has taken every reasonable precaution. She also holds the title deeds and had every reason to believe that the equitable mortgage had been discharged. The court should not, therefore, grant the plaintiff relief against her. Further the memorandum did not operate as a charge because it contained no description of the property charged: *Ratcliffe* v. *Barnard*, 19 W. R. 764, L. R. 6 Ch. 652; *Bailey* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25; *Hewitt* v. *Losemore*, 9 H. 449; *Gainsborough* v. *Watcome Terra Cotta Clay Co.*, 54 L. J. Ch. 991.

Norton, K.C., replied.

BYRNE, J., after stating the facts: Under these circumstances the question arises whether the defendant, having the legal estate and possession of the title deeds, is entitled to hold the property free from the mortgage, or whether the plaintiff, as equitable mortgagee, can uphold the security.

I think that the contention of the plaintiff must prevail. There was a subsisting charge in his favour of which the defendant had notice prior to payment of the purchase-money. Having such notice, it was for her or her solicitors on her behalf to be satisfied that the incumbrance was discharged before parting with the money. They were satisfied with what appeared to be, but was not in fact, sufficient evidence; and I am unable to say that the fraud practised upon them by the vendor's solicitors enabled the defendant to stand in the same position as if she had never had notice of the charge. If the arrangement had been that the equitable mortgagee should join in the assignment to the defendant, and he had not joined, but some person had fraudulently personated him and forged his name at the completion, the point would have appeared, I think, clear; but the principle seems to me the same.

The case is a hard one upon the defendant, and not the less so because if less diligence had been shown by the gentleman who actually made the search in bankruptcy the mortgage would probably never have been disclosed, and the purchaser could then have claimed to be purchaser without notice; but, on the other hand, a decision against the plaintiff would have been equally hard upon him, as he would have been deprived of his security without any default on his part by the fraud for which I feel bound to hold the defendant must suffer instead.

The point was taken that the memorandum of deposit did not operate as a charge because the property included in it was not described, but inasmuch as the mortgagor and mortgagee as well as the purchaser all knew and acted upon the footing that the property intended to be dealt with by the memorandum was, as in fact it was, that to which the deposited deeds related, and as the deposit alone would have created an effectual charge, I do not think that this matter can effect the result. It is a most unfortunate case.

Judgment for the plaintiff.

Solicitors, *Watson, Dyer, & Rydon; Shepheards & Walters.*

Chan. Div. } Farwell, J. } June 10, 11, 18.

BRITISH HOMES ASSURANCE CORPORATION (LIMITED) v. PATTERSON. (*a.*)

Partnership—Contract with partner before partnership—Fraud of co-partner—Novation of original contract—Election—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 10, 11 (a).

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Where A. has entered into a contract with B., and B. and C. subsequently become partners, but A. elects to stand by the original contract with B., he cannot, by issuing a writ against B. and C., make an election to novate and render C. liable, it being, under the circumstances, unjust.

This was an action to make the defendant liable for the fraud of his partner. The facts are fully set forth in the judgment of Farwell, J.

The Partnership Act, 1890, provides:

Section 10.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Section 11.—In the following cases, namely—(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

Jenkins, K.C., and *A. P. Poley*, for the plaintiffs.

Upjohn, K.C., and *F. Thompson*, for the defendant.

FARWELL, J., in giving judgment, said: This is one of those unfortunate cases in which the court has to determine which of two innocent parties must suffer for the defalcations of a rogue.

The plaintiffs are a land company, whose chief business is to advance money on the mortgage of house property out of the funds of the company as and when available, to the holders of house property certificates.

The defendant is a solicitor. In the year 1899 the plaintiffs appointed one Frederick Atkinson, who carried on business as a solicitor at Hastings and Bexhill under the firm of Atkinson & Atkinson, to act as their solicitor in their mortgage transactions on certain special terms. The plaintiffs knew that Atkinson was in business alone, although trading under the style of Atkinson & Atkinson. In the early part of the year 1900 the plaintiffs instructed Atkinson as their solicitor to carry out a mortgage, to be made by one Coleman. The business was somewhat protracted, and the money to complete the mortgage was not sent by the plaintiffs until March, 1901. In the meantime—namely, on the 31st of December, 1900, the defendant entered into partnership with Atkinson; no books of any sort were produced to him, but accountants on his behalf examined the affairs of Atkinson, and gave a satisfactory report.

The deed of partnership was dated the 31st of December, 1900, and recited that it had been agreed that the defendant should purchase a third share of Atkinson's business, including profits of offices and appointments held by Atkinson, for £1,500, which was paid on the execution of the deed. It then provided that Atkinson and the defendant should become partners in the profession of solicitors and conveyancers in continuation of the business carried on for many years by Atkinson, from the 1st day of December, 1900, during their joint lives under the style or firm of Atkinson & Patterson, and that neither partner should enter into any engagements on behalf of the firm except in its name. Under this deed the benefit of the contract between Atkinson and the plaintiffs *re* Coleman would form part of the partnership profits.

On the 5th of February, 1901, Atkinson gave notice in writing to the plaintiffs that he had taken the defendant into partnership, and that the style of the new firm would be Atkinson & Patterson. The plaintiffs received this notice, but paid no attention to it. Their house property manager was called and said that he continued to correspond with Atkinson & Atkinson and ultimately sent them the money to complete Coleman's mortgage because he had no instructions to act otherwise. The money to complete the Coleman mortgage was in fact sent by a cheque dated the 23rd of February, 1901, payable to Atkinson & Atkinson *re* Coleman or order in a letter dated the 28th of February, 1901, and addressed to Atkinson & Atkinson. The cheque was indorsed "Atkinson & Atkinson," by F. Atkinson, and a receipt signed "Atkinson & Atkinson" was sent to and accepted by the plaintiffs. The money was paid by Atkinson into his own private account and was embezzled by him. The defendant first heard of this Coleman transaction on the 15th of March, 1901, and Atkinson absconded shortly after. No books of the new firm were in fact ever kept, and no partnership account in the name of the new firm was ever opened with any banker, and no payments were made out of Atkinson's account to or for the benefit of the partnership. The name-plate on the door of the office at Hastings was altered, but that at Bexhill was left untouched; but the defendant commenced to attend regularly at Hastings only on or about the 5th of February, 1901, so that little more than five weeks elapsed before Atkinson's dishonesty was discovered. When the Coleman cheque for £360 was paid into Atkinson's account, that account was overdrawn to the extent of about £330, and the balance of £30 by which the account was put in credit was drawn out again in a few days. The defendant had nothing to do with and had no power to draw on this account of Atkinson's.

Under these circumstances the plaintiffs allege that the defendant is liable as a partner, and rely on sections 10 and 11 of the Partnership Acts. [His lordship read the sections, and continued:] Now the liability of partners which is declared by the sections is merely a branch of the law of principal and agent. "Each partner is an agent of the firm and his other partners for the purpose of the business of the partnership" (section 5), and all the partners are liable because the individual partner has acted or contracted as agent for them as either disclosed or undisclosed principals—if disclosed, because the act or contract is avowedly with them or on their behalf; if undisclosed, because the law gives the other contracting party the option of proceeding against the undisclosed principal when discovered. But where A., knowing B. and C. to be partners, refuses to contract with them jointly and insists on contracting with B. alone, he cannot afterwards treat C. as liable. "Where a man has an option to choose one or other of two inconsistent things, once he has made his election it cannot be retracted; it is final and cannot be altered. *Quod semel placuit in electionibus ampliuis displicere non potest*," per Lord Blackburn in *Scarfe* v. *Jardine*, 30 W. R. 893, at p. 897, 7 App. Cas. 345, at p. 360. The several liability of B. is a totally distinct thing from the joint liability of B. and C. A. had his option which he would accept and he elected to accept B.'s several liability. The same principles apply to a contract made between A. and B. where B. subsequently takes C. into partnership and gives A. notice thereof. The question then becomes one of novation—has the original contract been discharged by the the acceptance of the new liability? I take the law as stated in Lindley on Partnership (5th ed.

239. A. is, of course, not bound to accept the liability of B. and C. in discharge of that of B., and if he gave express notice that he refused to do so he would have finally elected to abide by the original agreement, but "he is not bound to elect at once. He may wait and think which way he will exercise his election so long as he can do so without injuring other persons": *Scarfe* v. *Jardine*.

The questions that I have to decide are (1) did the plaintiffs before action elect either to abide by their original contract or to adopt the new firm as their solicitors in Coleman's matter in lieu of Atkinson, and (2) if not, can they so elect by the writ or now at the bar. In my opinion the plaintiffs prior to the writ elected to stand by their original contract; they knew of the change in the firm, but they did not merely continue to address their letters to Atkinson & Atkinson but they actually sent the money to Atkinson & Atkinson payable to the order of Atkinson & Atkinson, and accepted a receipt from Atkinson & Atkinson. Indeed, it was hardly contended that they had novated before action, but it was urged that it was still open to them to elect, and thus the issue of the writ was an election to novate. In my opinion this is not so, but the payment of the whole money to Atkinson operated as an election to abide by the original contract, and being once made could not afterwards be retracted. But even if this were not so they could not, in my opinion, now elect to make the defendant liable. The principle applicable is the same as that which is applied by the court in the case of an undisclosed principal. It is true that the party who contracted with the agent can sue the principal when discovered, but this is subject to the qualification that nothing has occurred in the meantime to make it unjust. "If the principal has paid the agent, or if the state of the accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment on such state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent": *per* Bayley, J., *Thompson* v. *Davenport*, 9 B. & C. 78, at p. 89. It would, in my opinion, be manifestly unjust to allow the plaintiffs to deal with Atkinson alone so long as a payment was to be made by them, and to allow them to elect to deal with Atkinson & Patterson when the liability for the sum so paid to Atkinson alone came in question. The plaintiffs relied on the sections of the Partnership Act, to which I have referred, but that Act is declaratory only. It states the law as it affects partners in relation to third persons under ordinary conditions, and in the absence of special circumstances. It in no wise affects the acts or defaults of third persons contracting with the partners or any individual member of the firm. It is said that the case of the defendant falls within the exact terms of sections 10 and 11 (*a*) inasmuch as Atkinson was "acting in the ordinary course of the business of the firm" (section 10), and "acting within the scope of his apparent authority" (section 11 (*a*)); but even if this were so, the plaintiffs' contention would involve the introduction of some such words as these: "Notwithstanding that the person complaining has declined to contract with or recognize the partner as partner." But the words of the Act do not refer to the rights and liabilities of the partners *inter se* in the abstract, but only in relation to contracts made with or acts done to the detriment of third persons, and those third persons must be persons who are dealing with the partner as such or who are in a position to elect to deal with the partner as such or to treat his wrongful act as the act of a partner. In my opinion the defendant does not come within the words of the Act, because I do not think that it is open to a third person to assert that the individual with whom he has intentionally contracted as an individual on his several contract, or with whom he has elected to continue as on a contract with an individual, can be heard to say that such person was acting in the ordinary course of the business of the firm or was acting within the scope of his apparent authority, when he knew that he was not acting or appearing to act for the firm at all, and he preferred to have it so. Further, in my opinion, section 11 (*b*) had no application, because, under the circumstances, I think it impossible to hold that the firm of Atkinson & Patterson did, in fact, receive money or property of the plaintiffs. The cheque was, as I have said, drawn payable to Atkinson & Atkinson, was intentionally sent in a letter addressed to Atkinson & Atkinson, and was paid into the account of Atkinson alone, and was received and dealt with by Atkinson alone. The plaintiffs' action fails and must be dismissed with costs.

Solicitors, *Rawlings & Butt; Field, Roscoe, & Co.*

Chan. Div. } April 23, 24, 25, 26, 30.
Buckley, J. }

Broome v. Speak. (*a*.)

Company—Prospectus—Contract by company—Omission from prospectus—Rights to be "honourably met"—Cancelled contract—Cancelling contract—Untrue statement—Companies Act, 1867 (30 & 31 *Vict.* c 131), *s.* 38—*Directors' Liability Act,* 1890 (53 & 54 *Vict.* c. 64), *s.* 3.

By an agreement of the 9th of May, 1898, *a promoter agreed to float a company for a sum equal to one per cent. on its nominal capital. Subsequently it was resolved to purchase the business of another company as a going concern, and the company, by a letter of the 21st of September, a resolution of the 1st of October, and a letter of the 1st of October, entered into a contract with the promoter by which the promoter agreed to advance the sum of £14,250, which was required as a deposit in respect of the purchase, and the company agreed to repay him that amount together with a commission of £7,500. The agreement of purchase was signed on the 26th of September. The directors of the vendor company, some of whom were to join the board of the new company, objected to the payment of the £7,500. The promoter was accordingly assured that his right to receive proper remuneration for commission would be honourably met, and, with his consent, the contract contained in the letter of the 21st of September was cancelled by a resolution of the 10th of October and a letter of the 18th of October. Subsequently the directors issued a prospectus in which it was stated, on the advice of counsel, that the only contracts to which the company was a party were those of the 9th of May and the 26th of September.*

Held, that the contract to pay the promoter the commission of £7,500 contained in the letter of the 21st of September, the resolution of the 1st of October, and the letter of the 1st of October was not wholly cancelled by the contract contained in the resolution of the 10th of October and the letter of the 18th of October, and that in any event both contracts should have been disclosed in the prospectus under section 38 of the Companies Act, 1867, *and that the statement in the prospectus that the only contracts to which the company was a party were those of the 9th of May and the 26th of September was a false statement within the Directors' Liability Act,* 1890.

(*a*.) Reported by H. L. Ormiston, Esq., Barrister-at-Law.

Held, also, that the fact that the contracts were omitted from the prospectus on the advice of counsel was no defence to an action under either statute.

Action with witnesses.

This was an action brought by a shareholder against the chairman, Mr. Paul Speak, and two of the directors, Messrs. Shepheard and Clayton, of the London and Northern Bank (Limited), to recover damages in respect of the non-disclosure of certain contracts in a prospectus on the faith of which the plaintiff took shares.

The company, which was incorporated in April, 1898, did not originally contemplate the acquisition of any existing business.

Under an agreement dated the 9th of May, 1898, Mr. Bowden, the promoter, was to receive for promotion expenses a sum equal to 1 per cent. on the then nominal capital of the company.

Subsequently it was resolved to purchase the business of the Leeds Joint Stock Bank. The Leeds directors demanded a deposit of £14,250, and this amount Bowden agreed to advance.

On the 21st of September, 1898, a letter was written on behalf of the bank to Mr. Craig (who was Bowden's nominee for this purpose), undertaking to repay the amount of the deposit, together with £7,500 bonus for the loan.

On the 26th of September the agreement for the agreement for the purchase of the Leeds Bank was signed, and the £14,250 was deposited.

On the 1st of October the agreement to repay the amount of the deposit and to pay the bonus of £7,500 to Craig was adopted at a meeting of the board, and a letter to that effect was sent on behalf of the bank to Craig.

At a meeting of the board on the 10th of October, at which some of the Leeds directors were present, the question of the payment of the bonus to Bowden was discussed. Two of the Leeds directors—Messrs. Bray and Gaunt—were very hostile to the proposal and refused to go on with the purchase unless it was abandoned. When this was pointed out to Bowden, and also that if he persisted in his demand he stood to lose, not only the amount of the deposit, but also the money which he was to receive under the promotion agreement, he consented to the cancellation of the contract contained in the letter of the 21st of September. At the same meeting a resolution was passed in the following terms: "That after full discussion and hearing the views of the directors of the Leeds Joint Stock Bank (Limited), and upon the chairman giving Mr. Bowden assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank Co. (Limited), and raising the necessary deposit, shall be honourably met at a future meeting of the directors of the London and Northern Bank (Limited), it is resolved, with the assent of Mr. Craig, that the contract contained in the letter of the 21st of September, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board."

On the 18th of October Craig wrote to the trustee of the London and Northern Bank a letter as follows: "Referring to the letter which you wrote to me, dated the 21st of September, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission in introducing the business of the Leeds Joint Stock Bank (Limited) or for raising the necessary deposit shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled and the arrangement there suggested as being considered at an end."

On the 24th of October the prospectus was issued. On the advice of counsel reference to the cancelled contract of the 21st of September, 1898, was omitted, and it was stated that the only contracts to which the bank was a party were the promotion agreement and the purchase agreement.

On the faith of the prospectus the plaintiff applied for, and was allotted, shares in the bank. Subsequently the bank went into liquidation, and the plaintiff brought the present action.

Astbury, K.C., and *J. Roskill*, for the plaintiff.—The effect of the resolution of the 10th of October and the letter of the 18th of October was only to vary the contract to repay the deposit money and to pay the bonus to Bowden, by leaving the amount of the bonus to the discretion of the directors. The cancellation was that of a document which fixed the amount; it could only take effect by way of accord and satisfaction; if Bowden was to have no legal right to receive anything, there could be no accord and satisfaction, and, consequently, no cancellation: *Bayley* v. *Homan*, 3 Bing. N. C. 915. The contract, therefore, with its subsequent variation, should have been disclosed in the prospectus. Even assuming that contract to have been cancelled, the cancelling contract, that is to say, the resolution of the 10th of October, was a subsisting contract, and should have been disclosed. The statement in the prospectus that the only contracts to which the bank was a party were the promotion agreement and the agreement for the purchase of the Leeds Bank, was untrue to the knowledge of the defendants, and renders them liable to pay compensation to the plaintiff under the Directors' Liability Act, 1890.

Haldane, K.C., and *F. Cassel*, for the defendant Shepheard.—The consideration for Bowden giving up his rights was that the purchase of the Leeds Bank should go through and that he should get his promotion money, the payment of which was conditional on the successful flotation of the company. Apart from the resolution of the 1st of October he could not have enforced his right to the payment of the bonus, for he was a promoter, and was, therefore, dealing with himself. After the resolution of the 10th of October cut away his legal right to the £7,500, all that remained was a relationship of honour; where this is the case there is no question of a *quantum meruit*. We rely on *Taylor* v. *Brewer*, 1 M. & S. 290; *Roberts* v. *Smith*, 4 H. & N. 315, 7 W. R. C. L. Dig. 54, and the dissenting judgment of Parke, B., in *Bryant* v. *Flight*, 5 M. & W. 114. The obligation to repay Bowden the amount of the deposit remained, but it rested on the implied contract contained in the agreement to purchase the Leeds Bank. Even if the directors were wrong in their construction of the resolution of the 10th of October, that construction was arrived at on the advice of counsel; they honestly thought that the resolution did not amount to a contract, and the principle of *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149, and *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 21 W. R. Dig. 269, applies. It cannot, therefore, be said that they issued a prospectus with knowledge of the existence of a contract within the section: *Twycross* v. *Grant*, 25 W. R. 586, 2 C. P. D. 469, at p. 482. Only material contracts are within section 38, and cancelled contracts are not material. The cancelling resolution was not a contract at all, but a waiver. Our case under the Directors' Liability Act is even stronger, for the directors had a reasonable ground for believing the statement in the prospectus to be true.

Eldon Bankes, K.C., and *O. L. Clare*, for the defendant Speak.—Section 38 only contemplates executory contracts.

Warmington, K.C., and *Hon. F. Russell*, for the defendant Clayton.

Astbury, K.C., in reply.—The words "properly met," in the letter of the 18th of October, show that Bowden understood the resolution of the 10th of October to mean that he was to have a *quantum meruit*. If this was not the case, he could still have sued on the subsisting contract. In any case it takes a contract to cancel a contract: *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, at p. 65. The only contracts which need not be disclosed are those which are not material: *Sullivan* v. *Mitcalfe*, 29 W. R. 181, 5 C. P. D. 455. The contracts in question are most material.

BUCKLEY, J.—I consider that the prospectus must be deemed fraudulent on the part of the defendants. [His lordship here stated the facts:] Now I go back to the minute of the 10th of October. The question here to be determined is whether on the 10th of October there was not created another contract to which the company was a party by the resolution passed on that date. It is contended by the defendants that the meaning and result of this resolution was that Mr. Bowden, when he left that meeting, was to leave it in such a position as not to be entitled as of right to a single penny—that he was to throw himself upon the honour or good feeling or generosity of the board as to whether he was to have anything or nothing. Now I do not think that was the result of it. The chairman at the meeting, as the price of the destruction of the letter of the 21st of September, gave Mr. Bowden an assurance. It seems to me that in doing that he was acting as representing the board, or to speak more correctly, as representing the bank. Now was that assurance one under which Mr. Bowden was to give up everything provided they were minded to give him nothing? I think not. Mr. Bowden had stood in peril; he had found the £14,250, and he stood in peril of losing that altogether. But was it likely that he was to have no rights at all reserved to him by this alteration as regards the letter of the 21st of September? I think not. If that was meant, why did not the minute say so? Why does it not express in so many words that he is to throw himself upon the generosity of the board and have no rights? It is admitted on all hands that he was possibly to get something, and the question argued is, was he to get a *quantum meruit*—that is to say, was he to have the right to what was fair, or was he to rest only upon a promise with a discretion in the directors as to whether they would give him anything or nothing? Now, looking first to the language of the resolution, and thinking of what the situation was, I think the intention was to reserve him a right. The language is this: the assurance is "that his right to receive proper remuneration" for something "shall be honourably met." The defendants seek to say that those words mean that there shall survive to him only a debt of honour, a debt resting at the discretion of the board. That is not consistent with the language, and, I think, not consistent with the position of the parties as they stood at that time. I think that they intended, and that Mr. Bowden acted upon, the footing that his right to receive something was admitted. What was proper was not admitted, and as regards the question of amount, that was left to honour in this sense, that it was to be a fair and proper sum, not a sum to be paid only as a debt of honour, but a fair and proper sum. For the purpose of construing the language of this resolution, I cannot read the letter to explain it, but I feel myself fortified in giving that meaning to the words when I find that on the 18th of October a letter which Mr. Craig was asked to sign, and which had been drafted in point of fact by the solicitors in counsel's chambers, varied this word "honourably" by saying "honourably and properly met." [His lordship then referred to the evidence as supporting this construction of the resolution, and continued:] Now with that I want to go on to consider quite shortly what is the law that I ought to apply to this, having regard to the cases of *Taylor* v. *Brewer*, *Bryant* v. *Flight*, and *Roberts* v. *Smith*. What I have to look to on these authorities is this: was this a mere promise, leaving it to the discretion of the promisor to say what the figure was to be, or was it a contract upon which Bowden could have sued? In *Taylor* v. *Brewer*, in 1813, the words were to the effect "Such remuneration as shall be deemed right," and in *Roberts* v. *Smith*, in 1859, "Any remuneration you may think me deserving of." In both those cases it was held that an action would not lie. In *Bryant* v. *Flight*, in 1839, the words were "The amount of payment I leave entirely to you." It was held that an action would lie, but Parke, B., dissented. Now all of those cases were considered the other day in the Court of Appeal, in the case of *Loftus* v. *Roberts*, 18 Times L. R. 532, and Vaughan Williams, L.J., sums them up by saying this: "The decision in the first of these cases and the third, and the dissentient view of Parke, B., in the second, was this—that wherever words which by themselves constituted a promise were accompanied by words which showed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all. The doctrine was an old one. In Leake on Contracts (3rd ed.), p. 3, it was expressed thus: "Promissory expressions reserving an option as to the performance do not create a contract."

Now, that being the law which I have to apply, what is the effect of this resolution? To my mind it is not to constitute a promise with a discretion in the promisor. There existed at its date a legal obligation as between the bank and Bowden. That was to be put an end to so far as the payment of the £7,500 was concerned, but what was to be substituted for it was this, that the right of Bowden to receive something was to be admitted; the amount that he was to receive was not admitted, but what might be a proper amount was to be honourably paid in the sense, as I understand it, that he was to be fairly and reasonably dealt with. For those reasons I come to the conclusion that the minute of the 10th of October, 1898, produced another contract.

Now with that I must go to the law. In the first place, it has been argued before me that section 38 of the Companies Act, 1867, does not extend beyond executory contracts. I think that is not so. Section 38, of course, has always created very considerable difficulty in knowing what is the proper limit to be put upon the very wide effect of the generality of the expressions; but I see no reason for cutting down the words "contracts entered into by the company" so as to exclude a material contract entered into by the company, although, in point of fact, that contract may have been wholly executed. Suppose a contract between a promoter and every member of the board, that a promoter will pay an intending director £1,000 for serving on the board, and that in return for that the director shall allow himself to be appointed one of the first directors, and suppose that the money has been paid, and that the director has joined the board, and that the contract is wholly executed, it seems to me that that would still be a contract entered into by a promoter as such and a director before the issue of the prospectus, and that it would be a material contract, and I see no reason for

cutting down the language of the section so as to exclude that. Again, supposing a contract for the sale of property of any kind from A. to B., and that that has been wholly executed by a conveyance by A. to C. by the direction of B., but B.'s name does not appear on the prospectus; and suppose that B.'s name was one which, as being that of the promoter, or for some reason or other, would have been naturally looked at by the intending investor, and if he had known that B. was interested in the matter it might have influenced him in taking shares; why is not that executed contract, which certainly was entered into by the promoter or director in the case which I am supposing, and possibly by the company, not within the words "contract entered into," because it has been completed by a conveyance, if the disclosure of B.'s name would have been material? To take another illustration, supposing there is a contract, and a material contract, running, say, for a period of five years which has expired, it is a contract entered into by the company, and I see no reason for restricting the generality of the language of the section so as to exclude it.

Now, what I have been addressing myself to so far is the contract contained in the letter of the 21st of September and the letter of the 1st of October. It is true that at the date when the prospectus was issued —at least, I will assume for the moment that it is true—that had been put an end to, but it was a material contract, and I think as such it ought to have been disclosed, and the prospectus ought to have contained the dates and the names of the parties to those three transactions—namely, the letter of the 21st of September, the minute of the 1st of October, and the letter of the 1st of October. But now, further, by the minute of the 10th of October and the letter of the 18th of October another contract was entered into—namely, a contract cancelling the previous contract or cancelling it to some extent. Now that was a subsisting contract at the date of the prospectus, and why should it not have been disclosed? It appears to me again that that is within the section. They would have been required to disclose the three matters by date and parties—the 21st of September, two of the 1st of October, one of the 10th of October, and one of the 18th of October. I think both of those are matters which ought to have been disclosed within section 38. Then, thirdly, it seems to me that the letter of the 21st of September was not cancelled by what took place on the 10th and 18th of October. It contained two parts—the obligation to return the deposit and the obligation to pay the bonus. As regards the latter, it was put an end to, but as regards the former, it was not; it was a subsisting contract. The witnesses are all agreed as to that. The company still remained bound to repay the £14,250 deposit; and again, as regards that, I think it was a subsisting contract, and as such ought to have been disclosed.

Then, lastly, if I am right in the view which I take as regards the effect of the minute of the 10th of October, that created a new obligation; not a mere debt of honour, but something which was binding on the company, and which, therefore, was a contract, and that again, I think, ought to have been disclosed under section 38.

Now it is true that section 38 of the Act of 1867 has been repealed by section 33 of the Act of 1900; but, having regard to section 38 of 52 & 53 Vict. c. 63 (Interpretation Act, 1889), it seems to me that—in point of fact the defendants have not disputed it —the plaintiff's right in this action is a right acquired, accrued, or incurred under that repealed enactment, and that this legal proceeding can be instituted as if the repealing Act had not been passed. It seems to me, therefore, that here the plaintiff is in a position to avail himself of the statutory fraud arising upon section 38 of the Companies Act, 1867, and I think he succeeds upon that statutory fraud.

There are two other matters upon which the action might fall to be decided. First, the Directors' Liability Act of 1890. Now upon that what one has to investigate is whether there was an untrue statement in the prospectus or notice made without reasonable ground of belief in the directors that the statement was true. For the purposes of that Act I think that "an untrue statement" means a statement in fact untrue, not a statement in the belief of the directors untrue. You have to see what the real facts are. Now what were the real facts here as regards this? The real facts, if I am right, of course, in the conclusion at which I have arrived, are that all the several contracts which I have mentioned were subsisting contracts, and that the company was a party to them; but as regards the contract for cancellation of the contract of the 21st of September, it does not seem to me possible to say that that was not a contract in the sense of being a subsisting contract, and it was said that that contract did not exist. That was untrue in point of fact. That also this was untrue in point of fact; the agreement of the 21st of September had created an obligation to repay the deposit of £14,250, and that had never been disclosed. That remained, and that was a contract, and it was untrue to say that the company was not a party to a contract for the repayment of the £14,250. So that there were, I think, other statements which were in fact untrue.

Then had the directors reason to believe, and did they believe that those statements were true? Now here, speaking as regards Mr. Shepheard, I do not for a moment impute as against him that he was stating anything which was untrue in any belief that it was untrue. I acquit him altogether of any fraudulent intent or improper action in the matter, but in point of fact he had no reason to believe that the cancellation contract had been put an end to, because it had not. I do not suppose that he ever addressed his mind to the point. That is the real answer to it. The contract existed, and he did not think or inquire, I suppose, at all as to whether that was a thing which was in existence or not. He did protect himself in this way, that he went to counsel, and counsel said that the prospectus could be issued as it was—having regard to the rescission of the contract, it would do. But counsel cannot protect directors by telling them that they need not comply with the Act of Parliament if they ought to comply with it. The question is simply one of fact, whether the contract existed or not; if it did exist, then the statute applied. It seems to me, therefore, that under the Directors' Liability Act also it is only a statutory fraud, but it is a fraud by reason of the statute. [His lordship then dealt with the action so far as it was based on common law fraud.]

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Cooper & Sons*, Manchester; *Williamson, Hill, & Co.*, for *Storey, Willans, & Storey*, Halifax; *Waterhouse & Co.; Parker, Garrett, Holman, & Howden.*

K. B. Div. (Phillimore, J.) June 18.

HUNTER v. THE KING. (a.)

Revenue — Income tax — Life policy — Exemption on premiums—Assurance company agreed to return half of each of the first seven premiums paid as loans to the assured on interest—Such advances treated as first charge on policy—Actual premium paid—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 4, *Schedules D, E.*

By the terms of a policy issued by an assurance company the assured had the option of receiving back by way of loan at interest from the company half of each of the first seven years' premium paid by him in respect of an assurance he had effected on his own life, the money so advanced to him being a first charge on the capital money of the policy.

The assured having elected to exercise the option, paid £66 17*s.* 6*d.*, *the first premium, and received back as a loan* £33.

Held, that the amount which the assured had paid in premium was £66 17*s.* 6*d.*, *and that he was entitled to claim exemption from income tax on the whole of that sum.*

This was a special case stated and agreed between the suppliant and his Majesty's Attorney-General, raising a question of law which was decided by Phillimore, J., sitting for a Divisional Court.

The facts set out in the case were as follows: The suppliant, R. L. Hunter, a solicitor and a member of the firm of Messrs. Hunter & Haynes, by a policy of insurance dated the 30th of June, 1896, effected an insurance on his life with the London Life Association (Limited) in the sum of £1,500. The policy recited that the sum of £66 17s. 6d. (including an advance of £33), being the premium for such insurance until the 30th of June, 1897, had been paid to the association. By clause 1 of the policy it was provided that a portion of the renewal premium—viz., £33—should, if the assured should so desire, be advanced by the association and should be a first charge on the policy. Clause 4 of the policy provided that the association might at any time advance moneys for payment of any sum necessary to prevent the lapsing or avoidance of the policy, and that any such advances should bear interest at 6 per cent. per annum, reducible to 4 per cent. on punctual payment, and that any such advances and interest should be a first charge on the policy and the sum assured.

The form of receipt received by Mr. Hunter on the 30th of June, 1896, was as follows: "Received this the 30th day of June, 1896, the sum of £66 17s. 6d. (including £33 advanced by the association), being the first premium on an insurance of £1,500 effected on the life of Mr. R. L. Hunter, for which a policy, numbered 30,540, and dated as above, will be issued in due course." The receipt for the next and following year acknowledged the receipt of "£66 17s. 6d., being the amount of one year's premium."

On the 19th of July, 1897, the suppliant entered into an agreement with the association whereby, in consideration of the loan to him in the previous year of £33, and in consideration of five further sums of the same amount to be advanced to him under the terms of the policy of assurance, the suppliant charged the policy and all money and benefits thereby assured as security for repayment to the association of the principal sums advanced and to be advanced with interest at 6 per cent. per annum, reducible to 4 per cent. on punctual payment, and also covenanted to pay the premium and all other moneys required for keeping up the policy as the same should become payable.

No advance in cash was made by the association to the suppliant, and save so far as the same could be gathered from the suppliant having made a proposal for a half premium policy, from his having accepted the same, and from the terms of the charge, no specific request was made by the suppliant that the association would make an advance and no receipt in respect of any alleged advance was given by the suppliant to the association.

The only moneys which passed from the suppliant to the association in respect of payment of payment of premium was a payment in cash of £33 17s. 6d. only, and no other moneys were received by the association in respect of the same beyond that sum, but the suppliant was indebted in the loan register with the amount of the principal sums secured by the charge, and was indebted in the renewal premium register with the full amount of the premium separately entered into in two sums of £33 17s. 6d. and £33 respectively, the sum of £33 having against it the remark "On credit. . . ." The premiums were treated as having been paid in full under the heading "premiums" in the revenue account of the association published each year pursuant to the Life Assurance Companies Act, 1870, and in the calculation made for the reduction of the premiums subsequent to the seventh, while the principal sums secured by the charge were included in the balance-sheet published pursuant to the Act under the head "loans on the association's policies (with their surrender value)."

Section 4 of the Income Tax Act, 1853, provides that "any person who shall have made an insurance of his life . . . shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contract from any profits or gains in respect of which he shall be liable to be assessed under section D or E of this Act."

The question for the opinion of the court was whether the suppliant was entitled, in any of the years from 1896 to 1899, to deduct from his assessment, or to obtain relief in respect of £66 17s. 6d. as being the annual sum paid by him in respect of premium within the meaning of section 54 of the Income Tax Act, 1854, he having been only allowed relief by the Commissioners for General Purposes to the extent of £33 17s. 6d., the sum actually paid by him in respect of the premiums.

The suppliant originally lodged a petition of right claiming payment of the sum of £3 6s., being the income tax chargeable on the sum of £33 for the three years in question.

The Attorney-General consented, in order to obtain the decision of the court in the promptest way, to waive any objection made as a matter of law that a petition of right did not lie, but such waiver was not to be taken as a precedent in other cases.

Sir Edward Clarke, K.C., Danckwerts, K.C, and *R. B. D. Acland*, for the appellant.

Sir R. B. Finlay, A.G., and *S. A. T. Rowlatt*, for the Crown.

PHILLIMORE, J.—In this case the question I have to decide is, what is the annual premium which the suppliant has made in respect of his life policy? Nominally he has paid £66 17s. 6d., and in hard cash he has only paid £33. In these circumstances he contends that he is nevertheless entitled to deduct the nominal value of the premium—namely, £66 17s. 6d. from the amount upon which his income tax was assessed, while on the other hand the Crown says that as to £33 of the larger sum there has been no

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

payment within the terms of the section of the Act, and he is only entitled to claim exemption on the balance or actual sum he paid in cash. No doubt, as the Attorney-General contended, it is impossible to look at the policy without seeing that the association held out as a special inducement the fact that if the assured so wished half of the nominal premium could in fact remain unpaid for a time, the unpaid part being debited against the assured and being treated as a first charge on the capital money. When the arrangement between Mr. Hunter and the association was made, Mr. Hunter elected to accept this offer and in fact only paid £33, but he gave a charge for that amount and he agreed to pay interest on it and gave his personal contract for its repayment. In my opinion the question is not affected because the money was borrowed from the same office with which the insurance was affected. If the case had been one where the second half of the premium and the interest was never to be paid or might never by the happening of the death of the assured before a certain date become payable, and was but a mere charge on the policy in favour of the association, the case might have been different. In my opinion the amount paid by the suppliant was £66 17s. 6d., and not £33 17s. 6d. by way of premium as alleged by the Crown. It follows, therefore, that the suppliant is entitled to claim exemption from the payment of income tax on the larger sum, and judgment for him for £3 6s. must accordingly be entered, with costs.

Solicitors, *Hunter* v. *Haynes; The Solicitor to Inland Revenue.*

K. B. Div. (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — April 16; May 3.

READ *v.* FRIENDLY SOCIETY OF OPERATIVE STONEMASONS AND OTHERS. (*a.*)

Action, Cause of — Contract, Inducing breach of — Justification—Bona fides.

The plaintiff was apprenticed by an indenture to W. & W. as a stonemason, and they employed him as a labourer. By one of certain rules of the trade union of which the plaintiff and the defendants were members, and which rules W. & W. were parties to, it was provided "That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The plaintiff was twenty-five years of age when employed by W. & W. The defendants threatened to withdraw the men employed by W. & W., those men being members of the trade union, if the plaintiff was taught the art of a stonemason, and in consequence there was a breach of the contract entered into between the plaintiff and W. & W. The plaintiff brought an action against the defendants for procuring such breach.

Held, on appeal from the county court judge, who gave judgment for the defendants, that the plaintiff would have a cause of action against the defendants unless they showed they were justified in interfering with his contractual rights; such justification for interference with the plaintiff's right must be an equal or superior right in themselves, and it would not be sufficient for them to show that they had acted on a wrong understanding of their rights or without malice, or bonâ fide, *or in the best interests of themselves.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Appeal from his Honour Judge Eardley Wilmot, sitting at the Ipswich County Court. The facts were thus stated in the written judgment read by Darling, J.:

In this case the plaintiff sued the defendants for wrongfully and maliciously procuring to be broken an indenture of apprenticeship dated the 1st of June, 1900, and made between the plaintiff of the one part, and Wigg & Wright, monumental masons, of the other part; and for unlawfully and maliciously conspiring together to procure the said indenture to be broken, and for unlawfully and maliciously conspiring together to molest and injure the plaintiff in his trade or calling, and for otherwise committing or procuring violations of the legal rights of the plaintiff. The plaintiff claimed damages and an injunction. The case was heard before a county court judge on the 22nd of January last, and the facts, so far as they are before us, appear to be these: By a deed of apprenticeship dated the 11th of August, 1900, the plaintiff was bound to Wigg & Wright for three years as an apprentice stonemason. He was employed and paid by them as a labourer, and was not learning the trade of a mason. All the men employed by Wigg & Wright were members of the trade union of which all the defendants are members. Wigg & Wright were parties to the rules of that trade union, and had signed them. Of those rules, No. 6 is as follows:

"That boys entering the trade shall not work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average."

The letter of the 20th of May, 1900, written by Wigg & Wright to the defendant Moss as secretary to the trade union, and his reply of the 22nd of May, sufficiently explain what was the action of the defendants as against Wigg & Wright when read together with defendants' answers to interrogatories 4 and 8. The letter of the 20th of May was in the following terms:—

"Dear Sir,—As it appears we have inadvertently taken an apprentice contrary to the rules of your society (for which we are very sorry) we should be glad to give an explanation of how it occurred, as we had no intention whatever of infringing the rules. We had taken an apprentice before on the same condition, with the exception of age, and note the rule says: 'And in no case to be more than sixteen years of age, except masons' sons and stepsons.' Now, this seems to us to entirely do away with limit of age providing they are masons' sons. What else can it mean? The fact seems to be this rule wants revising and made plainer, so that there could be no mistakes in future. When Mr. Read spoke to me about taking his son as an apprentice I told him we were not entitled to take another apprentice, but he said, 'Oh, yes, you can take him, being a mason's son.' Now, this, coming from a member of the society, we took it to be the meaning of the rule, and we never heard a word to the contrary. If we had we should certainly not have taken this one. Well, now he has been bound just a year. We don't know if we are legally bound to keep him, being over age, and we should not be at all sorry to get rid of him, although we should wish to behave honourably in the matter, and it seems to us the best way out of the difficulty would be to let him finish his time out, and we hope you will be able to view the matter in the same light, as we should be exceedingly sorry that there should be any unpleasantness between us and the society."

The letter was signed, "*Pro* Wigg & Wright, W. B. Wigg."

The reply, dated the 22nd of May, and signed by the secretary of the society, was as follows:

"Your letter of the 20th was laid before the members of my society on that date, and I am instructed to inform you that you have misunderstood the meaning of the rule. It admits of a mason's son learning the trade without being bound apprentice, but we cannot understand a man of twenty-five or twenty-six years of age claiming that right, nor an employer who would take him without first consulting us. Had you done so we should have expressed our intentions in the matter at once plainly. As the matter stands, we regret your firm has placed itself in a difficult position, but my members consider your action a direct infringement of the rules, and if the man in question starts working at the trade we are bound to protest against you for introducing an individual not of the trade, and in accordance with our general rule we have empowered our members working for your firm to take prompt action in the matter. We regret the thing has occurred, but we feel that the blame does not rest with us in any way."

The answers to interrogatories were as follows:

"4. (*a*) At a meeting held the 21st of May, 1900, it was reported to the meeting that there was a man working at Wigg & Wright's named Mr. Read, bringing a mallet and tools, stating that he was going to be an apprentice, but he was still working as a labourer, but if he should start at the bunker (it was noted on the minutes that) brother Turner had a right to report the same. (*b*) At an ordinary fortnightly meeting held the 13th of August, 1900, it was reported that Mr. Read had been made an apprentice, but had not started masonry. It was resolved that if he started work two hours' notice should be given to Wigg & Wright by members working there. (*c*) At an ordinary meeting held on the 20th of May, 1901, it was resolved that the secretary write to Wigg & Wright respecting L. Read entering the trade, his age being twenty-five years. (*d*) The fortnightly meeting held on the 29th of July, 1901, was specially summoned in consequence of J. Read writing his intention of visiting the meeting; resolutions were passed as follows: 'That J. Read be admitted to the lodge on his consenting to be duly read in as a member; that J. Read be allowed fifteen minutes to state his case of complaint *re* his son; that after hearing the explanations and arguments of brother Read this society does not see any reason to recede from the position taken up by the society in the letter dated the 24th of May sent to Wigg & Wright.'"

"8. The prompt action referred to in my letter of the 22nd of May, 1901, was that the masons in Messrs. Wigg & Wright's employ should give two hours' notice and leave Messrs. Wigg & Wright's employ if they thought fit."

The plaintiff was not taught the trade of a mason in consequence of the action taken by the defendants.

Henlé, for the plaintiff.—The county court judge was wrong. The defendants were not justified in interfering with the plaintiff's contractual right with Wigg & Wright: *Quinn* v. *Leathem*, *ante*, p. 139, [1901] A. C. 495; *Allen* v. *Flood*, 46 W. R. 259, [1898] A. C. 1. Even if there were a binding contract between the defendants and Wigg & Wright the defendants would not be entitled to insist on such contract being carried out to the detriment of the plaintiff: *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715; *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333; *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216.

He also cited *The Mayor, &c., of Bradford* v. *Pickles*, 44 W. R. 190, [1895] A. C. 587.

Chester Jones, for the defendants.—The defendants were entitled to insist upon the contract between themselves and Wigg & Wright being carried out, even though it should be to the detriment of the plaintiff. Where a person enters into contracts with different parties and such contracts turn out to be inconsistent with each other, either party may insist upon the fulfilment of his particular contract, and if in consequence there follows a breach of the other party's contract, such party has no right of action against the party whose conduct induced such breach.

Henlé replied.

Cur. adv. vult.

May 3.—DARLING, J. (having stated the facts, as above set out, read the following written judgment of himself and CHANNELL, J.).—The learned county court judge held that the facts as proved or admitted before him fell short of giving any ground of action against the defendants, that the defendants seemed to have acted *bonâ fide* in the best interests of the society of masons, and were not in any way actuated by improper motives, that the defendants gave a certain interpretation to rule 6 and acted upon it, and that though their interpretation may or may not have been correct, yet, as it was honestly held, he did not consider they had acted improperly in their method of enforcing it. It appears to me that this view is wrong, and that there should be a new trial. To my mind the case presents itself thus. The plaintiff had entered into a contract which entitled him to demand of Wigg & Wright that they should teach him the trade of a stonemason. That was his contractual right. To interfere with that right may give a cause of action against him who does so. For this proposition there is much unquestionable authority, but it is enough to cite these words from the judgment of Lord Macnaghten, in *Quinn* v. *Leathem*, 50 W. R. 139, [1901] A. C. 495, at p. 510: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." It was argued before us on behalf of the defendants that they had here such a justification because they had themselves entered into a contract with Wigg & Wright, the terms of which were inconsistent with the contract between Wigg & Wright and the plaintiff. It may well be that a person or many many persons, acting in concert, would have a right to demand the fulfilment of a concert entered into with him or them, even if such fulfilment involved him who performed it in breaking a contract made by him with another person. Many examples might be put. For instance, a man who had affected to sell the same article to two separate purchasers, could not possibly perform one contract without breaking the other, if both insisted upon their rights, yet it would not render the purchaser who insisted on his contractural rights liable at the suit of the other purchaser. But it may well be that the contract here alleged by the defendants is one which, if it were proved, would be by reason of its being in restraint of trade or otherwise illegal, incapable of being enforced, and, in that case, I think that to seek to hold Wigg & Wright to it could not be held "a sufficient justification for the interference with the contractual right of anyone—*i.e.*, in this case, of the plaintiff. Whether there was here a contract between the defendants and Wigg & Wright I do not think sufficiently appears upon the evidence. If in form there were one, it might still be as illegal as I have indicated, and to decide this it would be necessary to consider how far it satisfied the words of Erle, C.J.: "Every person has a right under the law as betwe

himself and his fellow subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." These sentences are expressly adopted by Lord Brampton as part of his judgment in *Quinn* v. *Leathem*. It may be that the agreement alleged to exist between Wigg and Wright and the defendant is one which, unlawful otherwise, is legalized by the Trade Union Act, 1871; but that can only appear when it is ascertained exactly what are the terms of that contract and who were the parties to it. Moreover, when all this is ascertained, it may possibly appear that the defendants combined together to do things hurtful to the plaintiff and not necessary to the mere enforcement of their own rights, contractual or otherwise. As to this, the evidence before the county court judge is, I think, not sufficient to enable us to decide. On the new trial the court should have regard to all these considerations. To resume: I think the plaintiff has a cause of action against the defendants unless the court is satisfied that when they interfered with the contractual rights of the plaintiff the defendants had a "sufficient justification for their interference," to use Lord Macnaghten's words. This sufficient justification they may have had and they may prove it; but the facts found by the county court judge and relied on by him as enough do not amount to one, for it is not a justification that "they acted *bonâ fide* in the best interest of the society of masons"—*i.e.*, in their own interest; nor is it enough that "they were not actuated by improper motives." I think their sufficient justification for interference with the plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man of whose contract he has procured the breach on the ground that he acted on a wrong understanding of his own rights or without malice, or *bonâ fide*, or in the best interests of himself, nor even that he acted as an altruist seeking only the good of another and careless of his own advantage.

Lord ALVERSTONE, L.C.J., read the following written judgment: I am clearly of opinion that the judgment of the learned county court judge in this case is not satisfactory, but the question upon which I feel considerable difficulty is whether or not the facts before us enable us finally to determine the question which is raised in the action. The action was brought against the Friendly Society of Operative Stonemasons for maliciously procuring and maliciously conspiring to be broken an indenture of apprenticeship made the 1st of June, 1900, between the plaintiff and the firm of Wigg & Wright, stonemasons, of Ipswich. The facts as I understand them to be agreed and in reality stated by Mr. Chester Jones, who was counsel for the defendants, are as follows: That Read, the plaintiff, being a man of twenty-five years of age, and desirous of improving his capacity for earning wages, entered into the agreement of the 1st of June with Wigg & Wright whereby he covenanted to serve them for a period of three years at the wages of 15s. a week, which were ordinary labourers' wages, and they in their turn covenanted to the best of their skill and ability to teach and instruct him in the trade or business of stone or marble mason, and all things incidental thereto. Wigg & Wright and the men in their employ were members of the defendant society.

Rule 6 of the working rules was in the following terms: [His lordship here read the rule.] The plaintiff entered into Wigg & Wright's service pursuant to the terms of the indenture of apprenticeship, working for them at the specified rate of wages, and, but for the action of the defendants, Wigg & Wright, would have carried out their part of the contract, and would have instructed him in accordance with the undertaking contained in the indenture.

It was stated at the time that the defendants wrote the letters, and took the action to which I am about to refer, Wigg & Wright were employing four masons and had one apprentice besides the plaintiff. In August, 1900, the defendant society resolved that if the plaintiff started work as a mason, or, in other words, if Wigg & Wright commenced to instruct him in accordance with the terms of the indenture, one of their employees was to report the fact to the society within two hours. In consequence of the action of the defendants Wigg & Wright did not employ the plaintiff as a stonemason or instruct him in his trade, and upon the plaintiff remonstrating and asking that they would fulfil their agreement the two letters of the 20th and 22nd of May, 1901, passed, the material part of which is that, in the letter of the 22nd of May, the secretary of the defendant society told Wigg & Wright that they protested against their introducing individuals not in the trade, and had empowered their members working for the firm of Wigg & Wright to take prompt action in the matter. It was agreed that "prompt action" meant that the defendants would authorize their members to give two hours' notice to quit Wigg & Wright's service. It was further stated that the plaintiff was not being taught his trade owing to the action of the defendants. The law in such a case seems to me to be clearly established. It is sufficient to quote the language of Lord Macnaghten already cited by my brother Darling. This was the same principle that was enunciated by Erle, C.J., in *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216, at p. 232, "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong," and expressed by Lord Watson in *Allen* v. *Flood*, 46 W. R. 259, [1898] A. C. 1, in these words: "A person who procures the act of another can be made legally responsible for its consequences . . . if he knowingly, for his own ends, induces that other person to commit an actionable wrong." In my opinion the evidence establishes that in this case the defendants, instead of taking action against Wigg & Wright for a supposed breach by them of the contract, if any, embodied in the rules of the association did for their own ends procure and induce Wigg & Wright to commit an actionable wrong—that is to say, to break the terms of a special contract made with the plaintiff. I have some doubt whether the arrangement embodied in the working rules is protected by the Trade Union Act, 1871, but it is possible that the terms of section 3 of that Act are sufficient to prevent us from holding that if the rule amounts to an agreement between Wigg & Wright and the defendants, it is void or voidable. In my opinion the first part of the rule down to the words "sons and stepsons" has no application to the facts of this case. This was the case of a contract made by a man of full age in his own right, and not by or on behalf of a boy. The provisions as to one apprentice to every four masons creates some difficulty, but I think that in that case—assuming the arrangement embodied in the rule to be binding on Wigg & Wright—the defendants had no right to bring pressure to bear or procure Wigg & Wright to break their contract with the plaintiff. Whether they could have taken any

other action against Wigg & Wright is a question not before us. There was no evidence to show that the union or any of its members would in any way be injured by the plaintiff being taught his trade, or, in other words, by Wigg & Wright fulfilling their contract with him. The defendants' action was initiated at the lodge meeting of the 13th of August, 1900. The further action on the 13th of May, 1901, was by the secretary of the defendant society, and the action threatened to be taken by Wigg & Wright's men was to be empowered by the defendant society. In my opinion these facts negative any suggestion that the action was taken on behalf of individuals to protect their own interest. For these reasons I think the county court judge ought to have entered judgment for the plaintiff, but as my brothers are not prepared to go so far, there can only be judgment for a new trial.

Judgment accordingly.

Solicitors for plaintiff, *Leighton & Aldous*, Ipswich.

Solicitors for defendants, *Shaen, Roscoe, & Co.*

Prob. Div. & Adm. Div. Admiralty. } Feb. 28.

"THE AUGUSTE LEGEMBRE." (*a.*)

Admiralty—Salvage—Lifeboat crew—Assistance taken by salvors against consent of master of salved vessel.

Where it was the duty of a tug to tow a lifeboat out to vessels in distress, and the tug assisted in salving such a vessel with the lifeboat made fast to the distressed vessel,

The Court held that the crew of the lifeboat were entitled to be treated in regard to the salvage award as though they formed part of the crew of the tug.

Action.

The plaintiffs were the owners, masters, and crews of the steam tugs *Victor* and *Dragon*, of the life steamtug *Helen Peele*, and the coxswain and crew of the lifeboat *Edmund Harvey*.

The defendants were the owners of the steamship *Auguste Legembre*, a French vessel belonging to the port of Algiers.

It appeared that on the 12th of December, 1901, the *Auguste Legembre*, a vessel of 2,603 tons gross register, and of the value of £11,400, was on a voyage from Barrow-in-Furness to Port Talbot, Glamorgan, in ballast.

On that day she met with very severe weather while off the coast of Cardigan Bay, which resulted in a Manilla warp being washed overboard, which fouled her propellor so that her engines could not be worked. She then drifted to the southward before the force of the gale and apparently touched upon the rocks known as the Hats and Barrels, damaging herself so that in No. 2 hold she made water until it was level with the sea. Some water also appeared to have found its way into the engine-room, the bulkheads being only more or less water tight. In this condition the vessel drifted until she was brought up off the Cornish coast about fifteen miles to the westward of Trevose Head, where she lay throughout the night of the 13th holding to both anchors throughout the 14th in weather which went up to force 10, and at one time to force 11. Although it appeared that no distress signals were exhibited, news of the ship reached the several plaintiffs by telegram, and the *Helen Peele* (a tug boat belonging to the National Lifeboat Institution, of the value of £10,500) went to her assistance, towing the lifeboat *Edmund Harvey*, which came from Padstow, and which also belonged to the institution, and was of the value of £1,500. The lifeboat was manned by a crew of eleven hands, and she reached the ship on the evening of the 14th and stood by her till morning. The tugs *Victor* and *Dragon*, of the value of £7,000 and £6,000 respectively, also proceeded from Falmouth on the 14th, but the weather was so bad that they had to put back into Mount's Bay and they did not therefore reach the *Auguste Legembre* until the 15th. However, with the assistance of the three tugs the vessel was brought to Cardiff Roads in safety on the 16th, and it was in respect of these services the claim for salvage was made.

Aspinall, K.C., and *Stokes*, for the plaintiffs.

Laing, K.C., and *Dawson Miller*, for the defendants, denied that any salvage services had been rendered by the tug *Dragon* or the lifeboat *Edmund Harvey*, and alleged that the *Dragon* had done what she had done as the employee of the *Victor* and against the will of master of the *Auguste Legembre*, and therefore was not entitled to claim salvage services. Further, that the crew of the lifeboat was not employed as salvors at all, but were towed in their lifeboat astern of the salved vessel.

BARNES, J., in giving judgment, said that the property was undoubtedly placed in safety by the efforts of the salvors. The main question was the danger from which the vessel was rescued, and the risks run in effecting that rescue. So far as the weather was concerned there was no doubt that before any actual towage was rendered the wind had abated considerably and the weather was moderate, though there was probably considerable sea still running but going down as the wind fell. He thought it was remarkable that the vessel had ridden out the severe weather and had not dragged her anchors, but notwithstanding that she could not get away from that position, and it was therefore absolutely necessary that she should have towage assistance. The tugs did that satisfactorily, and a reasonable and proper award must be given for that service. But the real question was whether anything ought to be awarded to the men in the lifeboat *Edmund Harvey*, and to *The Dragon*. With regard to *The Helen Peele*, he did not think that the case could be treated exactly as if the eleven men in her owned her. It was said that these men ought to be treated in the same way as an ordinary lifeboat service is treated—namely, to let them take the salvage and run the risk of paying for any damages to the tug or lifeboat. But although it was so to be treated on the present occasion, it did not appear to the court to be very applicable to the case of so large and valuable a tug as the *Helen Peele*. There had been a conflict of evidence as to what had taken place when the *Helen Peele* and the *Edmund Harvey* arrived, and as to what took place on the following morning when they were making fast to the *Auguste Legembre*. The conflict as to what did take place was very possibly due to the fact that the master of the *Auguste Legembre* was a Frenchman and spoke English only slightly. But it seemed to the court that what the master really meant on the evening of the 14th of December was that the question of towage should be settled on the following morning, and when the morning came *The Edmund Harvey* was made fast to *The Auguste Legembre* because she could not remain astern of the tug while the tug was towing the steamer. But the court thought that the lifeboat men were entitled to be considered in the salvage award on account of the peculiar circum-

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

stances under which they had to render their services. The tug, it was said, would not be allowed to go out without the lifeboat, and was built for that express service, the rule being that she had to tow the lifeboat out. Practically, therefore, the lifeboat men had to keep with her, and she had to keep with the lifeboat. The court therefore thought that the lifeboat men ought to be treated as though they formed part of the crew of the tug, and were to be treated as instrumental in salving the property. With regard to *The Dragon* the question was one partly of law and partly of nautical skill. It was a legal question in the sense that although the tug's services were not directly accepted, but in fact were refused by the master of *The Auguste Legembre*, yet *The Dragon* did, at the request of *The Victor*, make fast ahead because the master of *The Victor* shouted through the megaphone to the master of *The Auguste Legembre* that he would not take him in tow without a third tug, and no intelligible answer appeared to have been received and accordingly she did in fact render a towage service of a valuable character. Now if those services were rendered in such circumstances that they ought to have been accepted then an award would be made of some amount on the well-known principle. The Elder Brethren had come to the conclusion that under the circumstances it was a reasonable thing for *The Victor* to take this third tug ahead, although in fact it did not turn out to be necessary, and *The Dragon* therefore ought not to be excluded, although the award should be of a moderate character. The award, therefore, would be £500 to *The Victor*, £325 to *The Helen Peele's* men, £100 to *The Dragon*, £75 to the lifeboat men.

Solicitors for the plaintiffs, *Thomas Cooper & Co.*, for *William Jenkins*, Falmouth.

Solicitors for the defendants, *Botterell & Roche*.

House of Lords.

From C. A. (England). Feb. 6.

LEIGH AND OTHERS *v.* TAYLOR AND OTHERS. (*a.*)

Fixtures—Tenant for life and remainderman—Tapestry—Attachment to the structure.

Valuable tapestries belonging to the tenant for life and by her fixed to the walls of the mansion-house, but removable without damage to the structure, do not become part of the freehold, but remain the property of the tenant for life.

Decision of the Court of Appeal (In re De Falbe, Ward *v.* Taylor, 49 *W. R.* 455, [1901] 1 *Ch.* 523) *affirmed.*

Appeal from the Court of Appeal (Rigby, Vaughan Williams, and Stirling, L.JJ., 49 W. R. 455, [1901] 1 Ch. 523). The question in dispute was between the executors of Madame de Falbe the tenant for life and the remainderman under her former husband's will as to the ownership of certain valuable tapestries.

Madame de Falbe being possessed of these tapestries, had affixed them to the walls of the drawing-room of the house of which she was tenant for life under the above-mentioned will. They were fixed in the following manner: Small slips of wood were fixed in the wood on the walls by means of nails and screws, and over these wooden strips canvas was stretched and nailed, and the tapestries were fastened to these strips and over the canvas by very small tacks, which did not penetrate the strips, white and gold mouldings were fixed round the strips of wood, and the whole formed part of the general decoration of the room. They had been removed with but very slight damage to the walls.

Byrne, J., came to the conclusion that they had been annexed to the mansion-house, and therefore passed with it to the persons interested in the settled estates. The Court of Appeal, however, held that the affixing was only for the better enjoyment of the tapestry, and consequently that the tenant for life was entitled.

Asquith, K.C., and *Levett, K.C.* (*T. T. Methold* with them), for the appellants.

Norton, K.C., and *T. L. Wilkinson*, for the respondents claiming under Madame de Falbe's will, were not heard.

H. B. Howard, for Madame de Falbe's executor.

Earl of HALSBURY, L.C.—In this case we have had a long and learned argument by the counsel who have appeared for the appellants. I am not certain that I quite understand the conflict between the two propositions, or that I quite understand on what principle one is supposed to decide these cases apart from the facts of each particular case.

One principle, I think, has been established from the earliest period of the law down to the present time—namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear—namely, that where it is something which, although it may be attached in some form or another (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor.

We have heard something about a suggested alteration of the law; but those two principles appear to have been established from the earliest times, and they are principles still in force. But the moment one comes to deal with the facts of each particular case, I quite agree that something has changed very much. I suspect that it is not the law or any principle of law, but it is a change in the mode of life, the degree in which certain things have seemed susceptible of being put up as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty. If that is true, it is manifest that you can lay down no rule which will in itself solve the question; you must apply yourself to the facts of each particular case; and I am content here to apply myself to the facts of the case. Here are tapestries which, it is admitted, are worth a great deal of money. I put the case: Suppose this had been a tenant from year to year, and she put up these things, is it conceivable that a person would for the purpose of a tenancy from year to year put up these things exactly in this way if thereby they made a present of £7,000 to the landlord? Counsel for the appellants would not acquiesce in that; but in logic I am unable to sever the two sets of facts which I suggest. It is all very well to say that there is a difference between the cases of an heir and an execu-

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

tor on the one hand, and a landlord and a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation, and you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things in the way in which Madame de Falbe did as tenant for life to the remainderman.

We come, then, in my view, to the determination of the question upon the principles which I have pointed out, applying them to the particular facts of this case. What are they? Here we have objects of ornamentation of very great value. Undoubtedly their only function in life, if it may be so called, is the decoration of a room. Suppose the person had intended to remove them the next month or the next year or what not, I do not know, notwithstanding the ingenious effort that has been made by counsel for the appellants, in what other way they could have been fastened than that in which they were.

We have seen the hard matchboard to which they were fastened in the first instance; then canvas was stretched on it, and the decoration of the wall as it originally stood was perfectly preserved except to the extent to which the nails were driven into the wall; they were necessarily driven into the wall, because otherwise the tapestry could not have been stretched out firm, as it was. I do not know any other mode by which the large one, for example, fourteen feet long, could have been placed there as it was. One has immediately before one's mind's eyes cases of pictures of another sort; and after all, although this tapestry is very valuable, as I understand, and very beautiful, it is only a picture made in a particular form—it is a picture, whether woven or worked or what not, made for the purpose of ornamentation. When one looks at it and sees what it is, I should have thought, if ever there was an extreme case in which it would have been impossible to suppose that the person intended to dedicate it to the house, it was the case of these tapestries, which can be, and in fact have been, removed without anything but the most trifling disturbance of the material of the wall.

Under those circumstances I can entertain no doubt, now that we have had the whole case before us, that there is nothing which points to any intention to dedicate these tapestries to the house. There is nothing in the nature of the attachment which is necessarily permanent. A number of words have been used, such as "only very slightly attached," and "not permanently attached." They really often assume the very question in debate. I do not think that if anybody looked at the piece of boarding on which the canvas was stretched and on which this tapestry went—I can hardly imagine anything more slight as a matter of fact in this particular case than that attachment—he could entertain any doubt on the matter; I do not know how a piece of tapestry of that extent, fourteen feet long, stretched against a wall, could be more slightly attached than this was. Under those circumstances it appears to me that the thing is so easily susceptible of being removed (and it has in fact been removed, without any damage or material injury to the structure of the wall) that in my own mind, so far as it is dependent upon a question of fact in this case, I am of opinion that it never was intended to form part of the structure of this house; and that, after all, is what the meaning of "the benefit of the inheritance" comes to, though expressed in different words. It never was intended to remain a part of the house; the contrary is evident from the very nature of the attachment, the extent and degree of which was as slight as the nature of the thing attached would admit of. Therefore I come to the conclusion that this thing, put up for ornamentation and for the enjoyment of the person while occupying the house, is not under such circumstances as these part of the house. That is the problem one has to solve in each of these cases. If it is not part of the house, it falls under the rule now laid down for some centuries, that it is a sort of ornamental fixture, and can be removed by whoever has the right to the chattel—whose it was when it was originally put up.

For these reasons I am of opinion that this appeal must be dismissed with costs.

I only wish to say that I do not want to add to the confusion which it is suggested has been caused by differences of opinion among the learned judges below. My own view is that, going back for some centuries, the real differences of opinion, which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to-day as it was in the early times; and the broad principle is that, unless it becomes part of the house in any intelligible sense, it is not a thing which passes to the heir. I am of opinion that this tapestry has not become part of the house, and was never intended in any way to become part of the house; and I am therefore of opinion that this appeal ought to be dismissed with costs, and I move your lordships accordingly.

Lord MACNAGHTEN.—I am quite of the same opinion.

It seems to me that the only question is, Have these tapestries become part of the freehold? I think these tapestries were purely matter of ornament, and not part of the freehold at all. Counsel for the appellants has spoken of the courts changing the law. I do not think that the law has been changed in the very least. It is said that in some cases it has been relaxed. I do not think it has been altered. What have altered are the habits and customs of the community. The increase of luxury has made many things matters of ornament which were not so used in former times. I think the only question is, Was this part of the freehold? and I do not think anybody can say it was so. I think the judgment in the Court of Appeal covers the whole ground.

Lord SHAND.—I am also of opinion that the decision of the Court of Appeal ought to be affirmed.

It may be true, as has been observed by the Lord Chancellor and by Lord Macnaghten, that there has been no change of the law; but I rather think that in the progress of time the law has been developed in the direction of holding what would at one time have been held to be parts of a building to be now temporary fixtures only, removable by the person who attached them to the building or his personal representative, and I think that this later view should be maintained.

It appears to me to be a sound principle, and to be the result of the later cases (whatever may have been the older law), that where a tenant for a term or a tenant for life has purchased tapestries or pictures and affixed them to the walls for the purposes of ornamentation, he is entitled to remove them, and his

executor has the same right. That principle, as it seems to me, is decisive in this case.

There has been an attempt to show that there was here such a degree or character of annexation as to make these tapestries permanent additions to the house. I doubt whether there could have been such annexation by a tenant only as could have had this effect where the purpose of the annexation is ornamental. However firmly a tenant may put up such ornaments as pictures or tapestries upon the walls, I confess that I think he is entitled to remove them, if during his tenancy he desires to do so, in order, it may be, to substitute others in their place, or to take them away altogether; and the same would be true at the end of his tenancy, at least where they are not built in so as to be really parts of the permanent building. His position is that of a temporary occupant having put up things for temporary purposes. He will be bound to take care that no damage occurs to the walls which he does not put right; but that is a different matter from an obligation to leave chattels which have not been built in as additions to the house, and remain so when his tenancy ends.

Here, in fact, I think there was no permanent attachment, and I need not repeat what has been said by the Lord Chancellor as to the character of the attachments.

I entirely agree with the judgment of the Court of Appeal, and with the grounds upon which the learned judges unanimously proceeded in giving their judgment.

Lord BRAMPTON.—I am of the same opinion. I entirely agree with the exhaustive judgments in the Court of Appeal, and I agree also with all the observations which the Lord Chancellor has made with respect to this case.

I confess I see no difficulty about the case myself, and I cannot see in the least how it can be said that these tapestries could ever have formed a portion of the house. It is not as if they had been pictures painted upon the walls of the house as a fresco that could not have been removed. There I can thoroughly understand that it could not be removed, because you could not remove it without removing part of the wall itself—in which case you would probably destroy the fresco and injure the house. But there is no sense in which these tapestries can be said to have been part of the house, nor do I see how any structural injury to the house could really be caused by their removal.

Lord ROBERTSON.—I also concur. My view is completely represented by the judgment of Stirling, L.J.

Lord LINDLEY.—I am entirely of the same opinion. I cannot bring myself to believe that Madame de Falbe when she put up these tapestries made a present of £7,000 to the remainderman. The tapestry remained a chattel from first to last.

Solicitors, *Payne, Shaw, Mackenzie, & Lake; Hadden, Woodward, & McLeod; Rowcliffe, Rawle, & Co.*

Court of Appeal.

From K. B. Div. (Mathew and Cozens-Hardy, L.JJ.) — July 9.

LEVI *v.* ANGLO-CONTINENTAL GOLD REEFS OF RHODESIA (LIMITED).

TAYLOR, *Third Party.* (*a.*)

Practice—Parties—Third party—Counterclaim—Plaintiff serving third-party notice—Jurisdiction—Ord. 16, *r.* 48.

Where a defendant in an action counterclaims against the plaintiff, the latter can serve a third-party notice, under ord. 16, *r.* 48, *on a person against whom he claims contribution or indemnity in respect of the defendant's counterclaim.*

Appeal from an order of Ridley, J., at chambers.

The action was brought to recover £100 for fees alleged to be due to the plaintiff as a director of the defendant company.

The defendants, in addition to a defence on the merits, counterclaimed for £437 10s., alleged to be due for calls upon 500 £1 shares in the defendant company standing in the plaintiff's name. The plaintiff thereupon served a third-party notice on one Taylor, under ord. 16, r. 48, upon the ground that Taylor had agreed to indemnify him against all liability for calls upon the shares. Taylor entered an appearance, and upon a summons for directions the master held that a plaintiff against whom a counterclaim was delivered had no power to serve a third-party notice claiming indemnity in respect thereof, and he refused to give directions.

Ridley, J., on appeal, held that there was jurisdiction in such a case to serve a third-party notice, and he reversed the order of the master.

The third party appealed.

Llewelyn Davies and *Denis O'Conor*, for the third party.—Ord. 16, rr. 48-55, which authorize and regulate third-party procedure, only allow a defendant in the strict sense of the term to bring in a third party. Those rules speak of plaintiff and defendant, and "plaintiff" is defined by section 100 of the Judicature Act, 1873, as including "every person asking any relief (otherwise than by way of counterclaim as a defendant)." Therefore a defendant who counterclaims is not a "plaintiff" within the meaning of the rules. It follows that a plaintiff, against whom a counterclaim is delivered, cannot be a "defendant" within the meaning of ord. 16, r. 48. The procedure laid down by the rules is not applicable to a plaintiff against whom the defendant counterclaims. [They referred to *Gibbs & Co.* v. *Neville & Co.*, 48 W. R. 532, [1900] 2 Q B. 181; *Eyre* v. *Moreing*. [1884] W. N. 58.] Secondly, if there was jurisdiction, the court ought not in the exercise of its discretion to allow the third party to be brought in. If the plaintiff succeeds on the claim and the defendants succeed on the counterclaim, the result will be that the defendants will recover judgment against the plaintiff for the difference between £437 10s. and £100—viz., £337 10s., and the third party can only be made liable to pay that sum to the plaintiff. Another action would have to be brought to recover the balance of £100. There is, therefore, no advantage in complicating the case by allowing the claim against the third party to be litigated in this action.

C. H. Swanton, for the plaintiff, was not called upon.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

MATHEW, L.J.—In my opinion, this appeal must be dismissed. The first question raised is a question of jurisdiction. It is contended that, though a defendant has been given by the rules the right to counterclaim against the plaintiff, the latter, against whom the counterclaim is delivered, is debarred from bringing in a third party from whom he claims contribution or indemnity in respect of the defendant's claim. I can see no reason why a plaintiff, who has been made a defendant to a counterclaim, should be embarrassed in this way. Counterclaims were established for the purpose of disposing in one action of all disputes between the parties. A counterclaim is treated throughout the rules as in effect a cross-action. Ord. 21, r. 11, which is an important rule giving a defendant a right to set up a counterclaim raising questions between himself and the plaintiff along with other persons, directs him to add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action. That rule contemplates a counterclaim as being similar to a cross-action. Further, Lord Esher, M.R., in *Stumore* v. *Campbell & Co.*, 40 W. R. 101, [1892] 1 Q. B. 314; and Bowen, L.J., in *Amon* v. *Bobbett*, 37 W. R. 329, 22 Q. B. D. 543, were of opinion that a counterclaim should be treated as an independent action. For myself, I can see no difficulty in allowing a plaintiff to bring in a third party to a counterclaim by the defendant. It is said that it has never been done. I quite agree that no authority has been cited to us in which the question has been even discussed. I can hardly doubt, however, that the question must have arisen in some case before this, and probably it has not occurred to anyone to take the point that a plaintiff, against whom a counterclaim has been launched, cannot bring in a third party from whom he claims contribution or indemnity. I am therefore of opinion that there is jurisdiction to allow the third party to be served with notice. There remains the question of discretion. I can quite see that the master might in a particular case consider it so embarrassing to the plaintiff, whether he be the plaintiff in the action or the defendant making a counterclaim, to allow the other party against whom the claim is brought to bring in a third party and to have the rights as between these two latter parties litigated in the action, that he would refuse in the exercise of his discretion to sanction it. In the present case I see no reason why all the questions raised should not be decided in this action. It is said that the possible effect may be that the judge at the trial will only be able to give judgment against the third party for £337, and that therefore the claim against the third party will have to be split up and a second action brought against him to recover the £100. However that may be technically, it would be met, as was pointed out by Cozens-Hardy, L.J., during the argument, by the declaration in the judgment that the defendants were entitled to recover £437 on their counterclaim against the plaintiff, if that sum were found to be due, and the third party would be bound by that declaration. The suggested difficulty upon that ground therefore came to nothing. In my opinion the order of the learned judge was right, and the appeal must be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. I need not stay to consider whether a counterclaim is for all purposes a cross-action, because the present case, in my opinion, clearly comes within ord. 16, r. 48. The defendants delivered a counterclaim against the plaintiff claiming a large sum for calls. So far as that counterclaim is concerned the defendants are the actors in it and are therefore in the position of plaintiffs in regard to it. The plaintiff alleges that he holds an indemnity from Taylor against a liability for those calls, and he has accordingly served him with a third-party notice. I cannot imagine a case more within the words and spirit of the rule, nor can I imagine one more fitting for the exercise of the discretion in favour of allowing the third party to be brought in.

Appeal dismissed.

Solicitor for the plaintiff, *A. E. Timbrell.*

Solicitors for the third party, *Spyer & Sons.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 25.

ABRAHAMS v. BULLOCK. (a.)

Master and servant—Negligence of servant—Liability of master—Jobmaster—Hire of carriage and driver for use of jeweller's traveller—Obligation to take care of carriage during temporary absence of traveller—Obligation to take care of contents of carriage—Liability of jobmaster for loss of jewellery by theft.

The plaintiff, a wholesale jeweller, entered into a contract with the defendant, a jobmaster, for the hire of a brougham and driver for the use of the plaintiff's traveller, and the brougham was fitted up for the purpose of such use. The traveller having gone into an hotel to get his lunch leaving the brougham in the street, the driver also went away for a similar purpose, and in their absence a quantity of the plaintiff's jewellery was stolen from the brougham. In an action to recover the value of the jewellery,

Held, that the defendant was liable, because there was an obligation on him to provide a driver who would take care of the contents of the brougham during intervals when the traveller would necessarily be absent.

Judgment of Ridley, J. (49 *W. R.* 653), *reversed.*

Appeal from the judgment of Ridley, J., at the trial of an action without a jury, reported 49 W. R. 653.

The action was brought by a manufacturer of jewellery against a jobmaster to recover £460, an agreed sum, as the value of certain articles of jewellery lost owing to the alleged negligence of the defendant's servant.

On the 21st of June, 1898, the defendant wrote a letter to the plaintiff to the following effect: "I shall be pleased to supply you with same brougham as you are having at £3 for the five days' week, payable monthly. Holidays or days it is not required to be allowed for. You can choose the brougham yourself, and I will keep the same coachman (Shed), paying him 18s. weekly for five days, and will try and give him work the other two days with extra pay."

On the 28th of June the plaintiff's traveller, on behalf of the plaintiff, wrote to the defendant as follows: "In accordance with your favour of the 21st inst., please start the brougham on Monday next." This letter also stated that the plaintiff had seen a brougham at Messrs. Alford's which he would like to have fitted up for the purpose of taking out goods. The brougham in question was fitted up, and was regularly used by the plaintiff's traveller. After

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

some time Shed ceased to drive the brougham and his place was taken by a man named Mills, who continued to drive down to the 24th of October, 1900. On that day the traveller in the course of his rounds left the brougham outside the Thomas à Becket Hotel, in the Old Kent-road, and went into the hotel to get his lunch, locking the door and taking the key with him. The driver also left the brougham standing outside the hotel, and went into the adjoining premises to get his dinner. While he was at dinner the brougham was driven away, and the contents—viz., the articles of jewellery the value of which was sought to be recovered in the action—were stolen.

There was a conflict of evidence on two questions—first, whether the defendant had, before the letter of the 21st of June, stipulated that he would not take any responsibility; and, secondly, whether the plaintiff's traveller knew that the driver was in the habit of leaving the brougham unattended when he went to get his dinner.

Ridley, J., was of opinion that, although the loss was due to the negligence of the driver in leaving the brougham unattended, yet, inasmuch as under the contract the defendant did not accept the duty of taking care of the goods, he was not liable for the loss. He accordingly gave judgment for the defendant.

The plaintiff appealed.

C. A. Russell, K.C., and *Sims Williams*, for the plaintiff.

Dickens, K.C., and *Schwabe*, for the defendant.

The following cases were cited: *In re United Service Co., Johnston's Claim*, 19 W. R. 457, L. R. 6 Ch. App. 212; and *Cobb* v. *Great Western Railway Co.*, 41 W. R. 275, [1893] 1 Q. B. 459.

COLLINS, M.R.—I think that this appeal must be allowed. The facts of the case appear to me to be simple. The plaintiff is a manufacturer of jewellery, and the defendant is a jobmaster, and a contract was entered into between them for the hire of a brougham. The terms of the contract are contained in a letter from the defendant to the plaintiff dated the 21st of June and a letter in answer dated the 28th of June. From those letters it appears that the intention of the parties was that a particular brougham was to be supplied by the defendant for the purpose of being used by the plaintiff's traveller, and that the defendant should also provide a driver. It seems to me to be clear that the contract was made with reference to well-known circumstances, and that structural alterations were to be made in the brougham for the purpose of fitting it up in such a manner as would render it more suitable for being used in a well-understood way. I think there was an obligation on the defendant to furnish a brougham chosen by the plaintiff himself which should be reasonably fit for the purpose of being used in that well-understood way, and to see that it was properly fitted up and adapted for the work of the person who was to use it, and a further obligation to furnish a driver who should use ordinary care in driving the brougham, and in whose custody the brougham should remain. It must be taken that the defendant knew that the plaintiff's traveller would not be in the brougham during the whole of his rounds, but would necessarily have to leave it at intervals, and I think that by inference an obligation was cast on the defendant to see that the brougham was taken care of during the intervals when the traveller would be obliged to leave it. Ridley, J., however, held that the relation between the parties did not involve any right in the plaintiff to ordinary care on the part of the driver to guard the contents of the brougham. I cannot agree with that; I think there was an obligation on the defendant to supply a driver who should use ordinary care both in driving the brougham and in safeguarding its contents during the intervals I have mentioned. There seems to me to be no ground for suggesting that the traveller was the only person who was responsible to the plaintiff for the safety of the jewellery, and I cannot agree with the learned judge in thinking that the legal position of the traveller negatived any liability on the part of the driver's master. It was argued that the loss was to be attributed to contributory negligence on the part of the traveller, and in support of this it was said that the traveller had often seen the driver leave the brougham and had allowed him to do so. But the learned judge in his judgment negatived this; for he said that, though the traveller did not know that the driver was in the habit of leaving the brougham unattended, he ought to have known it. The case comes back to this, whether there was a contract involving an obligation on the defendant to provide a driver who should use ordinary care in safeguarding the contents of the brougham during the traveller's absence. I am of opinion that there was, and it is clear that that obligation has not been performed. With regard to the contention that a new element has been introduced—viz., the theft—which makes a break in the chain of causality, I think that the loss in this case was a direct consequence of one of the things which must be taken to have been contemplated by the parties—viz., the failure of the obligation to prevent intrusion.

The appeal must therefore be allowed, and judgment must be entered for the plaintiff.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors, *Hudson, Matthews, & Co.; J. E. Waters.*

From K. B. Div.
(Vaughan Williams, Romer, and Mathew, L.JJ.) } May 13.

In re AN ARBITRATION BETWEEN THE BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891) (LIMITED) AND THE PONTYPRIDD WATERWORKS CO. (*a*.)

Lands Clauses Act—Taking lands—Compensation—Coal mine—Notice to treat—Subsequent rise in price of coal—Basis of assessment.

Where a notice to treat has been given under the Lands Clauses Act, 1845, *for the assessment of compensation payable in respect of certain seams of coal which a waterworks company requires the coal owner to leave unworked, the arbitrator is not entitled to take into consideration, in assessing the compensation, a rise in the value of coal which has taken place subsequently to the date of the notice to treat.*

Judgment of the Divisional Court (ante, *p.* 135, [1901] 2 *K. B.* 798) *reversed.*

Appeal by the defendants from the judgment of the Divisional Court (Ridley and Phillimore, JJ.), reported *ante*, p. 135, [1901] 2 K. B. 798.

The facts are fully stated in the report below.

B. Francis Williams, K.C., and *Trevor Lewis*, for the waterworks company.—The price to be paid for the coal must be taken as at the date of the notice to

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

treat. The then existing prospects as to the future price of coal may be taken into account, but not knowledge of the rise in value subsequent to that time. The decision was therefore wrong.

Abel Thomas, K.C., and *W. D. Benson*, for the colliery company.—The arbitrator has to find the loss to the colliery company by reason of being prevented from working the coal proposed to be acquired. That coal could not have been worked out in less than from three and a-half to five years. The value of the coal has to be ascertained, and the probable rise in price must be taken into account in assessing the value. Subsequent knowledge acquired at the time of the arbitration may be taken as confirming and crystallizing the evidence as to the probable rise in price.

They referred to *Haynes* v. *Haynes*, 9 W. R. 497, 30 L. J. Ch. 578.

Vaughan Williams, L.J.—The question we have to decide is whether the arbitrator in assessing the compensation should take in consideration the rise in the market price of coal between the dates of the notice to treat and the assessment of the compensation. The way in which the arbitrator himself expresses the contention of the coal company is set out in a paragraph in the special case as follows: "During the said reference the coal company claimed that in consequence of such rise the compensation to be paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the said part of the said mines, veins, beds, and seams which was possessed at the date of the said notice of the 15th of October, 1898 (which basis is hereinafter called the first alternative), but on the basis of the knowledge of such value which was subsequently acquired (which lastly mentioned basis is hereinafter called the second alternative)." The case then goes on to say that the question for the opinion of the court is whether the coal company are entitled to have compensation assessed according to the first alternative or according to the second alternative. The particular case in which the compensation has to be determined is set forth in the special case, and it appears from that the waterworks company did not give notice to the coal company that they would actually purchase the coal, but they gave notice that they were willing to make compensation to the coal company for their estate and interest in that part of the mines, veins, beds, and seams of coal which they required the coal company to leave unworked. Under that notice I have no doubt that the measure of compensation would be the same as if there was a notice to purchase the coal. If the coal was purchased the measure of compensation would be the same as on an expulsion from the land. If the coal company are debarred from working the coal, the measure of damages is the same as if the coal were purchased. That being so, it is common ground here that the measure of compensation must be ascertained as of the date of the notice to treat—that is to say, the value of the coal must be taken as on that date. The contention of the coal company is that, though the value of the coal must be taken as of the date of the notice to treat, the arbitrator was entitled, in estimating that value, to take into consideration the subsequent rise in price. The price of coal may rise or fall according to contingencies which no one can foretell. The arbitrator must admittedly ascertain the present value of the coal, and yet it is said that in arriving at that value he is to take into account the contingency of the future rise or fall in price, of which no one can form an estimate. It is argued that because the contingency happened at the time when the compensation came to be assessed, the arbitrator must deal with it as a matter to be taken into account in arriving at the value of the coal at the date of the notice to treat. I am unable to agree with that contention. In arriving at the present value of the coal the arbitrator can only take into consideration that which could have been anticipated as possible at the time when the notice to treat was given and which admitted of a measure of compensation at that time. It seems to me, therefore, that the true rule is that, in assessing compensation, the arbitrator can take into consideration every circumstance which existed in fact at the date of the notice to treat, as well as the probable user of the property in respect of which compensation is payable. For instance, if the property is agricultural land, its adaptability for building purposes should be taken into consideration, because that is a fact in existence at the date of the notice to treat. If, again, after the notice to treat has been served it is discovered that the land has some inherent value which nobody expected or knew of at the date of the notice to treat, that would be a proper circumstance to take into consideration in assessing the value of the property, because it would be a fact affecting the property at the date of the notice to treat. But when one deals with contingencies arising afterwards which cannot be assessed, such contingencies ought not to be taken into account. This is really the basis of the rule in giving damages for breach of contract. There may, and indeed must, be taken into consideration the value of the thing at the date when the contract ought to be performed, but not matters which are so remote or uncertain as not to be capable of measurement. The fact that before the compensation is assessed one of those contingencies has actually happened cannot be taken into consideration as enhancing the value of the property to be acquired. In my opinion the decision of the Divisional Court was wrong, and cannot be supported. The answer to the question put by the umpire in the special case should be that the compensation ought to have been assessed according to the first alternative—that is to say, according to the facts as they existed at the time of the notice to treat, and on that basis the compensation amounts to £2,950.

Romer, L.J.—I am of the same opinion. I gather that it is common ground that the compensation is to be assessed upon the value of the coal on the 15th of October, 1898, when the notice to treat was given. I agree that in ascertaining what the true value of the coal was at that date, the arbitrator might look at the subsequent facts so far as they are material to show the value of the coal upon that date. A circumstance occurring subsequently to the 15th of October, 1898, is, as stated in the case, that "coal rose in value subsequently to the date of the notice of the 15th of October, 1898." The next paragraph in the case states clearly the circumstance which the coal company claimed should be taken into consideration. The coal company claimed that in consequence of such rise the compensation paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the coal which was possessed at the date of the notice to treat, but on the basis of the knowledge of such value which was subsequently acquired. Therefore we have it that the only circumstance arising since the 15th of October, 1898, and relied upon as showing the true value of the coal, is the general rise in the price of coal since that date. That clearly means a rise in the price of coal as a general commercial article, and it is said that the arbitrator is to assess the value of this particular coal on the 15th of October, from his knowledge of the higher value of coal since that date.

In my opinion that contention is not tenable. The rise in the value of coal might be due to circumstances which were not in existence when the notice to treat was given, and which could not have then been foreseen. It would be wrong to say that the mere subsequent rise in the price of coal showed that the value of coal on the 15th of October was not its true value at that time. It is said that in estimating the value of coal on that date, expert evidence might have been called as to the prospective rise or fall in the price of coal as on that date. Admitting that to be so for the purposes of this case, any such opinion must be based upon facts existing at the time. It would not do for an expert to say that he could give no reasons for his opinion, that he could point to no facts to justify it, but that he was stating his opinion as a matter of mere speculation. It seems to me that in such a case the evidence would not be receivable. Expert evidence is only admissible because there are facts in existence the natural conclusions from which are not apparent except to the mind of an expert; but the opinions of experts must be founded on facts. When the market value of coal on the 15th of October was ascertained, that was its true value, subject to the then existing circumstances likely to cause it to rise or fall in price. But to say that because there was a subsequent rise in the price of coal the arbitrator must disregard the value of coal on the 15th of October is to me an untenable proposition. The appeal must therefore be allowed.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitors for the waterworks company, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Solicitors for the colliery company, *Wrentmore & Son*, for *Frank James & Sons*, Cardiff.

High Court of Justice.

Chan. Div. Kekewich, J. — July 2.

In re BUCKWELL & BERKELEY. (a.)

Practice — Costs — Taxation — "Disbursement" — Money paid to "Security for costs account" — Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

Moneys paid by solicitors in conducting an action to the "Security for costs account" for discovery and interrogatories are "disbursements" within the meaning of the Solicitors Act, 1843, *and are properly entered as such in a bill of costs.*

In re Remnant, 11 *Beav.* 603, *explained and followed.*

Summons to review taxation.

In a taxation as between solicitor and client the taxing-master had disallowed items of £5 and £8 respectively paid by the solicitors to the "Security for costs account" under ord. 31, rr. 25, 26, and 27, upon application for discovery and interrogatories. Objection having been taken to the disallowance, the taxing-master gave as his reason in each case: "This deposit cannot be allowed as the solicitors can obtain the return of it; the costs of doing this are subsequently allowed."

The bill was a heavy one, and if these items were disallowed, the effect was that more than one-sixth of the bill was taxed off. The solicitors took out this summons to review the taxation.

E. E. Humphreys, for the solicitors, relied on *In re Remnant*, 11 Beav. 603.

E. W. Hansell, for the client.—These are not payments which the solicitors were under any liability to make, and cannot therefore be "disbursements"; they ought to appear, not in a bill of costs, but in a separate cash account: *In re Kingdon & Wilson, ante*, p. 533, 18 Times L. R. 588.

KEKEWICH, J., in giving judgment, remarked that as a general rule he felt the greatest hesitation in differing from a taxing-master, who was accustomed to deal with bills of costs every day, and was cognizant of the practice in such matters; in the present case, however, the taxing-master had given a reason for disallowing the items without making any statement as to the practice usual with regard to such items; that reason, in his lordship's opinion, was not a good one, and no other reason was given; in his opinion these payments were—in a proper case—as necessary for a solicitor to make as were payments for counsel's fees, stamps on office copies, and the like. The proper criterion was not whether, in a certain event, the money could be returned, but in what character the solicitor made the payment—was it as solicitor in his professional duty, or was it merely as agent? As general agent a solicitor frequently did acts generous even to folly, and payments made in that way could not be brought into a bill of costs; the agency in such cases arose by virtue of the professional relation, not by virtue of the professional character, and payments so made should go into a separate cash account; but if he acted as a solicitor, payments made by him in the prudent course of his business were as much "disbursements" as were counsel's fees and stamps; that appeared to his lordship to be the proper criterion, and the one which was adopted by Langdale, M.R., in *In re Remnant*. To hold with the taxing-master would be extremely inconvenient; if a solicitor was not liable to pay as solicitor it would mean that whenever an affidavit of documents was applied for there would be a long delay owing to his non-liability to make the payments requisite for the purpose. The bill must go back to the taxing-master with that expression of his lordship's opinion.

Bill sent down for revision; leave to appeal.

Solicitors, *Biggs, Roche, Sawyer, & Co.; Cameron, Kemm, & Co.*

Chan. Div. Farwell, J. — May 14.

In re CREDIT ASSURANCE AND GUARANTEE CORPORATION (LIMITED). (a.)

Company — Reduction of capital — Unequal payments upon ordinary shares — Losses to be borne proportionately.

The deferred shares in a company were paid up in full, the ordinary shares of £10 each were as to some paid up to £5 each, as to others up to £2. The articles of association of the company provided that in the case of a winding up the losses were to be borne by the members in proportion to the capital paid up. The company passed a special resolution that the ordinary shares be reduced from £10 to £8 10s., cancelling capital to the extent of £1 10s. on each ordinary share.

Held, that the same rule must be followed in the reduction of capital as would have been followed in a winding up, and that the losses must be borne by the members in proportion to the capital paid up on the shares.

(a.) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Petition.

This was a petition for confirmation by the court of the reduction of capital.

The Credit Assurance and Guarantee Corporation (Limited) had a capital of £1,000,000, divided into 2,000 deferred shares of £1 each, and 99,800 ordinary shares of £10 each.

The deferred shares were all issued and fully paid, and 37,712 ordinary shares had been issued. Of the latter 2,621 had been forfeited, 1,123 had been issued under a duly registered contract with £5 paid up, and the remainder had been paid up to the extent of £2.

The memorandum of association provided that the profits should be applied after allowing for a reserve fund in paying first a dividend of 10 per cent. on the amount paid up for the time being, one half of the surplus to the holders of deferred shares, and the remaining moiety, subject to the payment thereout of such extra remuneration to the directors as might be determined in general meeting, should belong to the holders of ordinary shares.

By article 152 of the articles of association: "If the corporation shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

The corporation had power to reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets.

On the 12th of December, 1901, a special resolution was passed reducing the capital to £850,300, divided into 99,800 shares of £10 each, and 2,000 deferred shares of £1 each, and such reduction was to be effected by cancelling capital to the extent of £1 10s. in respect of each of the ordinary shares, which had been issued and were then outstanding, and by reducing the nominal amount of all the ordinary shares in the company's capital from £10 to £8 10s.

Upjohn, K.C., and *W. A. G. Woods*, for the company.—The reduction on the deferred shares, if carried out, would be trivial, and the shareholders have power to vary the general rule that all classes of shares should be reduced equally: *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399. Article 152 is to take effect only in case of a winding up. It was a mere bargain between the shareholders which they could alter: *Bannatyne* v. *Direct Spanish Telegraph Co.*, 35 W. R. 125, 34 Ch. D. 287.

Jenkins, K.C., and *Martelli*, for opposing shareholders.—Some of the ordinary shareholders had paid up more than others, and the reduction ought to be borne in the same proportion as losses in a winding up.

Farwell, J., said that with regard to the objection that there was to be no reduction in respect of the deferred shares, inasmuch as the moiety of profits after 10 per cent. had been paid on the ordinary shares was to go to them it did not much matter, so far as dividend was concerned, how much was deemed to be paid up. With regard to the return of capital on a winding up, the sum concerned was so small that he thought he might disregard it altogether.

However, the case was different as regards the ordinary shares, and he felt constrained to allow the objection, though he did it with some reluctance.

The ordinary rule, in the absence of special provision, was that the assets available for distribution in the winding up were to be distributed amongst the members in proportion to the nominal amount of capital held by them. In order to avoid that a special provision had been inserted in the articles. It was the practice of the court in cases of reduction of capital to act upon the principle that the reduction was a sort of anticipation of what would take place in the event of a winding up: *Bannatyne* v. *Direct Spanish Telegraph Co.* He looked, therefore, at the articles to see what the bargain was in the present case, and he could not see how he could avoid giving effect to it.

The petition must be dismissed.

Solicitors for the company, *Greenwood & Greenwood.*

Solicitors for the shareholders opposing, *R. Chapman.*

Chan. Div.
Buckley, J.

May 28.

In re Grosvenor House Property Acquisition and Investment Building Society. (*a.*)

Building society—Cancellation of registry—Winding up—Building Societies Act, 1894 (57 & 58 *Vict. c.* 47), *s.* 6, *sub-sections* 1, 5; *s.* 8.

Where the registration of a building society has been cancelled, and it has ceased to carry on business, a creditor's remedy is to petition for a winding-up order.

In such a case the court may direct that no proceedings be taken under the order without leave beyond the transfer of assets to the official receiver.

Petition for a winding-up order.

The society was registered in 1878 under the Building Societies Act, 1874, with a nominal capital of £175,000 and a paid-up capital of about £82. The society carried on no business after 1880 and in 1895 its registration was cancelled under the Building Societies Act, 1894, s. 6, sub-section 5. Prior to 1880 the society had become indebted to the petitioner to the amount of about £31; it was stated by the petition that the society was insolvent and that its sole asset was a sum of £73 and interest in the hands of its bankers.

P. Rose-Innes, for the petitioner.

Buckley, J., said that by section 6, sub-section 5, of the Act of 1894, after cancellation of its registration the society absolutely ceased to enjoy as such the privileges of a building society, but without prejudice to any liability actually incurred and the enforcing of such liability, and by section 8, sub-section 1, the society was to be deemed a company within the meaning of the Companies (Winding-up) Act, 1890. This petition was filed to enforce a liability and to obtain payment out for the benefit of the creditors of the money in the bank. In *In re Anglo-American Exploration and Development Co.*, [1898] 1 Ch. 100, 46 W. R. Dig. 31, it was held that where the name of a company had been struck off the register under the Companies Acts a creditor's remedy was to petition for a winding-up order; and in this case he would make a winding-up order and thereby enable the official receiver to get the money from the bank, but no proceeding beyond that was to be taken under the winding-up order without the leave of the court.

Solicitor, *H. Roger Sadd.*

(*a.*) Reported by L. W. Byrne, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) May 1.

WESTMINSTER, MAYOR, ALDERMEN, AND COUNCILLORS OF THE CITY OF (*Appellants*) *v.* ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY (LIMITED) (*Respondents*). (*a.*)

Metropolis—Rating—Poor rate—Valuation list—Omission to give notice of increase of valuation—Refusal to pay increased rate—Application for distress warrant—Objection to issue of warrant—Appeal against valuation list—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *ss.* 9, 45.

Where the overseers of a parish raise the gross or rateable value of a hereditament, and no notice of such alteration, as required by section 9 *of the Valuation (Metropolis) Act,* 1869, *has been served upon the occupier of the hereditament, the occupier cannot, on the application for a distress warrant to recover the balance of the rate, raise the objection that no such notice had been served upon him, that objection being one that could only be raised by an appeal against the valuation list or against the rate.*

Case stated by Horace Smith, Esq., Metropolitan police magistrate, sitting at Westminster police-court.

A complaint was made by the mayor, aldermen, and councillors of the City of Westminster, the appellants, that the Army and Navy Auxiliary Co-operative Supply (Limited), the respondents, being duly rated and assessed in the parish of St. Margaret and St. John, in the City of Westminster, had not paid the sum of £8 7s. 9d., which had been duly demanded of them. The magistrate, after hearing the parties and the evidence adduced by them on the 11th and the 18th of December, 1901, on the 9th of February, 1902, refused to issue a distress warrant and dismissed the summons.

The facts as stated were as follows: The respondents were at all times material to this case the occupiers of certain premises known as 20 and 22, Caxton-street, in the parish of St. Margaret and St. John, in the City of Westminster.

On the 12th of April, 1901, a general rate was made and published by the appellants, acting as the overseers of the parish under and by virtue of the London Government Act, 1899. In this rate the respondents were assessed in respect of the said premises at the sum of £33 2s. 9d., being at the rate of 2s. 9d. in the pound upon a rateable value of £241, being the rateable value of the premises as stated in the quinquennial valuation list for the parish made in the year 1900 under the Valuation (Metropolis) Act, 1869.

The sum of £33 2s. 9d. was demanded of the respondents, and they paid to the appellants the sum of £24 15s., the amount due on the assessment entered in the quinquennial valuation list for the parish made in 1895, leaving a balance of £8 7s. 9d. unpaid, which the respondents contended they were not liable to pay for the reasons hereinafter appearing.

The appellants took out a summons to recover the above sum of £8 7s. 9d., and upon the hearing of the summons the rate was produced and it was proved that this sum had been demanded and that the respondents were in occupation of the said premises.

The respondents proved that no notice of an alteration in value in accordance with section 9 of the Valuation (Metropolis) Act, 1869, had been served on them by the appellants, and it was admitted by the appellants' witness, who was called in support of the summons, that no such notice had been given to the respondents, and that the respondents had no notice of the raising of the gross and rateable values of the premises until the 12th of April, 1901.

The respondents contended that they were not liable to pay the sum of £8 7s. 9d., being the balance of the sum charged upon them by the above rate, upon the ground that the rate was based upon the rateable value of the premises stated in the quinquennial valuation list made in 1900—namely, £241, being an increase of £61 over the rateable value stated in the valuation list made in 1895—namely, £180, and they contended that the entry in the quinquennial valuation list made in 1900 relating to the premises was not binding upon them, because no notice, as it was admitted, of the increase in the rateable value of the premises had been given to them by the overseers of the parish, as required by section 9 (1) of the Valuation (Metropolis) Act, 1869, and therefore the quinquennial valuation list of 1900 was not the list for the time being in force, nor was it duly made in accordance with the Act, and therefore that they, the respondents, were not liable to pay so much of the rate as was charged upon the increase in the rateable value as shown by the quinquennial valuation list made in 1900 over the rateable value appearing in the valuation list made in 1895, and that as they had paid so much of the said rate—namely, the sum of £24 15s., as was charged upon the rateable value stated in the valuation list made in 1895, they were not liable to pay the further sum of £8 7s. 9d., which was charged upon the increase in the rateable value of the premises as shown by the list made in 1900. They cited in support of these contentions the case of *Reg.* v. *Justices of Middlesex*, 20 W. R. 774, L. R. 7 Q. B. 653.

The appellants contended that they were entitled to a distress warrant to recover the above sum of £8 7s. 9d. on the following grounds—namely, (1) that inasmuch as the respondents had not appealed against the rate, or the list on which it was based, the respondents were not entitled on the hearing of the summons to dispute the validity of the valuation list, and that the rate being good on the face of it and the respondents being admittedly in occupation of the premises for which they were rated, the duty of the magistrate was merely ministerial and that the appellants were not bound to show that the notice required by section 9 (1) of the Valuation (Metropolis) Act, 1869, had been duly given; and (2) that even if no such notice as is directed by the section had been given, the valuation list was not thereby rendered invalid.

The magistrate decided that the appellants' contentions upon both grounds were wrong, and that he ought not to issue a distress warrant to recover the sum of £8 7s. 9d.

The question for the opinion of the court was whether the magistrate was right in so deciding.

By the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), it is provided as follows:

Section 9: "In each of the following cases—namely, . . . where the assessment committee . . . alter a valuation list . . . by raising the gross or rateable value from a hereditament comprised therein, the overseers shall immediately after the deposit or re-deposit of the list (as the case may be) serve on the occupier of such hereditament a notice of the gross and rateable value thereof inserted in the valuation list."

Section 45: 'The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

mentioned be conclusive evidence of the and of the rateable value of the several ...ments included therein . . ."

Marshall, K.C. (*Ryde* with him), for the appellants.—The magistrate had no jurisdiction to refuse the warrant. The rate was in order and the fact that notice had not been served in accordance with section 9 did not affect its validity. Section 9 is purely directory and not imperative: *Reg.* v. *Ingall*, 25 W. R. 57. 2 Q. B. D. 199; *Reg.* v. *Justices of London* [1893] 2 Q. B. 476. The respondents should either have appealed against the valuation list or have applied to the court for a *mandamus*: *Bates* v. *Plumstead Overseers* 64 L. J. M. C. 127. 43 W. R. Dig. 117; *Churchwardens of Birmingham* v. *Shaw*. 10 Q. B. 868; *Bavin* v. *Hutchinson*, 10 W. R 807, 31 L. J. M. C. 229.

Bray, K.C. (*E. Hilliard* with him), for the respondents.—If the valuation list is in force against the respondents they have no remedy, as they would be bound by section 45 of the Act of 1869, and an injustice would be thus inflicted upon them. The object, however, of the Act is to arrive at an equitable assessment, and the expression "valuation list" in section 45 must mean a valuation list in respect of which all the formalities prescribed by the Act have been duly performed, and it is, therefore, essential that a notice of alteration of valuation should be served upon the occupier: *Reg.* v. *Justices of London*. Section 65 of the Act is in favour of the respondents. If the valuation list is not in force as against the respondents the overseers have no power to make this rate. Blackburn, J., in the case of *Reg.* v. *Justices of Middlesex*, 20 W. R. 774, L. R. 7 Q. B 653, at p. 656, says: "Whether or not the valuation is binding on persons who have had no notice under section 9 we are not called upon to decide, and I express no opinion, though it would seem but just that it should not affect them."

He also cited *Reg.* v. *Justices of Kingston*, 6 W. R. 551, E. B. & E. 256.

Ryde, in reply.—Notice of an alteration is not essential, and a defect under section 45 is not fatal. Further, the respondents might have appealed against the valuation list under sections 11 and 32 of the Act, and on discovering that no notice had been served, and if out of time, they might have applied to this court for a *mandamus* to the assessment committee to hear their objections. *Reg.* v. *Rochester Corporation*, 7 Ell. & B. 910, 6 W. R. C. L. Dig. 67. The object of the Legislature was to prevent any mere defect in service of notice from invalidating the valuation list, and the object of section 45 was to cure all defects in the preliminary steps.

Lord ALVERSTONE, L.C.J.—This is one of those troublesome cases which not infrequently arise under this class of Act of Parliament where the difficulty is to trace out what is the effect of a particular omission of some apparent condition precedent. In the view I take in this case it is not necessary for us to decide, any more than it was for Blackburn and Lush, JJ., to decide in the case of *Reg.* v. *Justices of Middlesex* what is the actual effect of the omission to serve the notice under section 9. Personally I incline to the view that for the purpose of making a rate the omission is cured by section 45, because, if not, nobody could safely make a rate without ascertaining that all the notices had been given. But I think that the decision of this case really depends upon other considerations. Mr. Bray says that because no notice was given under section 9 the valuation list for the time being in force cannot be deemed to have been duly made. If that were so section 45 would have very little effect. Section 45 could scarcely mean that a valuation list, as to which all conditions have been fulfilled, shall be deemed to be in force. I think it probably has reference to the earlier section—43. That would not be conclusive against Mr. Bray, because he would be entitled to say that though it might save some conditions it did not save this particular one, which was the personal notice under section 9. But it seems to me that Mr. Bray is in this difficulty. The application to the magistrate was for the issue of a distress warrant. If the overseers were justified in acting upon the valuation list of 1900 and making a rate, then Mr. Bray has to show that the point he raises is a point that he is entitled to raise in objection to the distress warrant being issued. Now I think that a person is not entitled to raise, in answer to an application for a distress warrant, all the points which he could possibly raise upon appeal. I quite agree that there are points which he can raise on both proceedings, as, for instance, non-occupation; but still I do not think that because a matter may be raised on appeal it can also be raised in answer to an objection to issue a distress warrant. I think, to a certain extent, that principle was recognized in the case of *The Churchwardens of Birmingham* v. *Shaw*, in which it was held "that a person exempt from poor rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy made to enforce such rate, not appealed against." I think that was practically repeated by my brother Wills in the case of *Bates* v. *Plumstead Overseers*, 64 L. J. M. C. 127, in which he said, at p. 129: "The only objections, therefore, which can be entertained by a magistrate on an application for a distress warrant are the three following: that the property rated is not in the parish; that the party rated is not the occupier; and that the rate is, on the face of it, bad." I do not wish to be thought to say that those three are the only objections, but I think they point to the class of objections that can be raised.

Lastly, in *The Overseers of Manchester* v. *Headlam*, 21 Q. B. D. 96, 36 W. R. Dig. 149, Wills, J., again pointed out in a considered judgment of the court how all these cases went back to the authority of *Crease* v. *Sawle*, 2 Q. B. 862, which decided that the rate being good on the face of it could not be impugned in an action for trespass for levying distress in respect of the rate. He said: "The objection being matter of appeal the rate unappealed against ought to be enforced. It would be very unfortunate if it should be otherwise, and if by reason of an error, possibly of the most trifling kind, made by the overseers in the amount of property which they supposed to be in the occupation of a particular individual, he, after having forborne to avail himself of an ample and satisfactory remedy for any error to his prejudice in the rate, could evade payment of the poor rate altogether. One cannot conceive a greater encouragement to improper litigation."

I think that those cases do lay down the substantial rules which show the class of points which can be raised in answering an application for a distress warrant, and that *primâ facie* points which may be raised on appeal ought not to be raised then. With reference to the opinion of Blackburn, J., which was cited from the case of *Reg.* v. *Justices of Middlesex*, I am by no means sure the learned judge was not referring to the question of whether or not the valuation should be conclusive upon an appeal. I do not think he had in his mind at that time the question of the issue of a distress warrant. Now had the

respondents the right of appeal? I think they had. I am not so clear in my own mind that they had the right to apply for a *mandamus*. I admit that there is a close analogy with those cases where a *mandamus* has gone, the time having gone by within which a statutory body had to perform a statutory duty; but inasmuch as that point may be raised hereafter it seems to me not necessary to decide it now: but I must say that if the respondents are entitled to raise this objection and say that for the purposes of a rate this was not a good valuation list binding upon them, they ought to be able to raise that on appeal, and I think that that right of appeal, if it existed, has not been taken away. Of course upon the appeal there would have to be arguments upon the merits, and a decision upon the merits, as to whether or not the failure to give notice under section 9 prevented the valuation list being binding upon them; but that point I think is one which ought to have been raised on appeal. I do not think it is the class of objection that the magistrate ought to entertain when application is made to him for a distress warrant, it being, as I have said, something which does not fall within those objections named, or objections of the same kind, but something which goes to the validity of the right to assess or rate at a sum of money all the persons named in the assessment. For these reasons I think the appeal ought to succeed, and that the magistrate ought to have issued the distress warrant.

DARLING, J.—I am of the same opinion. The whole question really turns upon the point whether the respondents had lost or been deprived by what took place of not only their right to appeal, but of their power of appealing. I think they have not, and that being so, injustice and hardship, which was really the whole foundation of Mr. Bray's argument, does not arise. If the case had been as unjust and as hard as he represented it to be, then I think we must have decided in his favour; but it seems to me he did omit to notice a remedy which was open to him, which was pointed out very clearly to him by Mr. Ryde, and therefore the injustice which he apprehended does not occur.

CHANNELL, J.—This case is one of some difficulty. It really turns upon what is the true construction of this Act of 1869. Section 45 begins as follows: "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act . . ." It is suggested by Mr. Bray that "the valuation list for the time being in force" must mean a properly made valuation list, and that no other is in force. If it meant that the section would read thus: "A valuation list duly made shall be deemed to have been duly made," and that the Legislature would never and could not possibly have enacted.

It seems to me that "the valuation list for the time being in force" is something which although not in fact duly made in accordance with the Act is to be deemed to have been duly made in accordance with the Act. I think the expression means that after the time when the valuation list is to come into force, and until the moment when the next valuation list has come into force, the valuation list shall be deemed to have been duly made. It is a case of time rather than anything else, and in substance comes to this, that it refers to a *de facto* valuation list in existence at a particular time which list is to be deemed to be made in accordance with the Act. The provision obviously is intended to cure for some purpose or another possible defects in the valuation list. The section then goes on to say the valuation lists shall be conclusive for certain purposes. Now, if conclusive for certain purposes means conclusive for all purposes whatever, it is obvious that a defect such as in the present case cannot be raised in answer to an application for a distress warrant. If, on the other hand, it is not conclusive for all purposes, it seems to me that, *a fortiori*, it would not be conclusive for the purpose of an appeal; so that either there is no remedy here and no answer to the distress warrant, because the provision is conclusive for all possible purposes, or there exists an appeal. If there does exist an appeal, I think it is quite clear on the cases my lord has referred to that this would come within the class of cases where, there being a possibility of appeal, there must be an appeal, and if the point is not raised by appeal it cannot be raised on the application for a distress warrant. I think those cases all depend on whether there is jurisdiction in the rating authority to make the rate, and whether the rate is good on the face of it. If the rating authority had jurisdiction to make a rate, any objection to the rate not apparent on the face of it cannot be raised on the application for the distress warrant. Such a rate as that it is the duty of the magistrate to enforce, and all the cases where objection can be taken upon application for a distress warrant—the well-known cases of non-occupation, property outside the parish, and so on—are merely instances of cases in which the rating authority had no jurisdiction to make a rate upon a person or upon the property as the case may be. The result seems to me to be that the argument for the appellants prevails, and that the appeal must be allowed.

Appeal allowed, without costs.

Solicitors for appellants, *Allen & Son.*

Solicitors for respondents, *Tyrell Lewis, Lewis, & Broadbent.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 25, 28.

REX *v.* KENNEDY. (*a.*)

Justices — Discretion to issue summons — Proceedings against Jesuits upon information under Roman Catholic Relief Act, 1829 (10 *Geo.* 4, *c.* 7), *s.* 34—*Indictable Offences Act,* 1848 (11 *&* 12 *Vict. c.* 42), *s.* 9.

Upon an application by a private person for summonses against three Jesuit priests on an information which alleged that they had committed an offence under section 34 *of the Roman Catholic Relief Act,* 1829, *in that they had, since the commencement of the Act, been admitted or become Jesuits within the United Kingdom, and had thereby committed a misdemeanour, the magistrate refused to grant the summonses upon the ground that the application was wrongly instituted, as the enactment should be enforced by the Crown and not by a private informer; and, further, that the information was too scanty and too bare a statement and insufficient to support an application for a criminal process; and, therefore, in exercise of the discretion conferred upon him by the Indictable Offences Act,* 1848, *he dismissed the information.*

Held, upon a rule nisi *for a* mandamus, *that the learned magistrate had exercised the discretion conferred upon him, and that in the exercise of such discretion he had declined to grant the summonses, and, therefore, that the court ought not to interfere.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In this case a rule *nisi* had been obtained at the instance of the Rev. Charles Stirling, on behalf of the Protestant Alliance, calling upon G. G. Kennedy, Esq., Metropolitan police magistrate, sitting at Marlborough-street, to show cause why a writ of *mandamus* should not issue directing him to grant summonses against three Jesuit priests, named the Rev. Sydney Smith, the Rev. Herbert Thurston, and the Rev. John Gerard.

The information upon which the summonses were asked for alleged that the three Jesuit priests in question had committed an offence under section 34 of 10 Geo. 4, c. 7, entitled "An Act for the relief of his Majesty's Roman Catholic Subjects," inasmuch as they had since the commencement of the Act been admitted or had become Jesuits within the United Kingdom, and had therefore committed a misdemeanour.

The section under which the proceedings were taken provides that: "In case any person shall, after the commencement of this Act, within any part of this United Kingdom be admitted or become a Jesuit or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life." The information in each case merely alleged that the person charged had, since the commencement of the Act—namely, since 1829, been admitted and become a Jesuit within the United Kingdom, without giving any particulars. The application for the summonses was made on the 17th of January, 1902, when the learned magistrate reserved his decision. On the 24th of January he gave his decision refusing the summonses. After referring to section 34 of the Act under which the proceedings were taken, and to sections 28, 29, 30, 33, and 36, the learned magistrate proceeded as follows: "Now, it may be observed, first of all, that all those sections are practically obsolete, and no records of any proceedings under them are accessible, and in the words of the late Sir James Stephen, in his History of the Criminal Law, 'These provisions ever since they have been passed have been treated as a dead letter.' It would seem to be gathered from them that membership of this religious order is not a criminal condition in itself, and is only made so under certain circumstances. It must be more, in my view, than a mere matter of policy, especially when such serious consequences as banishment for life and transportation are involved; and they are, moreover, provisions which, in my opinion, should be enforced by the Crown and not by a private informer. The confirmation of this view is, I think, to be found in section 38 of the Act, which says 'that all penalties imposed by this Act shall and may be recovered as a debt due to his Majesty, by information to be filed in the name of his Majesty's Attorney-General.' It may be said that banishment, which is the penalty enacted by sections 29, 31, and 34, is not one of the penalties which is indicated in section 38, but the provisions are so far allied to the common subject-matter that the procedure to enforce any of them should be by way of information from the Crown Office itself. Therefore, in my judgment, this application should be refused upon the ground that it is wrongly instituted. The third ground arises on the initiation of the proceedings themselves on the words of section 34, because it says that after the passing of the Act one of the gentlemen was admitted and became a Jesuit contrary to the provisions of section 34 of the Act. Now I think that information is too scanty and too bare a statement, and insufficient to support an application for a criminal process. Therefore, in exercise of the discretion which is conferred upon me by the Indictable Offences Act, I dismiss the information." In answer to Mr. Avory, who appeared before the magistrate on behalf of the Rev. Charles Stirling, the the magistrate stated that he would refuse an application based on an amended information giving further particulars, because the first ground of his decision—namely, that the Crown should be the informer, would still remain. The learned magistrate further explained that he had used the words "practically obsolete" in speaking of the provisions of the sections in question because they were not actually obsolete. He did not put that as a ground of his decision; he put it as influencing his discretion.

Sir E. Clarke, K.C. (*Hugo Young, K.C.*, and *Dennis O'Conor* with him), showed cause against the rule. The magistrate was right in holding that proceedings under the statute could only be taken at the instance of the Crown. That was the only way in which the provisions of the statute could be harmonised. Where the statute imposed a pecuniary penalty, that was recoverable only by the Crown. Further, where the statute imposed the punishment of banishment, it was necessary in order to carry out the punishment to invoke the executive authority of the Crown, which under section 35 the Crown might or might not exercise in its discretion. If the Crown did not choose to carry out the sentence of banishment, then the person proceeded against was free to remain in the United Kingdom without any ill consequences to himself; for in that case he would not be at large within the United Kingdom "without some lawful cause" within the meaning of section 34. If the words in that section "some lawful cause" do not refer to a case where the Crown in its discretion has refrained from carrying out the sentence of banishment, they are meaningless. Sections 28-38 of the Act all support this contention. Even supposing the magistrate was wrong in the construction he put on the Act, he nevertheless entertained the application for the summonses, and, that being so, his decision cannot be reversed by *mandamus* even though it were wrong in point of law: *Ex parte Lewis*, 37 W. R. 13, 21 Q. B. D. 191; *Rex* v. *Bros*, 85 L. T. Rep. 581; *Reg.* v. *Byrde*, 39 W. R. 171, 60 L. J. M. C. 17. These cases laid it down that if a magistrate heard and determined an application, and on its merits declined to grant a summons, the court would refuse to grant a *mandamus*. Before a *mandamus* could issue the justices must decline jurisdiction, and the court could not review their decision if they had come to it in good faith, although they might be wrong in law and in fact. It was clear in this case that the magistrate had not declined jurisdiction, and had exercised his discretion. Therefore the court would not interfere with the decision. He had come to the conclusion that the person before him was not a person to whom, according to the statute, he could grant a summons, and that is a matter of law. Even supposing the magistrate was wrong in holding that proceedings under the statute could only be taken by the Crown and that his decision in this respect could be reviewed, there remain the other grounds on which the magistrate has exercised his discretion. The information gave absolutely no particulars. It did not allege where the offence was committed or when, except that it was committed within the last seventy years. A magistrate is quite entitled to say that he will not act upon such an information. If the man who laid the information knew no more than that he would not be able to support the charge when it came on for hearing. If he did know more than

that he was bound to put his knowledge into the information, so that the time, and place, and circumstances might be brought to the knowledge of the person upon whom the summons was served. So also he might refuse a summons with reference to the object with which the summons was sought. The magistrate had in this case exercised a discretion with reference to considerations of this character, and the court would not review the exercise of the magistrate's discretion in such circumstances.

They cited *Reg.* v. *Cotham*, 46 W. R. 512, [1898] 1 Q. B. 802.

H. Sutton, for the magistrate, also showed cause.

He referred to Stephen's History of the Criminal Law, vol. 2, p. 493, and to the report of the summing up of Lord Mansfield on the trial of James Webb, reported in Holliday's Life of Lord Mansfield, at p. 176.

Avory, K.C. (*Biron* with him), in support of the rule.—In substance the learned magistrate had declined jurisdiction on the ground that the prosecution could only be at the instance of the Crown. He had no right in law to form the view that it might be public policy that the prosecution should be by the Crown. If he had a right to form such a view with regard to this Act he must have the same right with regard to every other Act of Parliament. Any private person has the same right to initiate a criminal proceeding as the Crown. A magistrate is not justified in refusing to put in force, or to allow anyone else to put in force, a statute because of its ancient date. This Act is not a dead letter and has never been treated as such by the Legislature.

He referred to Stephen's History of the Criminal Law, vol. 1, p. 495,; *Reg.* v. *Adamson*, 24 W. R. 250, 1 Q. B. D. 201; *Reg.* v. *Boteler*, 12 W. R. 466, 4 B. & S. 959; *Ex parte Wason*, 17 W. R. 881, L. R. 4 Q. B. 573; and *Reg.* v. *Ingham*, 14 Q B. 396.] There is nothing in the Act of 1829 to indicate that a peculiar rule depriving the private prosecutor of his ordinary rights is to prevail with reference to offences under that Act.

W. B. Campbell, amicus curiæ, called the Lord Chief Justice's attention to the *dictum* of Porter, M.R., in the case of *Roche* v. *Macdermott*, [1901] 1 L. R. Ir. 394, at p. 402.

Lord ALVERSTONE, L.C.J.—This case certainly presents very considerable difficulty, and it is one which has given us very anxious consideration. I do not think the principles of law which have to be applied are at all difficult of statement, but of course when you come to apply them very different and more difficult considerations arise. If an inferior tribunal has declined jurisdiction or thought that it has no jurisdiction through wrongly construing an Act of Parliament, there is no doubt that under ordinary circumstances the *mandamus* will go to order the magistrate or the inferior tribunal to exercise its jurisdiction. If, on the other hand, a magistrate not understanding the law, and not improperly applying the law in the matter of his jurisdiction, exercises a discretion that he will or will not allow the process of the court, then, at any rate in the clauses under the Act we have to consider—namely, 11 & 12 Vict. c. 42, his discretion cannot be inquired into.

It is not necessary to go through all the cases, but I think it desirable to call attention to one or two of the cases which illustrate the law before I proceed to apply that law to the facts of this case; and I think it is the more necessary, because it has been suggested in the course of the argument by Mr. Avory, in his able argument in support of the rule, that the case of *Reg.* v. *Ingham*, which was decided in the year 1849, and has been recognized as good law in recent cases, could only be supported on some different principle to that which I referred to in the course of the argument. In the case of *Reg.* v. *Ingham* it was decided that "when an information is laid before justices of the peace for an indictable misdemeanour, it is in the discretion of the justices to hear it, or refuse to hear and leave the complaining party to originate his prosecution before a grand jury." The case was an attempt to indict a person for perjury. It cannot be said that there was doubt as to there being *primâ facie* evidence of the offence. The magistrate had declined to allow the case to go on, on the ground of the pending of some proceedings in the Ecclesiastical Court; the court declined to interfere with that discretion; and Coleridge, J., at the end of the trial—and I think it is important in reference to this case—says: "The refusal of this rule does not prevent a trial if the prosecutor chooses to go before a grand jury. We only say that we will not oblige the justices to hear an information." In the case of *Reg.* v. *Adamson*, which was a case in which the court did make the rule absolute, the rule laid down by Cockburn, C.J., was that the court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of magistrates who have once heard a case and decided it, in a matter within their jurisdiction. If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it I should certainly say that the court could not act upon the matter further or send the case back." Then the Chief Justice went on to point out that he came to the conclusion that the magistrates in that case acted on extraneous and extrajudicial matter, and that they were influenced by their distaste for the views and doctrines promulgated at a certain meeting which was the subject of, and which led to, the proceedings. Blackburn, J., who concurred with the Chief Justice's judgment in that case, practically said that they could not interfere with the discretion; they could interfere, and should interfere, if the justices had declined to exercise their discretion on an improper ground. That case and the case of *Reg.* v. *Ingham* were referred to in the judgment in *Reg.* v. *Bride*, and I will read one passage from the considered judgment of Williams and Stephen, JJ., who, having referred to the principle to which I have made short reference, said this: "This seems to be the outcome of the decisions, and in particular, of *Reg.* v. *Adamson* and *Ex parte Lewis*. Blackburn, J., in his judgment in the former case, points out that the words in 11 & 12 Vict. c. 42, s. 9, 'if they shall think fit'—which are the words in this section also, it being under the same Act—'show that the justices have a discretion—and the *mandamus* in that case was granted expressly on the ground that the justices had not exercised their discretion. The justices may, however, it would seem, in the exercise of their discretion, refuse to issue a summons even though there is evidence before them of an alleged indictable misdemeanour, if they consider that the issue of the summons would be vexatious or improper." These cases seem to me to be illustrations of the rule which I endeavoured to state for myself at the beginning of my judgment. Now when the rule was moved before us—and I make no complaint against anybody, because one can understand how it arose—all that was stated in the affidavit was that the learned magistrate had refused to grant the summons upon the following grounds: That the statute 10 Geo. 4, c. 7, was practically obsolete, and that proceedings under section 34 of the Act could only be taken according to the provisions of the Act at the instance of the Crown by information at the

Crown Office or otherwise, and could not be initiated by a private individual. That was supplemented by a statement made perfectly accurately by Mr. Avory that, after the decision of the magistrate upon the point, the information before him stating no more than that three gentlemen had, after the year 1829, been admitted and become Jesuits within the United Kingdom, the learned magistrate being asked whether any alteration in the form of the information would remove his objection or lead him to entertain it, said, No; and I have decided this case from the point of view of assuming that Mr. Avory had stated in greater detail in his information anything which could be cured as a statement of fact, although I must not be supposed to say that even if I had taken a different view to that which I take in this case, there might not be a duty to exercise a discretion, or a right to exercise a discretion, arising upon the particular circumstances which were brought before the magistrate in any particular case. Now, that being so, I have done my best to see if I could get at what was the real decision of the magistrate.

I will read the passage of the learned magistrate's judgment which seems to me to show that in reality he dealt with this case as a question of discretion, and did not deal with the case upon the ground either that the Act was obsolete or that the Act could not be put in force by a private individual. He says: "It would seem to be gathered from them that membership of this religious order is not a criminal condition in itself, and is only made so under certain circumstances. It must be more in my view than a mere matter of policy, especially when such serious consequences as banishment for life and transportation are involved, and they are moreover provisions which, in my opinion, should be enforced by the Crown, and not by a private informer. The confirmation of this view is, I think, to be found in section 38 of the Act, which says 'that all penalties imposed by this Act shall and may be recoverable as a debt due to his Majesty by information filed in in the name of his Majesty's Attorney-General.' It may be said that banishment, which is the penalty enacted by sections 29, 30, and 34, is not one of the penalties that is indicated in section 38, but the provisions are so far allied to the common subject-matter that the procedure to enforce any of them should, I think, be by way of information from the Crown Office itself. Therefore, in my judgment, this application should be refused upon the ground that it is wrongly initiated. The third ground arises on the initiation of the proceedings themselves on the words of section 34, because it says that after the passing of the Act one of the gentlemen was admitted and became a Jesuit contrary to the provisions of section 34 of the Act. Now I think that information is too scanty and too bare a statement, and insufficient to support an application for a criminal process. Therefore, in exercise of the discretion which is conferred upon me by the Indictable Offences Act, I dismiss the information." Mr. Avory then asks him as to "whether it would be of any avail to present an amended information giving further particulars, or whether we may take it that you refuse it on all the grounds which you have stated. The Magistrate: I think you may take it that I should refuse the application because the first ground—namely, that the Crown should be the informer, would still stand. Mr. Avory: That objection would still stand, and that would, I understand from you, apply to any amended information. The Magistrate: Yes, that would apply to any amended information. Mr. Avory: Also, I presume, the ground which you first stated—that in your view the statute was obsolete. The Magistrate: With regard to that I used the words 'practically obsolete' because it is not actually obsolete. I do not put that as a ground. I put that rather as influencing my discretion. Mr. Avory: I thought it right to ask you that, because if you intended to base your decision upon that ground, I ought to tell you that I have since discovered that as late as 1898 a Bill was introduced into Parliament for the purpose of repealing these sections, and Parliament refused to do so. The Magistrate: I am much obliged to you; I had not found that out. It is a question of discretion. I do not put that as the ground of my decision at all. Mr. Avory: That leaves it open, of course, to test the question in a superior court. The Magistrate: Yes, there may be other remedies open to the applicant to proceed in a different way no doubt." Reading that fairly I think that is a statement that upon the circumstances of the case before him the magistrate came to the conclusion that he ought not to issue a summons.

Now, that I may not be thought to be merely covering the matter up with what I call general observations, I should like to state what I understand from the earlier part of the magistrate's judgment to have been the matters he took into his consideration. He took into his consideration, first, that the Act had never been put into force; I mean by the Act never having been put into force that these sections of the Act had never been put in force. Having gone through these sections of the Act he comes to the conclusion, which I think was the right conclusion, that the Act was for the purpose of getting the Jesuits out of the country and not for punishing criminally, if I may use the expression, the individual Jesuit. I think all the sections show that. He further took the view that it was not an Act, or at any rate these sections of the Act were not provisions that a private person ought to institute proceedings in respect of, but that those proceedings should be taken by the Crown or by representatives of the Crown.

Now it seems to me that all those three matters were matters that he was entitled to take into his consideration in exercising his discretion. I do not want to repeat anything that I have said in the course of the argument, but I think that some of the cases that I put to Mr. Avory would indicate that it is impossible to say that there is no discretion simply because there is *primâ facie* evidence that an indictable offence has been committed, and the authorities to which I have referred in my opinion negative any such proposition. I must also say for myself that I think the fact that the proceedings were not within the Vexatious Indictment Act has a very material bearing upon this Act. I quite agree with Mr. Avory that under ordinary circumstances it is not convenient that there should be an ordinary criminal prosecution without the preliminary proceedings by summons, and by committal for trial; but upon the other hand when you have such cases as this I think the magistrate, as was pointed out in *Reg.* v. *Ingham*, is entitled to take into his consideration the fact that his decision is not final but that a bill can be preferred by any person, and that a private person can present that bill of indictment, if he is disposed to do so. The fact is that this in any point of view is a very special Act of Parliament. Its provisions are, of course, unique, and we have no practice under it, which can be said to be any contemporaneous exposition or interpretation of it, and therefore the discretion which a magistrate should apply to such a case must be of necessity different to that which he should apply to ordinary crimes and ordinary criminal offences. For myself I wish to say that I by no means suggest that it is any legal bar to proceedings in the case that they are taken by a private

individual. If the magistrate had proceeded upon the view that the Crown, and the Crown only, could take proceedings, I think he would have been wrong, and I think he would have been ousted from his jurisdiction, but on the other hand I think he was perfectly entitled to take into consideration, having regard to the provisions of the Act, that this was not a proceeding in which he was bound to issue a summons at the instance of an ordinary informer. I mention that because I am as anxious as anyone can be that the provisions of the criminal law should be put in force, and that magistrates should not be tempted to say that they refuse to entertain proceedings by any outside considerations or any distaste or dislike for any Act of Parliament. That is not what, in my opinion, arises in this case. I have said already that the fact that they have never been put in force, the fact that its provisions point to persons being got out of the country, and not to what I may call ordinary offences against private individuals, are circumstances which the magistrate could take into his consideration, and also he could take into his consideration that this was a summons taken out by a private individual, and that was one of the circumstances upon which he might exercise his discretion. In coming to the conclusion as I do that the real substance of this is that the magistrate exercised his discretion, and declined to grant the summons in the exercise of his discretion, I think we ought not to interfere with it, and that therefore this rule must be discharged.

DARLING, J.—I am of the same opinion, but I think the magistrate really affected here to do two things. I think he did understand, and I think he did express in one part of his judgment, the opinion that proceedings could not under this Act of Parliament be initiated at the instance of a private person, but only by the Attorney-General acting as such. In that I desire to say I think he was wrong. If he held that opinion, and I think he did, and I think in one place he expressed it, I think he was wrong. To my mind it is clear that the Act is open to enforcement by a private individual, and I make this observation for this reason, that it may be that upon an application for a summons under this Act made to some other magistrate, another magistrate might take the view, if this were not said very plainly, that this court understood the magistrate to be right when he expressed that opinion that only the Crown, acting by the Attorney-General, could put the Act in force. I do not think any other magistrate could take that view. It seems to me a private person may be entitled to a summons, and a magistrate in proper circumstances might lawfully and properly grant one, and the case might be heard. But I think here in this case the magistrate did exercise his discretion upon matters as to which he was entitled to exercise it. The kind of discretion that a magistrate should exercise, and the kind that he is not entitled to exercise, have often been laid down, and I do not think really there is a much better example of it to be found than is given in the quotation from Lord Coke, which is in *Rooke's case*, 5 Rep. 100*a*, where he says: "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections, for as one saith, *talis discretio discretionem confundit.*" If the magistrate here had acted simply upon his own will or private liking for an Act of Parliament, or dislike for an Act of Parliament, he would then not have exercised his discretion in a proper way. But here I think, having regard to all the matters which he had regard to, and to which my lord has specially directed attention, he did exercise his discretion in the sense in which a magistrate may lawfully exercise the discretion of a judge, and not of a mere private individual.

I desire, however, to go a little further. I desire expressly to say this, that I think a magistrate may claim and may exercise a wider discretion in the case of proceedings under such statutes as this one is, statutes banishing people for their opinions, than any other statutes that I am acquainted with which appear on the statute books. Whatever may be the reason why they were passed, they were statutes which persecute opinion, and acts that are to my mind against the genius and spirit of this age. For example, here is a statute which says: "The Jesuit shall not exist in this country—that the Jesuit is to be banished." At the same time a Catholic school may earn a grant of public money, and, so far as I know, a Jesuit may teach in a Catholic school, and may help to earn that grant. All these things I think the magistrate may fairly bear in mind when he is asked to grant a summons in such a case as that. Now the words of Lord Mansfield have been referred to, and I think there is justification for the kind of thing the magistrate said in what Lord Mansfield said. Lord Mansfield was one the greatest judges who ever sat in this court—he is described, and properly described, in his epitaph in Westminster Abbey, as his country's pride. What did he say? Here in this book are two instances given of his laying down the law upon penal statutes—statutes persecuting opinion. One is in the case of a statute directed against the Quakers, the other is in the case of a statute directed against the Roman Catholics; and in each case it is perfectly plain that Lord Mansfield had regard to the enforcement of this law not only by laws and statutes in the books, but having regard to the circumstances of the time in which he was called upon to enforce it, and he says he does not dispute the necessity for those laws against the Catholic religion. The case was *Payne's case*, where Payne sued for a penalty as a common informer, and Lord Mansfield goes through the statutes and says: "There are statutes against priests—the first is that of Elizabeth," and so on "There was another made after, enacting that if a priest was convicted of saying Mass he was to forfeit two hundred marks and suffer one year's imprisonment, but neither does Payne go upon this statute, for here there is no reward for the informer. The third was made in King William's reign (11 & 12 Wm. 3, c. 4), soon after the Revolution. This is the statute Payne aims at, because here is one hundred pounds the country is to pay him if he can convict the defendant." Lord Mansfield draws attention there to the fact that that statute was made soon after the Revolution. It may have been very necessary to make it, and it may have been very reasonable to make it; but how does he go on? He says as to the Jesuits and so on: "Neither was it ever the design of Legislatures to have these laws enforced by every common informer, but only at proper times and seasons," such as immediately after the Revolution, obviously, "when they saw the necessity, for it and by proper persons appointed by themselves for that purpose"; and then he concludes with these very remarkable words: "And yet, more properly speaking, they were never designed to be enforced at all, but were made *in terrorem*." If Lord Mansfield might have regard to all that, it seems to me, looking at the statutes of this peculiar character, so may I, and so might the learned magistrate, and I do think that he was justified, having regard to the kind of statute under which he was asked to issue a summons,

having regard to the circumstances which are a matter of history, and which he must know. of how the statute came to be passed, having regard to the fact that the Crown had never attempted to put it in force, and that since it was passed people had been allowed to take part in public life and public opinion in this country holding the opinions that these people are charged with holding—I think having regard to all this, and having regard to all the circumstances to which my lord has specially directed attention, that he was justified in exercising his discretion, and that he did not exercise it simply according to his own will or caprice, but that he exercised it for good reasons which can be given and that he was entitled especially to do so when he was asked to enforce such a statute, and a statute of such a class as the class to which this statute belongs. I am therefore of opinion that there is no danger in holding—and that was the only thing I was anxious about in this case—as we hold to-day, that the law upon other statutes may be strained to allow magistrates to refuse proceedings which they ought properly to allow to be initiated.

CHANNELL, J.—I agree in the judgment of the court. I prefer to base my judgment upon the grounds stated by the Lord Chief Justice, and upon those alone. With reference to those which my brother Darling has just laid down, the matters were not brought before us in the argument, and I prefer to express no opinion upon those matters except that in my view this statute is not a statute merely directed against opinions, nor do I think that Lord Mansfield, in the passages that have been quoted to us from his life, was laying down the law in a way that we ought to recognise. The opinions of an eminent man, as he was, of course deserve our respect; but so far as I understand it, the views that he laid down to the jury have never got into the Law Reports, and have never been treated as a statement of the law. He was not trying, as I understand it, a criminal case, but an action brought by a common informer to recover and put into his own pocket a penalty; an action which has never met with a great amount of favour, and has seldom, I suppose, succeeded in recent years—at any rate unless the judge summed up in a very different way from that in which Lord Mansfield seems to have summed up in that case. One is not surprised that the jury found for the defendant in that case. But the matters which we have to consider in this case seem to me to be very different indeed from that, but I do think that these were matters that this magistrate, in the exercise of his discretion, was entitled to take into consideration. I should content myself entirely with a statement that I agree with the judgment of the Lord Chief Justice, if it were not that matters had been introduced in argument in this case as to which I think it is extremely desirable that there should be no mistake hereafter as to what it is that we do in fact lay down. Now these clauses in this statute appear to have been passed, as the preamble to section 28 states, for the purpose of the gradual suppression and final prohibition of these religious orders, and one sees that the object is to get all members of those orders gradually expelled from this country. Persons who were resident here at the time, whether natural born subjects or foreigners, and who were members of any of these religious orders, were to be allowed to stay here conditionally upon their registering themselves. Natural born subjects who were at the time members of the order were entitled to come here and to get the same protection as if they had happened to be here at the time of the passing of the Act, provided that within a certain time after their coming here they registered themselves. All those persons in the course of time would die, and the persons to whom the special privileges of staying here were given by the Act of Parliament would in the course of a great number of years disappear; and these provisions were made that no person being admitted to these religious orders elsewhere should come here, or that they should be admitted here and be here. The effect of those would be as stated in the preamble to effect the gradual suppression and final prohibition of these religious orders, and it seems to me it would have been done, not because of their opinions, but because they were supposed at that time, rightly or wrongly, to be mischievous persons; to be persons whom it was desirable not to have in this country; and the mode in which this was done was to say that their being here should be a misdemeanour, and that upon their being lawfully convicted they were to be sentenced and ordered to be banished. That is a peculiar sentence, not punishing them for being members of these religious orders, but directing that they being members of these religious orders, and not coming within the privilege of persons who were here at the time of the passing of the Act of Parliament, should be told to leave the country. Now it is put in the form of a criminal offence, and as it is put in the form of a criminal offence, it appears to me that a private individual is entitled to prosecute for it. As Mr. Avory said, it is an important constitutional principle that a private individual may set the criminal law in motion—at his own risk, in certain cases, of course, but that he may do so. To hold the contrary appears, to use an illustration of which one is reminded by the special subject of this kind of prosecution, very like reviving—if that is the proper expression for something which I suppose on the best authority never existed—the dispensing power of the Crown that was the subject of so much trouble in the days gone by. I think it is an important principle to hold that except where the special terms of the Act of Parliament direct the contrary (of which there are some instances) that a private individual may institute criminal prosecutions, and if this magistrate held, and I think he did express his opinion to the contrary of that as regards this Act of Parliament—if he had proceeded upon that alone I should think we ought to direct the *mandamus* to go. But in my view although he expressed that opinion, and stated it as one of the grounds of his decision, he stated it only as one of the grounds, and he went on as it were to say: Even if I am wrong in saying that a private individual cannot initiate these proceedings, at any rate I am entitled to take it into account as one of the matters to be dealt with when I come to consider whether I should exercise my discretion.

In that view I think he was right, and taking that into account, and taking into account the fact that proceedings had not in fact been taken during the seventy odd years since the Act of Parliament was passed, he was entitled to take into consideration those matters, and to say: I will not issue the summons. If I were preventing you from taking these proceedings and raising the question at all, possibly I might, but I am not doing so. You are entitled to present a bill to the grand jury, and if the bill is presented there will be a direction of the learned judge to the grand jury upon the law applicable to this matter, as to which my opinion is what I have expressed, but as to which I agree there may be doubts, and in the exercise of my discretion I think that is the better way of dealing with the matter. If he has said that, I think it is impossible for us to say that he is wrong, and that if we were to issue a *mandamus*, we should be doing that which the court never does upon *mandamus*—namely,

directing a man how to do his duty. The function of a *mandamus* is to direct the person to whom it is addressed, whether a magistrate or anyone else, to do his duty, but not to direct him to do his duty in any particular mode. The *mandamus* which we should issue, if we issued one here, would be to hear and determine this application for a summons. In my view he has heard it and determined it, because he has taken into consideration matters which he was entitled to take into consideration, and, having taken them into consideration. he has decided not to issue the summons.

Lord ALVERSTONE, L.C.J.—I am obliged to you, Mr. Campbell, for calling attention to *Roche* v. *Macdermott*, although the observation contained in it is only *obiter*.

Rule discharged, with costs.

Solicitors for the defendants to the informations, *Witham, Roskell, Munster, & Weld.*

Solicitor for the magistrate, *Solicitor to the Treasury.*

Solicitor for the applicant, *J. Othen, jun.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) } Feb. 27; March 3.

LONDON AND INDIA DOCKS CO. (LIMITED) v. WOOLWICH, MAYOR AND ALDERMEN OF THE BOROUGH OF. (*a.*)

Local government—Rating—Land covered with water—Right of appeal—Public Health Acts, 1848 (11 & 12 *Vict. c.* 63), *s.* 88, *and* 1875 (38 & 39 *Vict. c.* 55), *s.* 211—*Metropolis Valuation Act*, 1867 (32 & 33 *Vict. c.* 67), *s.* 45.

Land wholly covered with water was, in accordance with section 88 *of the Public Health Act.* 1848, *and section* 211 *of the Public Health Act*, 1875, *under the authority of which Acts rates were formerly levied in Woolwich, only rated at one-fourth of its net annual value.*

Held, that, in accordance with section 4 *of the London Government Act*, 1899, *the London and India Docks Co. were still entitled to that exemption although Woolwich is now governed by the Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120).

Held, also, that the appellants were entitled to appeal against the amount of the rate.

Case stated by quarter sessions.

The case stated set out the following facts:

The appellants are the owners and occupiers of certain hereditaments in the metropolitan borough of Woolwich, and in a general rate made for the said borough on the 21st of April, 1900, and allowed by justices on the 1st of May, 1901, the appellants were rated as the occupiers of the said hereditaments upon the full net annual value thereof and to the full amount of such rate.

The hereditaments included in the said rate consisted in part of land covered with water, and they were assessed before the 1st of April, 1901, at one-fourth part only of the net annual value.

The appellants objected to the valuation, and on the 26th of October, 1901, the committee heard and decided such objection on the basis of an alteration in the amount of the said assessments.

No objection was made by the appellants to the description of the said hereditaments.

By the Public Health Act, 1852 (15 & 16 Vict. c. 69), the Public Health Act, 1848 (11 & 12 Vict. c. 63), was made applicable to Woolwich.

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). Woolwich was placed in the metropolis, but in accordance with section 22 the rates continued to be made in Woolwich under the authority of the Public Health Acts.

By section 343 of the Public Health Act, 1875, the Public Health Act, 1848, was repealed, but by section 2 it was not to apply to the metropolis save as by this Act is expressly provided, and as Woolwich was not mentioned in the repealing sections the Public Health Act, 1848, still continued in force in that borough. The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), applied to Woolwich certain sections of the Public Health Act, 1875, including sections 209 and 227, which relate to the making of rates. The effect of the foregoing enactments, that previous to 1875 district rates were levied under the authority of the Public Health Act, 1848, and after that date under the Public Health Act, 1875.

By section 211 of the Public Heath Act, 1875, repeating *verbatim* section 28 of the Public Health Act, 1848, it is provided "that the occupier of any land covered with water . . . shall be assessed in respect of the same in the proportion of only one-fourth part of the net annual value thereof."

By section 19 of the London Government Act, 1899, it was enacted that a scheme under this Act should place Woolwich under the general law applying to metropolitan boroughs and provide for the repeal of the application thereto of the provisions of the Public Health Acts and the other Acts not applying to London, and place Woolwich under the Metropolis Management Acts, 1855 to 1893, and other Acts applying to London, and sections 15. and 16 of the Act provided that the committee of the Privy Council may make such schemes. Section 10 of the London Government Act, 1899, provides that any scheme under the Act shall make provisions for "protecting the owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed hereto at a less amount than other hereditaments."

In the London (Woolwich) Scheme, which was confirmed by the Privy Council on the 7th of August, 1900, the words above used were repeated, but in other respects it repealed the provisions of the Public Health Acts and provided that Woolwich should be governed by the Metropolis Management Acts, 1855 to 1893, and other Acts applying to London.

The London (Rating) Scheme, 1901, contained the following provisions: (1) In levying the general rate after the 1st of April, 1901, effect shall be given to any deduction from any existing rate (whether that exemption is given by way of reduced assessment or levying a differential rate in the pound or in any other measure by means of the deduction from the total amount of the general rate, which would otherwise be payable in respect of any hereditament to which the exemption or proportionate part corresponding to the exemption of the amount produced by the rate in the pound, which is treated as levied for the purposes in respect of which the exemption exists, or in the case of a total exemption equal to the whole amount so produced.

On the above facts the appellants contended that the effect of the above orders and schemes was to preserve to them the exemption in the case of land partly covered with water.

The respondents contended that section 211 of the Woolwich Improvement Act now having been repealed, the appellants were not entitled to any exemption, and that it had not been preserved by the

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

schemes and orders above referred to. They also took the point that by the Metropolis Valuation Act, 1867 (32 & 33 Vict. c. 67), s. 45, the valuation list is to be conclusive evidence of the amount, and as the appellants had only objected to the amounts before the assessment committee they could not appeal.

W. C. Ryde (*Balfour Browne, K.C.*, with him), for the appellants —First, with regard to the preliminary point, the valuation list is not conclusive on all points. For instance, when the rated person is wrongly described (*Smith* v. *Lambeth Assessment Committee*, 31 W. R. 3, 10 Q. B. D. 327), or when there is an exemption, as here, by statute: *Gordon* v. *Williamson*, 40 W. R. 692, [1892] 2 Q. B. 459; *Reg.* v. *Civil Engineers*, 28 W. R. 253, 5 Q. B. D. 48. We could not have appealed against the valuation list as we did not know then what the scheme was going to be. On the main point it is clear that the Legislature did intend to preserve our exemption, and the scheme has given effect to that intention.

Marshall, K.C. (*Courthope Munroe* with him).—The appellants are not entitled now to come and say that the valuation list was not correct, as they are properly described in the list, and objection cannot now be taken to the amount. With regard to the exemption, the exemption of the respondents is not preserved by any express words, and that as the Public Health Act, 1875, s. 211, has been repealed in its application to Woolwich they cannot now rely on it.

Ryde replied.

Cur. adv. vult.

March 3.—Lord ALVERSTONE, L.C.J.—The actual specific facts of the case are somewhat complicated, and I do not think there is anything to be gained by stating them in detail, as they must be gathered from the special case in the event of its being necessary to consider the facts of this case as bearing upon any other. The broad question is this. Prior to the passing of the London Government Act of 1899 the district of Woolwich, in which this property was situate, had been subject to the Public Health Act, 1875, and under that Act it is well known there was an exemption, that land covered with water should only pay at the rate of one-fourth in respect of certain rates. The district was also subject at that time to the Metropolis (Valuation) Act, 1869. Therefore for the purpose of procedure under rating, the procedure of the Metropolis (Valuation) Act had to be followed. By the London Government Act of 1899, it was provided by section 19, sub-section 1, that "a scheme under this Act shall provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts." The Act also contained a provision, section 16 (1), that "a scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate and for the discontinuance of a separate sewers rate and a separate lighting rate which were rates as to which under certain circumstances there would be this lesser liability, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments."

Later on there was a scheme which came into operation on, I think, the 9th of March, 1901, which did provide for a particular method of maintaining the exemption. It is not necessary to describe it. It is stated in par. 1, sub-section 2, of the scheme, and it practically maintained the one-fourth exemption, assuming it to be valid and binding in a proper case by a particular method of levying the rate. The particular valuation list on which the question arises was one for 1900. I ought to say it was attempted by the respondents to charge the appellants with an assessment for the full amount. The respondents justified that on two grounds. They said, first, that by the provisions of the Act of 1899 it was intended to bring Woolwich within the general law applying to metropolitan boroughs, and therefore inasmuch as some parts of the metropolitan boroughs at any rate had not got the exemption given by section 211 of the Public Health Act, 1875, in this respect, though they had certain other exemptions under certain other Acts, it was not intended that this exemption under the Public Health Act should be continued in Woolwich. We are all of opinion that that objection cannot be maintained. We think it was clearly intended that although Woolwich and the more outlying places were to come within the metropolis, the scheme should continue that exemption. At any rate, if the scheme has continued that exemption, it cannot be said it is not valid and binding. Hence the objection on the merits, we think, does not prevail. The more troublesome and difficult question is whether or not it was open to applicants to raise this point because they had not been before the assessment committee and obtained a distribution of the rateable value, which in the total was not objected to, between the part of the land which was not exempted property and the part which was. The assessment was on total, £15,000, I think, for the dock with tidal basin and quays, and although the total amount was agreed to after discussion, the appellants had asked the assessment committee to distribute between so much of the hereditament as was land covered with water and so much as was not. We are also of opinion that this objection cannot prevail and the appellants are entitled to raise the point. The original right of appeal goes back to the Act of 17 Geo. 2. There was previous legislation which one need only notice to add that it does not apply. The Parochial Assessment Act of 1831 and the Union Assessment Committee Acts Acts of 1862-1864. These do not apply to the metropolis, but I must not be thought as expressing an opinion that this kind of objection ought to have been raised before the assessment committee even under those Acts. I express no opinion because it is not necessary. I doubt whether any owner of a mixed hereditament can force the assessment committee to make the subdivision. There are certainly cases in which he could not, as in the case of a man who has got a park with a lake in it, but it is not necessary for us to say more than that we need not decide the question. Of course it is very convenient that there should be the subdivision, because it possibly then provides a standard which the parties would acquiesce in as to how these differential rates should be levied. When we come to the metropolis the case is, of course, somewhat different, and the rights and liabilities of the properties depend upon the Metropolis (Valuation) Act. Under that Act it was contended by Mr. Marshall (I do not pause to notice the machinery, which is very well known, as to how the parties proceeded) that because it was provided by section 45 that the valuation list shall be conclusive evidence of the gross and rateable value of the several hereditaments included therein, therefore the appellants were not entitled for the purpose of this rate either to contest the total amount or to raise the point that it ought to have been subdivided so as to enable them to raise this point. If there had been anything in the Metropolis Valuation Act which showed that the question was intended to be raised at that stage, I think there would have been something in Mr.

Marshall's point; but it is, in my opinion, much too late to contend that the right of appeal on other grounds than those mentioned in section 45 has been taken away.

There have been a number of cases in which it has been held that upon an appeal against the rate you can raise other questions than those determined by the assessment or by the sessions upon appeal against the valuation as, for instance, non-occupation or impropriety of the rate in other respects, and I see no reason why we should hold that a person is not entitled to raise this question, that he is the occupier in respect of the whole or part of the property subject only to the differential rate. In fact, when I put the point to Mr. Marshall he did not dispute that if the whole of the property was land covered with water and the man had been rated in respect of the whole he would be entitled on appeal against the rate to say in respect of that rate he was only liable to pay one-third or one-fourth as the case might be. I am of opinion that the old right of appeal in respect of such a matter still remains, and that the only effect of the Valuation Act for this purpose is that the total valuation is conclusive, and if possibly in some case there has been a subdivision settled by the original adjudication of the assessment committee or on a subsequent appeal the amount of the rateable value of that separated item in the list has been settled then the valuation list would be conclusive. I cannot hold that there was any obligation upon the appellants to get this subdivision made at the stage of the making of the valuation list. There is also another ground which appears to us to be conclusive in favour of the appellants in this case. I think Mr. Ryde was well founded in the argument that he made, that at the time the valuation test was going through its initial stages the company really did not know what the case would be. They did not know what steps would be taken, or in what way I should say the scheme would provide for the preservation of their protection, and I think that within the principle of Lord Bowen's judgment in *Gordon* v. *Williamson* it was not possible to contend that in that state of things the company were bound to get what I may call a hypothetical division in view of what might possibly happen. Speaking for myself, both on the special grounds of this case and on the general view of the construction of the Metropolis Valuation Act, I am of opinion that it was no bar to this appeal. It is obvious that our conclusion is in accordance with justice, as we do not think it was intended to remove the exemption either under the Act or under the scheme. The result is this appeal must be allowed. The parties agree about the figures.

Darling, J.—I agree.

Channell, J.—I agree with my lord, but I think I ought to say that my view of the matter is that, so far as any hereditaments in the future are concerned—that is to say, if a new dock were made in Woolwich, it was intended to apply to Woolwich the general law in the metropolis and not the law outside. I understood that section 10 (1) providing that a provision should be made for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate and the provision that was in fact made in the scheme, effect shall be given to any exemption from any existing rate of any hereditament to which the exemption applies—that it was intended to prevent the particular persons in Woolwich who had at the time got hereditaments of that character from being rated for the future any higher. That is why I do not think that it is contradictory to the express enactment that Woolwich should be put under the general law applicable to the metropolis; I think it is so put, and therefore if any dock were made it would come under the one law and not under the other. It is on that ground that the point on the merits, as it has been called, seems to me perfectly clear. That is the answer to the argument which otherwise was quite a logical argument, that Mr. Marshall put before us, that Woolwich is specially dealt with.

Lord Alverstone, L.C.J. — The point had not occurred to me. I do not differ from my brother Channell except as to this, that I should like to hear that particular point argued. It does not arise in this case.

Appeal allowed; leave to appeal granted.

Solicitors for the appellants, *Turner, Son, & Foley.*

Solicitor for the defendants, *S. Bryceson.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — May 28; June 20.

In re Sidebottom.
Beeley v. Waterhouse. (*a.*)

Charity—Gift of proceeds of sale of real estate—Retention of land unsold—Leave of court—Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5, 6, *and* 8.

Where land is devised to trustees upon trust to sell the same and hand the proceeds of sale over to a charity, the subject-matter of the gift being "personal estate arising from or connected with land," which is excepted from the definition of land contained in the Mortmain and Charitable Uses Act, 1891, *sections* 5 *and* 6 *of that Act do not apply, and it is competent to the trustees to retain the land unsold for more than a year after the death of the testator without obtaining the leave of the court therefor under section* 5 *of the Act, though it would probably be expedient for them to obtain such leave under the general jurisdiction of the court to administer trusts. In such a case section* 8 *of the Mortmain and Charitable Uses Act,* 1891, *has no application to the land devised by the will, unless the charity has money to purchase land under the provisions of some other will.*

This was an appeal against a decision of Buckley, J., which raised a question of some importance as to the operation of the Mortmain and Charitable Uses Act, 1891. That Act, by section 3, provides that "'Land' in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land."

By section 5, "Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court or any judge thereof sitting at chambers, or by the Charity Commissioners."

Section 6 provides that, after the expiration of the time limited for sale, "the land unsold shall vest forthwith in the official trustee of charity lands," and shall be sold by order of the commissioners.

(*a.*) Reported by J. I. Stirling, Esq., Barrister-at-Law.

Section 8 empowers the High Court, or any judge, or the commissioners, "if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of the personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, by order to sanction the retention or acquisition, as the case may be, of such land."

In the present case the late Mr. A. K. Sidebottom, by his will, dated the 9th of May, 1898, gave real estate on trust for sale, and directed that the proceeds should be handed over to the Ashton Infirmary when his executors should so decide.

The testator died in 1899. The executors sold a portion of the real estate but a large portion of it remained unsold when the time—one year from the death of the testator—allowed by section 5 of the Mortmain and Charitable Uses Act, 1891, was about to expire. Under orders of the court the time for sale was extended to the 26th of March, 1902: see *In re Sidebottom, Beeley* v. *Sidebottom*, [1901] 2 Ch. 1. 49 W. R. Dig. 21. The question was now raised whether, inasmuch as the subject-matter of the gift was personal estate arising from land, and so within the exception from the definition of land contained in section 3 of the Mortmain and Charitable Uses Act, 1891, section 5 of the Act was applicable, and whether it was not competent for the executors to retain the land unsold without obtaining the leave of the court.

Upon an originating summons issued by the trustees of the infirmary, the learned judge made an order declaring that sections 5 and 6 of the Act applied. And he extended the time for the sale of the real estate for six months, with a view to an appeal.

The trustees of the infirmary appealed.

Buckmaster, K.C., and *Martelli*, for the appellants.—This is not a devise of land to a charity. The charity is only interested in the proceeds of sale of land. But sections 5 and 6 of the Mortmain and Charitable Uses Act, 1891, can only refer to land as defined in that Act by section 3, and proceeds of sale of land are excepted from that definition.

They referred to *In re Wilkinson, Esam* v. *Attorney-General*, [1902] 1 Ch. 841.

Leigh-Clare, for the trustees of the will.

R. J. Parker, amicus curiæ, said that *In re Wilkinson* had been followed in several cases in chambers.

Romer, L.J., read the following judgment of the court: In this case land was assured by will to trustees upon a valid and effective trust for sale, and under the will the charity took no interest except in the proceeds of sale. It is not a case in which, according to the true construction of the will, land, or any "tenements or hereditaments, corporeal or incorporeal, of any tenure," was given directly to the charity or to trustees upon trust for the charity. So far as concerns any rents or profits derived from the land before sale, they would pass to the charity only by implication, as mixed with, and so as to be inseparable from, the proceeds of sale when the land was in fact sold. In these circumstances, having regard to section 3 of the Act of 1891, and to the object and intention of the Legislature as gathered from that Act as a whole, we have come to the conclusion that this is not a case in which land has been "assured by will to or for the benefit of any charitable uses" within the meaning of those words as used in section 5 of the Act, and, accordingly, that sections 5 and 6 of the Act have no application. No doubt by this will "land" was assured, and under the will the charity derived a "benefit." But by this will the charity obtained no benefit except a benefit in "the personal estate arising from the land" after the testator had affected the land with an effective trust for sale. This being so, in our opinion, as already stated, "land" within the definition of section 3 of the Act was not, as land, assured by will to or for the benefit of any charitable use. At the same time we desire to make it clear that this decision does not make it easy or possible for a charity to escape from the object of the Mortmain and Charitable Uses Act, 1888, as altered by the Act of 1891, so far as that object was directed to prevent charities holding land. In the present case, for example, in the events which have happened, the charity alone is interested in the proceeds of sale when the land is sold. But that fact will not justify the trustees, even by the direction or with the consent of the charity, in indefinitely postponing the sale and holding the land simply for the benefit of the charity. The trustees are still bound to carry out the trust for sale within a reasonable time from the death of the testator. The charity would have no right to revoke the trust for sale, or to authorize the trustees not duly or properly to carry out that trust. And we think that in any case in which it was made clear that, by express or tacit arrangement between trustees for sale and a charity, land was in fact being held unsold for an unreasonable time, it would be open to the Attorney-General to take action. It may be pointed out that the account rendered by trustees of a charity to the Charity Commissioners, pursuant to section 44 of the Charitable Trusts Amendment Act, 1855, ought to afford the means of ascertaining whether land is being so dealt with. In the present case we have not to consider how long it will be reasonable for the trustees not to sell the land. That question is not before us. But it may well be that, after the expiration of this time already allowed by the court for the postponement of the sale, the trustees will run considerable risk by postponing the sale unless they obtain the direction and authority of the court, not indeed under the provisions of section 5 of the Act of 1891, which have no application to the case, but under the general jurisdiction of the court as to trusts. We may add that the effect of our decision would seem to be that in a case like the present the provisions of section 8 of the Act of 1891 have no application to the land devised by the will unless the charity has money available to purchase land under the provisions of some other will. In the result we discharge the order appealed from, and declare that the provisions of sections 5 and 6 of the Act of 1891 do not apply to the land devised by this will.

Solicitors, *Woodcock, Ryland, & Parker*, for *Leonard Bottomley*, Ashton-under-Lyne; *Bower, Cotton, & Bower*, for *W. H. Vaudrey*, Manchester.

From K. B. Div.
Mathew and Cozens-Hardy, L.JJ.) June 10.

McIver & Co. (Limited) v. The Tate Steamers (Limited). (a.)

Practice—Costs—Taxation—Examination of witness in London—Attendance of country solicitor—R. S. C., 1883, *ord.* 65, *r.* 27 (29); *Appendix N, Item* 147—*R. S. C., January*, 1902, *r.* 10.

By rule 10 *of the R. S. C., January*, 1902, *regulation* 29 *of ord.* 65, *r.* 27, *was annulled, and the following regulation was substituted for it:* "*On every taxa-*

(a.) Reported by W. F. Barry, Esq., Barrister-Law.

tion the master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party."

Upon taxation of costs as between party and party the taxing-master allowed a sum of £12 12s. for the costs of the attendance of a country solicitor on the examination of a witness in London before the trial.

Held, that, under rule 10 of the Rules of January, 1902, the taxing-master had a discretion to allow this sum, though it exceeded the maximum authorized by the scale of fees in Appendix N, Item No. 147, to the R. S. C., 1883.

Appeal from a decision of Bigham, J., at chambers, refusing to review the taxation of costs.

The action was brought by the time charterers of a steamship to recover damages from the shipowners for negligence in allowing the steamship to start on a voyage without a sufficient quantity of coal on board whereby the steamship was obliged to deviate and put into a port where the charterers had to buy coal at an increased price. The action was set down for trial in the commercial list in London and an order was made for the examination of an important witness before the trial. The Liverpool solicitor who was acting for the plaintiffs, and who had drawn the proof for the examination of the witness by counsel, came to London and attended the examination. At the trial the plaintiffs recovered judgment. On the taxation of the costs the taxing-master allowed £12 12s. for the expenses of the Liverpool solicitor's attendance on the examination of the witness in London. The defendants carried in objections to the allowance on the ground that under item 147 in the scale in Appendix N to the Rules of the Supreme Court, 1883, only £2 2s. could be allowed as a maximum. The master, in answer to the objection, stated that in his discretion, as the witness was an important one, he had allowed £12 12s. Bigham, J., dismissed an application to review the taxation. The defendants appealed.

By rule 10 of the Rules of the Supreme Court, January, 1902, "Regulation 29 of ord. 65, r. 27, is hereby annulled, and the following regulation is substituted therefor: On every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing-master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses.

Bailhache, for the defendants.—The taxing-master is bound by the scale of costs set out in Appendix N to the Rules of the Supreme Court, 1883. Item 147 in that scale only authorizes a maximum of £2 2s. for the attendance of a solicitor on the examination of a witness before an examiner where counsel is employed. The scale in Appendix N applies to taxation of costs as between solicitor and client and also as between party and party. Some of the items in the scale, however, could not formerly have been allowed as between party and party, and rule 10 of the Rules of the Supreme Court, January, 1902, was framed to enable the taxing-master to allow as between party and party those costs which he could under that scale allow when taxing as between solicitor and client. Rule 10 of January, 1902, only applies to taxation of costs as between party and party, and not to taxation as between solicitor and client. That rule has not affected or done away with the scale of costs in Appendix N. As between solicitor and client no more could have been allowed under the scale than £2 2s., unless the client had previously authorized a higher payment or had subsequently ratified it: *In re Harrison*, 34 W. R. 645, 33 Ch. D. 52. The master, therefore, could allow in this case the sum of £2 2s. If rule 10 of January, 1902, is held to apply to taxation of costs as between solicitor and client, the result will be that the scale will be gone, and the matter will be at large, and solicitors will have no guide for drawing up bills of costs. The true view is that the rule only applies to taxation as between party and party, and its effect is to make all the items in the scale apply equally to both kinds of taxation. The master was therefore wrong in allowing £12 12s. for the attendance of the country solicitor in London.

A. D. Bateson, for the plaintiffs, was not called upon.

MATHEW, L.J.—In this case both the taxing-master and the learned judge were of opinion that this question of allowing £12 12s. for the attendance of the Liverpool solicitor on the examination of the witness in London was a matter entirely within the discretion of the taxing-master. It has been argued before us that the taxing-master has no discretion to allow such a sum. I may say that, if this is a matter within the taxing-master's discretion, I can have no doubt that in this case the expenses of the attendance of the Liverpool solicitor upon the examination of the witness in London might be very properly allowed. It was most probably a reasonable course for the Liverpool solicitor, who was familiar with the facts of the case, to come to London for the purpose of being present at the examination of the witness. But it is said that the taxing-master has no discretion to allow this sum of £12 12s., and this raises a somewhat formidable point. The old practice upon taxation as between party and party was that the scale was binding on the taxing-master, and such an allowance as that of £12 12s. in the present case could not have been sanctioned. After careful consideration it was determined to alter that, and rule 10 of the rules of January, 1902, was framed, which provides that on every taxation the taxing-master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. We are asked to interpret that rule by saying that it means in every taxation the taxing-master shall allow no higher costs than those prescribed by the scale. I decline so to read the rule. The rule was framed with full knowledge of the old regulations and scale, and the language is quite general, and authorizes the taxing-master to allow all such costs, &c., as shall appear to him necessary or proper for the attainment of justice. The master therefore had a discretion to allow this sum. The appeal must therefore be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. The argument is that rule 10 of the rules of January, 1902, was simply intended to bring party and party costs up to the then existing level of solicitor and client costs. In other words, the discretion of the taxing-master is limited within the four corners of the scale in Appendix N as applicable to taxation between solicitor and client. Upon the best consideration which I can give to the matter I have come to the conclusion that that argument cannot prevail. Rule 10 of the new rules is substituted for regulation 29 of ord. 65, r. 27. Regulation 29 was in somewhat similar terms, but was limited to party and party taxation. Rule 10 applies to every taxation, whether between party and party or

between solicitor and client. Reading it thus, the necessary conclusion is, not that in every case of a country solicitor coming to London to attend the examination of a witness his costs are to be allowed, but that if the taxing-master on a review of all the circumstances thinks that it is necessary or proper for the attainment of justice that such a charge should be allowed, either as between party and party or as between solicitor and client, even though in the latter case no prior instructions were given by the client, nor was there any subsequent ratification by him, then the item ought to be allowed. The solicitor is bound to exercise his own judgment in the matter, subject to the right of the taxing-master to say whether he has exercised a right judgment. The taxing-master therefore had a discretion to allow this item of £12 12s., and that being so, it is not for us to say whether his discretion has been well exercised or not. At the same time, I think it right to say that I agree with my brother Mathew in thinking that the master's discretion has been well exercised.

Appeal dismissed.

Solicitors for the plaintiffs, *Charles Russell & Co.*, for *C. A. M. Lightbound*, Liverpool.

Solicitors for the defendants, *Downing, Bolam, & Co.*, for *Bolam & Co.*, Sunderland.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — May 27, 28.

In re MCMURDO.
PENFIELD *v.* MCMURDO. (*a.*)

Administration—Insolvent estate—Secured creditor—Withdrawal of claim—Certificate—Disallowance of claim—Realization of security—Leave to prove—Judicature Act, 1875 (38 & 39 *Vict c.* 77), *s.* 10—*R. S. C., ord.* 55, *rr.* 57, 70, 71.

By section 10 *of the Judicature Act,* 1875, *the rules in bankruptcy are made applicable to the administration of insolvent estates in Chancery, so that a creditor is entitled to avail himself of any rights he may have under the rules in the absence of an established practice in Chancery to the contrary.*

A secured creditor in an action in Chancery for the administration of an insolvent estate who, in reliance on his security, withdraws his claim, is not debarred from subsequently coming in and proving for the balance of his debt in accordance with the practice in bankruptcy by the mere fact that a certificate has been made in which his claim is stated to have been disallowed.

In re Hopkins, Williams *v.* Hopkins, 29 *W. R.* 767, 18 *Ch. D.* 370, *distinguished.*

This was an appeal from a decision of Swinfen Eady, J.

Edward McMurdo, the testator in the action, died in the year 1889, and on the 25th of July, 1889, an order was made in the action for the administration of the testator's estate. At the date of his death the testator was indebted to the New Oriental Bank to the amount of £47,198 14s. 10d., for which the bank held certain securities, including twelve debentures of the aggregate nominal value of £2,000 and 6,000 shares of an aggregate nominal value of £60,000 in the Delagoa Bay and East African Railway Co. (Limited).

On the 29th of March, 1890, the bank, in answer to advertisements for creditors of the estate, sent in notice of their claim, and received notice to come in and prove it on the 29th of May, 1891.

The railway and assets of the Delagoa Bay and East African Railway Co. (Limited) were seized by the Portuguese Government, and on the 13th of June, 1891, an arbitration tribunal was appointed.

On the 15th of June, 1891, the bank applied for and obtained an extension of the time for proving their claim, and subsequent extensions were also granted.

On the 23rd of June, 1892, the bank went into voluntary liquidation, and Thomas A. Welton was appointed liquidator.

On the 29th of October, 1892, the liquidator's solicitors wrote to the plaintiff's solicitors, that the liquidator had decided not to prove for the bank's claim, but to rely on the securities held by him for the debt.

On the 2nd of December, 1892, the liquidator attended in chambers and withdrew the claim.

On the 29th of November, 1893, the chief clerk made a certificate as to debts, in which he disallowed the claim of the bank. Notice of this disallowance was given to the liquidator.

The award in the Delagoa Bay arbitration was not made till the year 1900. In July of that year the liquidator received £1,448 in respect of his security, and there was evidence that nothing more would be paid.

In December, 1901, the liquidator took out a summons to be allowed to come in and prove for the balance of the bank's debt, notwithstanding that the time limited for making claims had expired.

On the 16th of December, 1901, this summons came before the master and was dismissed by him on the ground that the certificate was conclusive. No leave was given or asked for to amend the summons by making it also a summons to vary the certificate, but on the 20th of January, 1902, another summons was taken out by the liquidator that, notwithstanding the time for applying to vary had expired, the chief clerk's certificate dated the 29th of November, 1893, might be varied so far as the claim of the applicant was withdrawn or disallowed, and that, notwithstanding the time limited for making claims had expired, the applicant might be at liberty, under the judgment dated the 25th of July, 1889, in the action, to make and establish his claim as a creditor upon the testator's estate for the sum of £47,198 14s. 10d., together with interest thereon.

At the date of the issue of this summons the estate had not been distributed, but the master's final certificate in the action was made on the 27th of January, 1902.

The summons came on in chambers on the 10th of March, 1902, and was dismissed.

The liquidator moved to discharge the order dismissing the summons.

Swinfen Eady, J., dismissed the motion.

The liquidator appealed.

Muir Mackenzie and *R. J. Parker*, for the liquidator.—By virtue of section 10 of the Judicature Act, 1875, the rules in bankruptcy apply to the administration of insolvent estates in Chancery. The fact that a certificate has been made in the administration does not prevent the bankruptcy rules applying. Under the bankruptcy rules a creditor may come in and prove at any time so long as any assets remain undistributed. There is no distinction between unsecured and secured creditors, except that the latter before coming in to prove must deduct what has been realized on their security. The fact that a creditor has intimated that he is going to rely on his security does not prevent him from making his claim against the general estate,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Upjohn, K.C., and *Eastwick, contra.*—Section 10 does not import the bankruptcy practice into Chancery administration. The real question is whether the applicant has brought himself within rules 70 and 71 of order 55. A claim can only be made after the expiration of the time fixed under rule 57 if no certificate has been made. If the claim has been the subject of a certificate the certificate is binding under rule 70, and will only be discharged or varied under rule 71 if the special circumstances of the case require it. *Gillespie* v. *Alexander*, 3 Russ. 130, is relied on in favour of the appellant, but the doctrine of that case has never been extended to a case in which a certificate has been made dealing with the very claim subsequently brought forward. To succeed the appellant must show special circumstances, but has failed to do anything of the kind.

Jenkins, K.C., and *Whinney*, in the same interest.

The following cases were referred to: *Ex parte Boddam*, 8 W. R. 457, 2 De G. F. & J. 625; *Ex parte Good*, 28 W. R. 553, 14 Ch. D. 82; *Brown* v. *Lake*, 1 De G. & Sm. 144; *Gillespie* v. *Alexander*; *In re Hopkins*. *Williams* v. *Hopkins*, 29 W. R. 767, 18 Ch. D. 370; *David* v. *Frowd*, 1 My. & K. 200; and *In re Metcalfe*, *Hicks* v. *May*, 28 W. R. 499, 13 Ch. D. 236.

VAUGHAN WILLIAMS, L.J., referred to the facts, and continued: Mr. Upjohn took the point that the question of the right of the applicants to come in now and prove had really been raised upon the summons heard and disposed of on the 16th of December, 1901, and that the result was that the question had now passed into a *res judicata*, and that the applicants had no longer any right to come to this court or any other court and have the question adjudicated on again. That objection *primâ facie* is a conclusive answer to this application. But it is an objection which can be got over if it is right and just so to do by extending the time for appealing against the order made on the 16th of December, 1901, and considering the very exceptional circumstances of this case it seems to us right that this extension of time for appealing should be allowed and that we should treat this appeal for some purposes as if it were an appeal from the order made on the 16th of December, 1901. When one bears in mind the great length of time that has occurred since the commencement of this administration without the fault of anyone one cannot be surprised that there was a slip made in procedure. That was really what happened, for when the summons came on to be heard on the 16th of December it was quite plain that both the applicants and the respondents to the summons intended to deal with the substantial question—aye or no, had the applicants, taking into consideration all the circumstances in the case, a right to come in and prove on proper terms being imposed? When that question was intended to be raised on the summons the objection was made that the old certificate stood, and that there was no application to vary it. In these circumstances I have very little doubt myself that if the hearing had been a hearing at which counsel were present an arrangement would have at once been made whereby either a fresh summons should be taken out or that summons treated as amended so as to include, if necessary, the application to vary the certificate. But that was not done. Nobody's rights have been affected or injured in any way by the time that has elapsed, and there being this substantial question raised between the parties it seems to us just that we should allow the extension of the time for appealing and deal with this matter now, and thus shut out in effect the objection that this question as to the right to prove has been disposed of, and is *res judicata* by reason of the order made on the 16th of December.

Having said that, I will now proceed to deal with the merits of the case. It really is not denied that in this case the 10th section of the Act of 1875 applies and that we must, if it makes any difference, deal with this question as it would be dealt with upon a proof being rendered in bankruptcy. I say if it makes any difference, because I am not at all sure myself that it makes any difference whatsoever. I will first deal with the matter as if the case were simply a case of a proof in bankruptcy. What were the circumstances of this case? The liquidator of the Oriental Bank Corporation was a secured creditor and he held as securities Delagoa Bay Railway bonds and some other securities the names of which are not material here. At the moment of the commencement of this administration it was very uncertain what the value of the Delagoa Bay Railway bonds might be. The question had been referred to arbitration as to what sum was to be paid by the Portuguese Government to the bondholders and the value of these securities necessarily depended upon this—one might almost call it—international arbitration. It was not known what sum might be awarded or how soon it might be awarded. In fact the arbitration occupied some eight years. It was not really for the interest of either the creditors of the estate or anybody else who was interested in the estate of Colonel McMurdo that the administration should take place without the value of these bonds being ascertained. In those circumstances the liquidator having made a claim, a certificate was made in which, to put it shortly, this claim was stated to be disallowed. At that moment the liquidator as creditor in the administration really was not, at all events according to the bankruptcy code, in a position to prove at all. He could not prove without realizing or valuing his security, and he had not done either one or the other, and therefore the claim was disallowed. No one suggests that this disallowance amounted to any adjudication upon the merits in respect of the right to prove. It was merely a declaration that *rebus sic stantibus* there was no right of proof. In those circumstances it does not seem to me that the liquidator allowed an unreasonable time to elapse after the award had been made before he applied for leave to prove.

Now according to my experience of bankruptcy practice there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and asked for leave to prove, to any terms which the court may think it just to impose; and of course in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the court. If that is so, leave must be granted upon such terms as the court may think just. That undoubtedly being the general rule, what is it that is said against it? It is said against it that by the first rule of the second schedule to the Bankruptcy Act of 1883, "every creditor shall prove his debt as soon as may be after the making of a receiving order," and it is suggested that the result of that rule is that if the creditor does not come in as soon as may be after the making of the receiving order, his right of proof is gone. Now, in answer to that there is first the section which Stirling, L.J., called attention to in the

course of the argument—the 61st section of the Act: "Any creditor who has not proved his debt before the declaration of any dividend or dividends, shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend," &c., &c. Now, Mr. Jenkins seemed, to my mind, entirely unable to reconcile that section with the construction which he invited us to put upon the first rule of the second schedule. Moreover, if you take the rules with regard to proof in the second schedule as a whole, it is perfectly plain that the first rule of the second schedule cannot receive such a construction as is sought to be put upon it. It is a mere directory section, the non-compliance with which does not in any way deprive any creditor of a right or limit his right.

Now, the next point that was made is one that affects the proof whether it is looked at as a proof in bankruptcy or whether it is looked at as a proof under an administration in Chancery, and what he says is this: "Although it may be that there is a general rule that a creditor may come in and prove at any time provided he does not disturb prior distributions, and in some cases provided proper terms are imposed, yet all this is overridden because the creditor may subsequently to the commencement of the arbitration have so conducted himself as to estop himself from bringing in the proof."

It is said that he may have so acted as practically to have irrevocably agreed that he never will bring in a proof. I am not prepared to say that that is not a possible state of things, but the plain answer in this case is that although that may be theoretically possible there is not any ground whatsoever for saying that by words or by conduct the liquidator ever did agree, or did lead those who were interested in the administration to suppose that he agreed, that he would never carry in a proof.

Then it is suggested further that these securities while they were in the control of the creditor might have been dealt with by him, and at one time were of greater realizable value than they are now. I say nothing about the fact. I dare say that it is the truth, but it seems to me that it is impossible to say that because the securities have altered in value that that in any way estops the creditor from carrying in a proof here. I have not got to decide at the present moment, and I shall not express any opinion as to whether it is possible, when the proof is carried in, that in some way or other this altered value may not have to be taken into consideration; for the purpose of to-day I need not deal with that question.

I have now said all I have to say about the proof, looking at it as a proof in bankruptcy. Now let us look at it as a proof in an administration, and I shall really say very little upon this part of the case because my brethren are so much more competent to deal with it than I am, but I wish to say for myself that, having regard to the authorities that have been cited to us in reference to the practice in administrations, it seems to me that there is not the slightest ground for saying that the disallowance in a certificate like this of the claim to prove a disallowance which it is not suggested was based in any way upon an adjudication or any merits of any sort or kind, is a fact which interferes with the right to carry in a proof subsequently in the administration. It is quite true that the effect of the certificate is that the creditor not having come in within the time limited has no longer any right to the benefit of the order or decree without some subsequent order by the court, some supplementary certificate, and in effect, what is being asked for here is a supplementary certificate. I say again that upon the authorities that have been cited to us, including the authority of Lord Eldon in *Gillespie* v. *Alexander*, it is plain that the right to apply for leave to prove out of time is a right which has been recognized again and again in administrations. In those circumstances I really do not think that it makes very much difference whether one looks at this proof as if it were carried in in bankruptcy or carried in in the administration in Chancery. In either case it seems to me that by the machinery of what is in effect a supplementary certificate upon proper terms the court would allow the creditor to come in.

As to the other points that were raised, as to there being some estoppel, or some alteration in circumstances, which should prevent the creditor from proving now, the observations that I have made upon this subject with regard to the proof in bankruptcy apply equally to the proof in the administration. It seems to me that the whole argument to the contrary—the argument, I mean, which ought to treat the certificate as if it was something binding which prevented the liquidator from proving now—was based upon a misapprehension of what the certificate was intended to do. It should be remembered that *primâ facie* the object of the certificate is not to decide a question as to the rights of the creditor. *Primâ facie* the object of the certificate is to protect those who have to administer the estate. Of course there may be cases in which in truth and in fact merits have been adjudicated upon before the certificate is given, and in that case a supplementary certificate, I take it, would certainly be refused. But, according to my judgment, the view which seems to have been taken on the order of the 16th of December, 1901, that the certificate which was issued early in these proceedings raised some fatal objection to the proof of the creditor, an objection which could not be removed by a supplementary certificate, has no justification whatsoever in either theory or practice.

Now, there is only one other matter which I ought to mention, but there again I feel that the matter can be so much better dealt with by my brethren than by me owing to their greater familiarity with the Chancery practice, that I propose to put my view very shortly. Mr. Upjohn relied upon two rules in order 55. He said, as I understood him, that rule 57 only applied to causes arising before the actual certificate had been given, and then he said that that threw one upon rules 70 and 71; that the moment you had got the certificate it was binding upon all parties, and could only be got rid of by the exercise of the powers given to the judge under rule 71: "The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied," &c., and then he said that in the present case there were no such special circumstances. It does seem to me that one need not really take any exception here to the argument of Mr. Upjohn upon this point, although I must not be taken as entirely agreeing with it, but I think one need not take any exception to it in the circumstances of this case, for if it be true that under rule 71 there must be special circumstances, and that this certificate, which really adjudicated upon nothing whatsoever, is binding upon the creditor just as if it had been an adjudication in substance. If all that is true—I do not know whether it is true, yet we have the special circumstances here, and we have got them by reason of what Romer, L.J., called attention to in the course of the argument, because you have got a state of things where by the lapse of time it would be right to exercise the powers under rule 57, and that itself is a state of circumstances which falls in with the words "special circumstances." In these circumstances the view we take is that the leave ought now to be given as asked for in this summons of the 14th of January, it being

taken that by our order the time for appealing against the order of the 16th of December, 1901, is extended, and that this summons is dealt with as if framed upon such an extension of time for appealing.

In those circumstances the only question that has to be dealt with is the question of terms. With regard to that question of terms, I do not mean at the present moment to say anything final, because it seems to me that to a very large extent these terms can be, and ought to be, dealt with when the claim is carried in. I do not define the terms so far as we have to impose them at the present moment, because this will be much more satisfactorily done after my brothers have given their judgments, so that at present my judgment only is that the leave ought to be given upon proper terms, and the proper terms will be dealt with after my brethren have given their judgment.

ROMER, L.J.—I also think that on terms the appellant should be allowed here to come in and prove. I will first consider what took place in the early days of the proceedings in this administration action. The appellants intimated their intention to prove their debt for its full amount. They were then required by the administrator (the creditor having the conduct of the proceedings) to prove their debt. They then had to consider their position having regard to the fact that the estate was insolvent and that they held securities. Now what ensued appears to me to be in substance this. The appellants found what was obvious, that in accordance with the Bankruptcy Rules which applied to this case they could not come in and prove without valuing their security; and at that time they appear to me to have come to the conclusion that their security was equal to or greater in value than the amount of their debt, and thereupon they announced their intention of not proving and withdrawing their claim to prove. That was assented to, and then before the master their claim was, as it is said, disallowed. When the certificate came to be made by the master he entered in the certificate this claim as having been made and having been disallowed. We now therefore know what the meaning of the word "disallowed" is in this certificate. It means what I have stated and no more. It does not amount to an adjudication on the question of debt or no debt. It is not a matter of adjudication in the true sense. This is not a case of *res judicata* being pleadable as against the appellant—indeed it is not contended on behalf of the respondents that the appellant is estopped upon that ground.

Then if he is not prevented from asking for leave to prove on that ground, I next will consider whether his then determination not to prove because of what he then considered to be the value of his security was to be taken as against him as final and irrevocable, so that when he subsequently found that his security did not realize what he had hoped it would and did not suffice nearly to pay his debt he should be held debarred from all opportunity under that change of circumstances from coming in and proving for the balance of his debt. I think that what then took place could not be held to so prevent him. To my mind it was a mere case of a secured creditor resolving not to prove because at the time he valued his security as equal to or greater than the amount of his debt, and at that time he probably did not contemplate that there would be any necessity at any time thereafter for his having to come in and prove because of any possible change in the value of the security or in the amount it would realize. But that is a very different thing from saying that he must be thereby taken to have resolved and elected never to come in and attempt to prove even if it should turn out that contrary to his anticipation the property realized less than the amount of his debt. It seems to me that we cannot, and ought not to draw such a conclusion from his acts on that occasion.

That being so, I pause to consider whether upon any other ground he ought to be estopped by his then determination of withdrawing his proof from coming forward now in the existing circumstances and asking to be allowed to prove. I think not, for I wish to point out that this was not a case of a bargain between the administrator and the creditor. It was not anything in the nature of a contract express or implied whereby the creditor withdrew his proof on the terms of retaining his security—nothing of the sort. He simply did not prove for the reason I have stated, and for no other reason, and the rights of the parties remained wholly unchanged by what he then did for, as I pointed out in the course of the argument, the administrator could at any time have redeemed on paying the amount of the debt. Had the value of the assets gone up even beyond the then expectation of the creditor, the administrator at any time could have come forward and called on him to hand over all the securities on being paid the amount of his debt.

That being so I will treat this in the first place as if it had been a case of bankruptcy pure and simple. To my mind, having regard to the second schedule to the Bankruptcy Act of 1883, the Legislature clearly contemplated the right of a creditor on any alteration during the bankruptcy in the value of his security by realization of that security or otherwise to be allowed to readjust his claim—of course by so doing not thereby creating any injustice to the other parties, and of course not interfering with anything that had been done as to dividend or otherwise prior to the change of proof. And apart from any other sufficient circumstances justifying the Court of Bankruptcy, in a case like the present somewhat special circumstances, it could not be said that merely because the creditor had originally valued his security as being greater than his debt or equal to it he was thereby for ever prevented coming in and proving when it turned out by realization or otherwise that his security was insufficient to pay his debt. Of course the Court of Bankruptcy would have had power to impose terms, if terms had been necessary, and, of course, he would not have been allowed to disturb, as I have said, any prior dividends in the bankruptcy; but, in such a case, as I have indicated, in the absence of any special circumstances, which would render it unjust to allow the creditor to come in, he would have been allowed in bankruptcy, and ought to have been allowed in bankruptcy to come in; and the bankruptcy practice would clearly have allowed him to do so. As a general rule, he could have come in, of course, such terms being imposed as might, to the court, under any special circumstances, have appeared just. It is said that rule 1 of the second schedule would have stopped the creditor in such a case, from coming in and proving. That rule, to my mind, has not such a hard and fast effect as the respondents here would seek to attribute to it. That rule must be read with the other rules. Rule 1 is a very general rule. It applies to all creditors, and, of course, was not dealing with the secured creditors more than it was with any other creditor, and clearly no one could reasonably contend that, by reason of rule 1 of that second schedule, an ordinary creditor by mere delay in coming in and proving his debt would thereby altogether lose his right of coming in at all as against undistributed assets in a case where otherwise no injustice would be done. As a rule no injustice is done when a creditor comes in for the Bankruptcy Court can always impose

terms which will prevent any unnecessary delay in the administration of the estate in bankruptcy being caused by the lateness of the creditor coming in, and of course the court could make such terms as would be right as to the creditor coming in not disturbing prior dividends or otherwise. As a rule, subject, as I have said, to care being taken that no injustice is done, by special order the Court of Bankruptcy will undoubtedly, notwithstanding rule 1, allow a creditor, notwithstanding his delay, to come in and prove and share in undistributed assets. I will not say that there may not be special circumstances that might justify the Bankruptcy Court in refusing to admit a creditor who came in late, but I have stated what I conceive to be the general rule and practice of the Bankruptcy Court.

Now are there any special circumstances in this immediate case which would have justified the Bankruptcy Court—and as far as I am dealing with this part of the case the same meaning applies to the application though it is made in Chancery—in saying to the creditor, "You ought not to come in and prove at all." I think not.

In the first place, as to the delay. No doubt there has been considerable delay; but this is a very peculiar case. The principal securities consisted of debentures and shares in the Delagoa Bay Railway. That railway, as we know, was seized by the Portuguese Government, and a fund was found by the Portuguese Government; and the parties entitled to share in it had to be ascertained by arbitration. What the secured creditor, the appellant here, did was this: He waited the result of the arbitration; he waited to see what sum would be awarded to him in respect of his holdings in the railway under the award of the arbitrator. Was that an unreasonable course for him to take? I think not. Was it a course which a mortgagee, acting reasonably and properly, would be entitled to take? I think it was, and, indeed, curiously enough, in this very case the very same course has been adopted, and I think rightly so, by the administrator in this very action, acting, of course, under the direction of the court. For part of the assets of the testator in this case were holdings in this very railway, and we have been told, and I have no doubt accurately, that the delay that has arisen in winding up this estate is partly, if not chiefly, due to the fact that the award had to be waited for, and the funds awarded in respect of the testator's holding in the railway had to be sent over here before the estate could be finally wound up.

In those circumstances can it be said that, by reason of the delay, the appellant ought not to be allowed to come forward now, when the funds in court have not been distributed, and ask that he, as a creditor who has not been paid by his security, should be allowed to share as against the undistributed balance? I think not, assuming always that care is taken by terms not to allow the winding up of this estate to be further delayed by reason of the delay in the appellant making his present application for leave to prove. If the appellant is allowed to come in and prove no injustice will be done. There has been no change of parties, which would have rendered it unfair to allow the appellant to come in and prove. The only thing that can be said which would require the court's attention in dealing with the matter specially is this, as I have said, the question of the delay of the appellant not leading to further delay in the administration of the estate; and that can be properly guarded against.

Now, there was one other point taken on behalf of the respondents here which must be alluded to, though I do not think it amounted to the essence of the case. It was said that the liquidator, the representative of the applicants, had other securities besides the securities of the Delagoa Bay Railway to which I have referred; and it is said, on behalf of the respondents, that one of those securities, consisting of shares, might have been sold at some time during the administration for some substantial sum. That is the only case made in respect to those other securities. The appellant has not thought it necessary to deal specifically with that allegation on behalf of the respondents. No doubt, of course, if those securities have realized anything, if they are not now valueless, the appellant on being allowed to come in and prove must give a proper account of those securities, and either value them, or if they are valueless state that they are valueless, and offer to give them up; but the mere fact that the secured creditor as mortgagee might possibly have sold some shares ought not to be in itself fatal to him on this application. A mortgagee holding shares is not bound, as mortgagee, to be looking about for every turn of the market to see whether he can sell, nor is he bound to sell at the highest price the market can give. I can see no sufficient reason myself, in many a case, why a mortgagee of shares should not be acting prudently and rightly in not attempting to sell the shares, but in trying to realize moneys in respect of them by dividends or otherwise; and certainly I do not think a case is made against a mortgagee fatal to him in a case like the present by merely stating that he had, as security, some shares, and possibly might have sold them at a value during the period which elapsed before he desired to prove.

I do not think, therefore, that on this part of the case, the respondents have made a sufficient case to justify us in peremptorily refusing to allow the appellant to come in and prove. That deals with practically the whole of what I may call the special circumstances in this case, which are said to render it unjust to allow the appellant to come in and prove now; and I have pointed out, I think, why I think there are no such circumstances as would enable us to say, on the merits, that the applicant ought not to prove.

But now I come to a contention which, to a great extent, is a technical objection, and may be said to be almost the principal objection taken on behalf of the respondents. It is said that this is not an administration in bankruptcy, and it is said that the applicants here are in a very much worse position because it is an administration in the Chancery Division, and a certificate has been made. To my mind, that is not in any way fatal to the appellant. Section 10 of the Judicature Act of 1875 undoubtedly applies to this case. I do not say that that has done away with the Chancery practice in an administration action, or that, for the purposes of the present case, we are to treat the bankruptcy practice as incorporated with or overruling the Chancery practice. Nothing of the kind; but section 10, all the same, applies, and, so far as it is consistent with the Chancery practice, the bankruptcy rules apply, and ought to be applied; and if this secured creditor in bankruptcy would have been allowed to come in and prove, to my mind he ought to be allowed to come in in the Chancery administration, the estate being insolvent, unless there is some Chancery practice which prevents it.

Is there any Chancery practice which prevents it? Is it prevented by the certificate? Not so. I have pointed out, so far as the certificate is concerned, what its effect and meaning is, and what in particular the word "disallow" means in this certificate; and on the general question I wish to point out that, according to Chancery practice, a creditor, after a certificate has been made as to debts, and notwith-

standing the certificate is, as a rule, allowed to come in when there are assets undistributed and share in the administration of those assets, of course in each case on such terms as to the court seems just; and I think the appellant ought to be allowed to come in on such terms as I have already indicated. There is no difficulty in the present case. In the first place it appears to me that the certificate here, having regard to what we now know to be the meaning of the word "disallow," need not even be varied. I think it would be quite sufficient to say that the creditor should be allowed to come in and prove, notwithstanding the certificate; but, even if it had been formally necessary here to vary the certificate, I should still have felt no difficulty, for under ord. 55, r. 71, I certainly am of opinion that there would have been special circumstances which would have bound the court in justice to vary the certificate—of course, taking care always to cause no injustice in the way I have previously referred to. That disposes of this case. I need not go through the authorities. The only one I need say a word upon is *In re Hopkins*. That case, to my mind, is clearly distinguishable, and does not apply to the present case. In *In re Hopkins*, under the Bankruptcy Act and rules then applying, the creditor who, in that case, wished to come in and change his proof could not have amended his proof in bankruptcy, and would not have been allowed to do so; and when he came and was obliged to confess that, in bankruptcy, he could not have been allowed to change his proof, he was met by the unanswerable objection in Chancery: "Where are your special circumstances? There is no special circumstance, and the Bankruptcy Rules," as they then stood, "are against you"; and, accordingly, it was held that, not being allowed to change his proof in bankruptcy, and there being no special circumstances entitling the court to allow him to amend the certificate, he could not alter his proof in Chancery. That is the whole case, and it is clearly no authority on the case now before us. With regard to the application made to the master by the appellant that occasioned some little difficulty in my mind at first; but when I look at the peculiar circumstances of this case, I have also come to the conclusion that what then took place was a slip in practice, and, that, under the circumstances, it ought not to be held fatal to the appellant. I think that what my lord has pointed out is the proper course to be adopted—namely, to extend the time in which to appeal from the decision of the master in that case; to treat the present application as amended in that respect, and thus to give the court necessary jurisdiction to make the proper order which I think ought to be made here.

The result will be that the appellant should be allowed, notwithstanding the certificate, to come and prove. The terms with regard to detail will be mentioned in a moment.

STIRLING, L.J.—I have arrived at the same conclusion as my brethren, and after what they have said there is very little for me to add. I should like, however, to say a few words on the point which was mainly urged before us yesterday, and which, as I read the judgment, was adopted by the learned judge as the ground of his decision in the court below. The arguments and the judgment, as I conceive, have rested upon ord. 55, r. 70, which provides, reading it shortly, that every certificate shall be transmitted to the Central Office to be there filed, and shall thenceforth be binding on all the parties to the proceedings unless discharged or varied upon application by summons. A certificate has been made in the present case by which the claim of the present appellant was disallowed. It is said that that certificate is binding. And that is quite correct. It is binding, but what is the meaning of "binding"? The contention is that it is binding in this sense, that the creditor is thereby precluded from again bringing forward the claim notwithstanding any changes in the circumstances which have occurred since that certificate was made. Now, undoubtedly, the certificate might be a complete bar to the creditor. If, for example, the debt had been contested and it had been adjudicated before the master at the time when he made his certificate that either the debt did not exist or that it had been satisfied. I conceive that adjudication, not having been set aside within the proper time, would be a complete bar to the claim being brought forward. But it seems to me that we are entitled to go behind the certificate to this extent to ascertain the circumstances in which the disallowance took place.

Now when that is done it is clear upon the evidence that the claim, being originally brought in in answer to an advertisement issued under the direction of the court, the appellant when called upon to prove his debt thought fit to withdraw the claim, relying as he said upon the securities he held. There was therefore, and this indeed was not disputed at the bar, no adjudication whatever upon the debt itself. *Res judicata* could not be pleaded by any party to the proceedings. It seems to me that all that was meant by the certificate is this, that the claim was disallowed because in the circumstances existing at the date of the certificate the claim was inadmissible, the creditor electing to rely on his security. If, then, the circumstances have so altered that the creditor might legally bring forward the claim at the present time, it appears to me that the certificate ought not to prevent him from so doing, and in my judgment the case of *In re Metcalfe* is an authority for that proposition. It does not in its circumstances govern the present case, but it is an authority to this effect that, notwithstanding a certificate in which a claim is allowed at a certain amount a further claim may be brought in without that certificate being varied. There a claim was made for a sum of £525, being principal £500 and £25 interest, and the certificate found that that was the amount due to the creditor. The creditor afterwards discovered from documents which came to his knowledge that the amount of interest which was allowed from the estate of the deceased was too small, and he applied to be allowed to prove for the additional interest which had not been allowed, and the Court of Appeal allowed the claim. James, L.J., who gave the judgment of the court, said that the case could not be distinguished from the ordinary case of a creditor coming in after a lapse of time, and he said that the interest in question had never been the subject of decision; that they were not reviewing any decision; it was merely a question of carrying in a claim for an amount which the applicant by mistake had omitted previously to claim. It appears to me that the Court of Appeal there considered that the procedure which is authorized by rule 57 of order 55 was applicable, and that upon a simple application by summons without any variation of the certificate a claim might be received if the judge was satisfied that it was just, but upon such terms and conditions as to costs and otherwise as the judge might think fit.

Now, the question whether in the present case the creditor ought to be admitted appears to me to depend upon the rules which prevail in bankruptcy at the p[illegible] which are made applicable to admiss[illegible] case as this by section [illegible] 1875. With referer[illegible] he creditor

would in bankruptcy be entitled to come in. He might, as it seems to me, come in in two ways, either because he is a secured creditor who has realized his security, and is, therefore, entitled to come in under rule 9 of the second schedule of the Act, or it may be that he ought to be treated as a creditor who has valued his security as equal to the amount of his debt, and in that case the provisions of rule 13 of the same schedule would be applicable, and would enable him in the changed circumstances to come in and prove in bankruptcy. It appears to me that the case of *In re Hopkins*, which was referred to, cannot govern the present case, because in that case, as has already been pointed out, the rules which were in force in bankruptcy at the time when that case was decided were different from those which now exist and precluded the creditor from bringing in any such claim as is now brought forward here.

I agree with what has been said by the other members of the court on the various points which I do not think it is necessary for me to enter into in detail, and on the whole I come to the conclusion that this appeal should be allowed on proper terms.

Appeal allowed.

Solicitors, *Hollams, Sons, Coward, & Hawksley; Harston & Bennet; Hurford & Taylor.*

High Court of Justice.

Chan. Div.
Farwell, J. } May 9.

In re CARROLL.
BRICE *v.* CARROLL. (*a.*)

Practice—Solicitor—Officer of court—Loan of trust money—Jurisdiction—Summary order.

A solicitor's clerk who was trustee under the will of A. lent trust moneys belonging to A.'s estate to his employer, the solicitor, who was aware that the money belonged to the trust. Notice for the payment up of the money was given to the solicitor, but the money was not received. In an action for the administration of A.'s estate,

Held, that the court, in exercise of its jurisdiction over its officers, had power, on motion in the action, to order the solicitor, although he was not a party to the action, to bring the money into court.

MOTION.

The plaintiffs, Emma Brice and E. Vale, in this case were two of the legatees under the will of Elizabeth Carroll, who died in 1894. The sole executor of the will was P. Carroll.

The plaintiffs claimed payment of the legacies, administration of the estate, and that the executor (who was the present defendant) should bring into court all the moneys in his hands belonging to the estate.

The defendant was a clerk in the employ of Mr. de Mortimer-McIntosh, a solicitor. An order for an account was made against the defendant on the 25th of February. The defendant filed his accounts on the 7th of April, and from his affidavit it appeared that the net residuary estate of the testatrix available for the payment of legacies amounted to £902 9s. 9d. Of this the sum of £450 4s. 10d., which represented the legacies in question, had been lent by the defendant to his employer, Mr. de Mortimer-McIntosh at 4 per cent. interest without any security, but subject to six months' notice. Notice had been served on Mr. McIntosh in August last, but the money had not been paid up.

The court was moved on the 28th of April by the plaintiff for an order on the defendant Carroll to pay the legacies into court, but the motion was refused on the ground that the money was not in his hands.

The plaintiffs then served Mr. McIntosh with notice of motion for an order to bring the money into court.

An affidavit was filed by Mr. McIntosh admitting receipt of the loan from defendant with notice that it was trust money, and stating that it would be repaid in due course, but objecting that the court had no jurisdiction to make an order on him in an action to which he was not a party.

Sheldon, for plaintiffs.—The solicitor is an officer of the court, and the court in exercise of its jurisdiction over its own officers can give summary relief and not compel the trustee to sue the solicitor: *In re Clerihew*, 19 W. R. 939; *Staniar* v. *Evans*, 35 W. R. 286, 24 Ch. D. 470.

Muir Mackenzie, for de Mortimer-McIntosh.

FARWELL, J.—This is a very bad case. The only defence to the present application is that this court has no jurisdiction to make the order. The two cases cited are, however, in my opinion, sufficient authority for making a summary order. I adopt the language of James, L J., in *In re Clerihew*, where he says "it would be a shocking thing if this order could not be made." Mr. McIntosh must bring the money into court within fourteen days and pay the costs of this motion.

Order accordingly.

Solicitors for plaintiffs, *W. R. Millar & Sons.*

Solicitors for defendants, *De Mortimer-McIntosh & Shaw.*

Chan. Div.
Swinfen Eady, J. } June 5, 6, 7, 9, 24.

BAXENDALE *v.* NORTH LAMBETH LIBERAL AND RADICAL CLUB. (*a.*)

Right of way—Licensees of grantee—Reasonable user.

A grant of a right of way to premises which may lawfully be used for a given purpose authorizes the use of the way in question in any reasonable manner by all persons lawfully going to or from such premises in pursuance of such purpose, whether such persons be mentioned in the grant or not.

This was an action by the lessee of a house in Wincott-street, Kennington-road, against the defendant club (a society registered under the Industrial and Provident Societies Act, 1893, 56 & 57 Vict. c. 39) and one of its members, claiming an injunction to restrain the members, honorary members, guests, visitors, officers, and tradespeople of the defendant club from using as a carriage or footway a passage across the lands included in the plaintiff's lease.

The passage led from Wincott-street through an archway under the house above-mentioned, first to a yard and workshops in rear of the said house, and then to the buildings of the defendant club.

It was at the time of action used as the sole entrance to the club buildings.

The club had a large number of members, each of whom was entitled to introduce a guest, and all associates of the Working Men's Club and Institute

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(*a.*) Reported by C. B. CAMM, Esq., Barrister-at-Law.

Union (Limited) were entitled to the use of the clubhouse.

A right of way over the passage was claimed by the defendant club under a lease made to the defendant club's predecessor in title by the then common owner of the house in Wincott-street and of the site of the club. This was a grant of "a full and free right and liberty for the lessee, his executors, administrators, and assigns, undertenants, and servants, from time to time and at all times hereafter, at his or their will and pleasure, for all purposes connected with the use and enjoyment of the said premises to go, return, pass, and repass in, along, and over" the said passage. The underlease contemplated further buildings on the demised land, and there was nothing in it to prohibit the use of the land for the purposes of a workmen's club.

The plaintiff contended, *inter alia*, that the members, honorary members, guests, officers, and tradespeople of the defendant club were mere licensees, and as such were not within the terms of the above grant.

Eve, K.C., and *Leverson*, for the plaintiff.—The grant is confined to the lessee, his executors, administrators, and assigns, undertenants, and servants. Neither the members, nor the guests, nor the officers, nor the tradespeople of the defendant club come within any of these designations. Grants intended to include such licensees of the grantee are in a wider form. Thus conveyancing precedents mention: "Friends," Bythewood & Jarman (4th ed.), p. 604; "visitors," 2 Davidson, Part I., p. 527, 1 Key & Elphinstone (7th ed.), p. 738; "agents and workmen," 1 Key & Elphinstone, p. 838; "persons authorized" by the grantee, 3 Bythewood & Jarman, p. 572, 1 Prideaux (18th ed.), p. 387; and "other persons and person for the benefit and advantage of" the grantee, 2 Davidson, Part I., p. 266, 5 Bythewood & Jarman, p. 543. In any case, the user of the right of way must be reasonable: 5 Davidson, Part I., p. 144; and *Hawkins* v. *Carbines*, 27 L. J. Ex. 44, 6 W. R. C. L. Dig. 102.

Vernon Smith, K.C., and *Howland Jackson*, for the defendants.—The way may be used by any person entitled to go the dominant tenement: *Cannon* v. *Villars*, 26 W. R. 751, 8 Ch. D. 415. It is in fact only used for the reasonable purposes of the club. In *Metcalfe* v. *Westaway*, 13 W. R. 181, 34 L. J. C. P. 113, the words "assigns, officers, servants, and workmen" were held to include licensees.

Eve, K.C., in reply.

Cur. adv. vult.

SWINFEN EADY, J.—It is contended that the right of way extends only to the grantee and his tenants and servants, and does not include the members of the club, who number some 374, and honorary members, who number very many more, and that there is no authority for holding that a grant of a right of way extends to all licensees of the grantee.

I am of opinion that the grant of a right of way to premises which may be lawfully used as a workmen's club extends to all persons lawfully going to and from the club, and includes the members of the club, associates, tradespeople, and servants. Reliance was placed on the fact that in certain precedents "visitors" and "persons authorized" are expressly mentioned, but it cannot be doubted that in the ordinary case of a grant of a right of way to a house which may be used as a private dwelling-house, the right would extend not only to the grantee but to members of his family, servants, visitors, guests, and tradespeople, even though none of these persons might be expressly mentioned in the grant. At the time of this grant the passage in question was adapted for and was capable of being used by carts and carriages, and the necessary or reasonable user of the premises as a club requires that there should be liberty of passing over the passage in question for the persons and vehicles shown to have used it: see *Cannon* v. *Villars*. The result of the evidence is that the defendants are only using their premises in a usual and ordinary manner within their legal rights, and that the passage is only used in a reasonable manner having regard to the lawful existence of the club. The action fails and must be dismissed with costs.

Solicitors for the plaintiff, *Upton, Atkey, & Co.*

Solicitor for the defendants, *Chalton Hubbard.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — May 16.

SMITH v. MAYOR AND ALDERMEN OF THE BOROUGH OF SOUTHAMPTON. (*a.*)

Local government—Rating—Right of appeal—Charges incurred more than six months before rate—Right of appeal—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 210, 218.

A ratepayer applied to quash a rate on the ground that it included expenditure more than six months before the striking of the rate, contrary to section 210 *of the Public Health Act*, 1875.

Held, that a primâ facie *right of appeal lay, and that it had not been taken away by section* 218 *of the Act.*

This was an appeal against the decision of the Recorder of Southampton quashing a rate on the ground that it included certain charges which had been incurred and become due more than six months before the rate contrary to the provisions of section 210 of the Public Health Act, 1875.

The special case set out the following facts: The respondent was a ratepayer living at Shirley, which up to 1885 formed no part of the county of Southampton, but which was added to the borough by virtue of a provisional order of the Local Government Board made pursuant to sections 58 and 59 of the Local Government Act, 1888, and dated the 30th of May, 1895. The order was confirmed by the Provisional Order Confirmation Act, No. 16, 1895, and came into force on the 9th of November, 1895. The corporation, acting as the urban sanitary authority, madea general district rate to enable them to defray expenses incurred or to be incurred for the period commencing the 1st day of April, 1901, and ending the 31st day of March, 1902.

The corporation, before proceeding to make the rate pursuant to section 218 of the Public Health Act, 1875, caused an estimate of the rate to be made, and the estimate was on the 22nd day of May, 1901, approved by them. And the estimate was duly entered in the rate book, which contains the rate made on the 12th of June, 1901, and open to public inspection during office hours thereat.

The respondent appealed against the rate on the ground above stated.

The recorder held that certain items in that estimate were for charges incurred more than six months before the making of the rate, and though they did not come within any of the exceptions to the general rule, that a retrospective rate was bad.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Macmorran, K.C. (*Emmanuel* with him)—No appeal lies against this estimate. By section 218 of the Act the estimate made of the rate "shall forthwith, after being approved by the urban authority, be entered in the rate book. . . . but it shall not be deemed part of the rate, nor in any respect affect the validity of the same." That section applies in this case.

Foote, K.C. (*Forder Lampard* with him).—The words of that section were not intended to take away the general right of appeal against a rate: *Reg.* v. *Worksop Local Board of Health*, 13 W. R. 253, 5 B. & S. 951.

Lord ALVERSTONE, L.C.J.—The questions raised in this case are of course important, and to a certain extent difficult, but they have been most clearly explained to us by Mr. Macmorran in his argument. I think I had better, before I deal with the facts, say a word or two upon the law as I understand it applicable to this case.

By section 210 of the Public Health Act, 1875, the general district rate, which forms part of the general district fund when it is collected, is to be levied in order to raise money for the payment of future charges and expenses incurred at any time within six months before the making of the rate. In calculating the period during which the rate may be made retrospectively the time during which any appeal or other proceeding relating to such rate is pending shall be excluded. Therefore there is an express statutory prohibition, and a very distinct one, against allowing retrospective payments to be included beyond the period of six months, and all the more so because money may be raised by a rate to make a payment retrospectively for a certain period. Therefore it obviously seems to be a matter of importance, and they have met the difficulty which corporations or public bodies would have in making these payments by fixing the period of six months. Then there is the general right of appeal under section 269, and notwithstanding all that has been urged before us by Mr. Macmorran. I think it would be extremely difficult to say that *primâ facie* this was not a right of appeal in respect of a rate that was levied and purported to be levied in respect of charges which were not authorized by section 210. It was expressly decided in the *Worksop case* in 1887 that there was. Now at that time the concluding words of section 218 with regard to the operation of the estimate were not in the existing statute. It is contended before us that as to the old provision with regard to the making of the rate there are added the words, the estimate shall not be deemed part of the rate nor in any respect affect the validity of the same, a person has not a right of appeal in respect of a matter alleging that the rate includes the payment of a charge more than six months old. I think that it would require very much more than that to take the existing right of appeal away, which I think was clearly given, and I do not think that the addition of the words, though I agree probably they were added in consequence of the decision in the case of *Reg.* v. *Worksop Local Board of Health*, are sufficient to do so. It is not necessary for us to decide what is the full effect of those words. I should think that they would be sufficient to prevent a person being allowed to rely upon any defect in the estimate or a particular way in which the estimate was made, or possibly to prevent him marshalling the items in an estimate. According to his contention the estimate so construed would indicate the payment of a debt more than six months old, but I cannot think it ever could have been intended that, if upon the facts before the magistrates before the sessions on appeal it is established that there is a payment which will be made out of the moneys to be raised by the rate levied more than six months' old, the right of appeal is not given, and I do not myself think it means that you may not look at the estimate for the purpose of ascertaining the facts. Of course, I can quite imagine it is open to the corporation to say, and the court would receive all evidence to show that the estimate does not show the true state of facts, but to say that nobody may look at the estimate for the purpose of raising a *primâ facie* case is, I think, going very much too far. When we come to look at the facts there really does not seem any reasonable doubt.

DARLING and CHANNELL, JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Prior, Church, & Adams*, for Town Clerk, Southampton.

Solicitors for the respondents, *Speechly, Mumford, & Rodgers*, for *E. R. Ensor*, Southampton.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) } April 21; May 3.

GREAT NORTHERN AND CITY RAILWAY CO. v. TILLETT. (a.)

Railway—Lands Clauses Compensation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 121—*Tenant from year to year—Jurisdiction of magistrate—Possession.*

The justices, where a claim has been made for compensation under the Lands Clauses Compensation Act, have no power to inquire into the claimant's title, but it is a condition precedent to any claim that the claimant shall have been required to give up possession of lands occupied by him.

Case stated by Sir Horatio Davies, K.C., M.P., an alderman of the City of London.

The following facts appeared on the special case.

The respondent James Tillett, with Frank Yeoman and Clement Andrews, carried on the business of auctioneers, 32, Finsbury-pavement, and held a lease of a portion of the basement there which expired the 25th of December, 1899, but the respondent Yeoman remained in possession after that date.

Notice to treat was served by the railway company (the appellants in this case) on the 12th of June, 1899, on the superior landlord, one M. J. Jervoise, and on the 14th of June, 1899, on the respondent. In March, 1900, the respondent went out of possession but retained the keys.

On the 1st of January, 1901, the superior landlord assigned to the appellants his lease of 32, Finsbury-pavement, under section 121 of the Lands Clauses Compensation Act, 1845. The case was heard before the alderman (who has the authority in law of two justices), and the appellants then contended that the alderman had no jurisdiction—(1) as the premises in respect of which compensation was sought was not in the possession of the respondent within the meaning of the section; (2) that the respondent was not on the facts within section 121, or entitled to issue the summons, or claim to have compensation assessed; but the agreement for the sale of the lease was stated to be subject to the rights, if any, of Messrs. Tillett and Yeoman, and recited an alleged underlease dated the 6th of March, 1900, from M. J. Jervoise to Tillett and

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Yeoman, the validity of which was disputed by the appellants.

On the 22nd of February the appellants began to pull down the premises.

On the 29th of August, 1901, the respondent, as receiver of the business of Messrs. Tillett & Yeoman, put in a claim for £560 on the basis of a tenancy from year to year of the portion of the basement at 32, Finsbury-pavement.

The alderman decided in favour of the respondent on the ground that the respondent could only get compensation assessed under section 121, and on the authority of *Reg.* v. *Kennedy*, 41 W. R. 380, 57 J. P. 346; *Bexley Heath Railway* v. *Colonel North*, 58 J. P. 832, 43 W. R. Dig. 93.

Section 121 of the Act of 1845 provides with regard to lands subject to leases, "that if any such lands shall be in possession of any person having no greater interest therein than as a tenant from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein he shall be entitled to compensation for the value of his unexpired term or interest in such lands, . . . and the amount of such compensation shall be determined by two justices in case the parties differ about the same. . . ."

E. W. Hansell.—The respondent was not entitled to take any compensation under section 121. The only claim he alleges is under an underlease dated the 6th of March, 1900, and no claim as against the railway company can be created after the notice to treat: *Ex parte Edwards*, 19 W. R. 1047, L. R. 12 Eq. 389. In the second place the respondents were not in possession, and that is a condition precedent to their claim: *Reg.* v. *Stone*, 14 W. R. 791, L. R. 1 Q. B. 529.

Paul Goff, for the respondent.—The question of title is not for the justices; their duty is only to assess the compensation: *Reg.* v. *London and North-Western Railway*, 3 E. & B. 443, 2 W. R. C. L. Dig. 166. If the magistrate had not given us compensation we had no other remedy: *Reg.* v. *Manchester, Sheffield, and Lincolnshire Railway*, 2 W. R. 591, 4 E. & B. 88. The railway company have struck too soon; they should have waited for the award to be sued upon.

Cur. adv. vult.

The judgment of the court was delivered by

Lord ALVERSTONE, L.C.J.—This was a case stated by an alderman of the City of London on an application made to him to assess compensation under section 121 of the Lands Clauses Act. That section requires that the amount of compensation payable to persons who have no greater interests than as tenant for a year or from year to year shall be determined by justices. The facts raise two questions—first, whether in such a case the justices have power to inquire and determine whether the claimant has the interest which he alleges; secondly, whether the claimant was required to give up possession before the expiration of his term within the meaning of the section. As regards the first point—namely, whether the justices have any jurisdiction to inquire into the title of the claimant to the interest which he alleges, we are clearly of opinion that they have no such right. The duty of the justices is, in this respect, practically the same as that which is under other sections of the Act to be discharged by juries and arbitrators. As was pointed out in the case of *Reg.* v. *Lord Mayor of London*, L. R. 2 Q. B. 292, 15 W. R. C. L. Dig. 28, the 121st section of the Act comes by way of proviso, taking out of the previous general enactment a particular breach for which it makes a particular provision, and therefore on principle the same rules as to investigation of title should apply, although the tribunal for assessing the amount of the compensation is different. A long series of authorities, commencing with *Reg.* v. *London and North-Western Railway*, and followed by many subsequent cases, have conclusively established that the jury or arbitrator has no right to try a question of the claimant's title to the interest which he alleges; any such question must be raised in subsequent proceedings, although there is no authority expressly dealing with the case under section 121. The same principle is, in our opinion, practically recognized in the case of *Reg.* v. *Hannay*, 23 W. R. Dig. 44 L. J. M. C. 27, and *Cranwell* v. *Mayor of London*, L. R. 5 Ex. 284, 18 W. R. C. L. Dig. 63. Therefore upon the first point we are of opinion that the claimants, alleging they had an interest as tenants from year to year, the justices were bound to assess compensation upon that basis, assuming no other objection would be taken to their jurisdiction. It is, however, a condition precedent to the right to claim compensation under section 121 that the claimant shall have been required to give up possession before the expiration of his term or interest therein, and that in that case he shall be entitled to compensation for the value of his unexpired term or interest. It is, we think, obvious from this language that the justices must ascertain whether or not the claimant has been required to give up possession before the expiration of his term because the question of compensation will depend upon that fact. If the claimant was required to give up possession only a few days before the expiration of his term the compensation would be very different from that which he would receive if he was required to give it up more than six months or it might be nearly eighteen months before his interest would be determined, and the cases of *Reg.* v. *London and Southampton Railway*, 10 Ad. & E., 3, and *Reg.* v. *Stone*, are, in our opinion, authorities to show that requirement to give up possession is an essential condition of the right to claim assessment of compensation under section 121. Applying this rule to the facts of this case it appears that notice to treat having been given to the claimants on the 14th of June, 1899, the terms on which they were holding expired on the 25th of December, 1899, and that they held over also on conditions which are not agreed, but which as the claimants claimed to be tenants from year to year would, as we have already said, compel justices to assess compensation on that basis; in the month of March, 1900, the claimants went out of occupation merely retaining the key. Nothing further happened as far as they were concerned until the 22nd of February, 1901, when the company, having taken an assignment of the landlord's interest, pulled the house down. Under these circumstances we are of opinion that there was no evidence that the claimants were required by the company to give up possession of lands occupied by them before the expiration of their term or interest and upon this ground the justices ought to have held that they could not assess any compensation. If the claimants have any claim against the company based upon the fact that when they went out of possessesion they retained the key this would not in our opinion be matter for compensation under section 121, but if any claim could be founded thereon, as to which we express no opinion, it would have to be dealt with by action as pointed out in the case of *Cranwell* v. *The Lord Mayor of London*, to which we have already referred. For the above reasons we are of opinion that judgment must be for the appellants.

Solicitors for the appellants, *Le Brasseur & Oakley.*

Solicitor for the respondent, *M. J. Jarvis.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) March 5.

BROWNE v. BRANDT. (a.)

Innkeeper—Rights of—Traveller—Power of innkeeper to refuse.

An innkeeper is not bound to admit travellers when the inn is full, and having regard to modern habits, it may be said to be full when all the bedrooms are occupied.

Appeal from Judge Martineau at the Brighton County Court.

The plaintiff was, on the 9th of April, 1901, driving a motor-car near the village of Horley, in Sussex. It broke down in the night, and he arrived at 2 a.m. at "The Chequers," a well-known inn there.

All the bedrooms were occupied, and the landlord refused to accommodate the plaintiff even in the sitting-room, who, however, received some refreshment.

The plaintiff was then compelled to find another inn, to which he drove in a hired brougham. He claimed damages for the refusal to admit him, and also for an attack of rheumatism which he alleged had been brought on by the defendant's conduct.

The county court judge found that the defendant had acted reasonably and was not liable.

E. T. H. Lawes, for the plaintiff.—The rule of law is that an innkeeper must admit all travellers unless the inn is full or the traveller is not a proper person to be admitted.

He cited *Rex* v. *Ivens*, 7 C. & P. 213; *Fell* v. *Knight*, 8 M. & W. 269; and Hawkins' Pleas of the Crown (7th ed.), p. 267.

English Harrison, K.C., and *Burleigh Muir*, for the defendants, were not called upon.

Lord ALVERSTONE, L.C.J.—In this case the plaintiff, having broken down in his motor-car, arrived at the plaintiff's inn, but after some discussion was not allowed to stay. He now brings an action asserting that the defendant has broken his common law duty by not allowing him to stay in the house. I do not think we ought to assume that the question before the learned county court judge was whether there had been a demand to take the one sitting-room, but we ought to assume in the plaintiff's favour that there was some room where he might have been able to pass the night. In my opinion it would be straining the common law rule if we were to hold that the plaintiff had a right of action. The common law provides that the innkeeper cannot select but must give accommodation to people who were in a position to pay and were not drunk or disorderly, but I cannot think that the authorities which have been cited before us mean that the landlord who provides a certain amount of bedrooms and sitting-rooms is under a legal obligation to receive as many guests as the inn will hold without overcrowding. There is, as I think, no legal right to pass the night in a sitting-room, and if all the bedrooms are full the landlord is not obliged to take in other travellers.

The landlord must, of course, act reasonably, but the county court judge had found that he had done so, and I therefore think that the county court judge was right, and this appeal must be dismissed with costs.

DARLING, J.—I agree. It seems to me that in this case the question is as to when an inn is full. I do not think that the old cases help us very much in this matter. In past times we know that people often used to sleep in one room, and even in one bed. What was called full in the fourteenth century would now be called indecent overcrowding. "Full" must therefore mean what, having regard to modern habits, "full" would mean now in a well-conducted inn. I think there might have been some difficulty if the plaintiff had expressed his willingness to pass the night in a sitting-room, and had not demanded a bed. But this does not arise here. The county court judge had come to the conclusion that, having regard to modern habits, this "inn" was full, all the bedrooms being occupied. He had referred to Chaucer and the *Canterbury Pilgrims*. One need only look at the "Sentimental Journey" to see how people's habits have altered since the time of Lawrence Sterne. I am of opinion that the county court judge's decision was right.

CHANNELL, J.—I agree.

Solicitors for the plaintiff, *George Terrell, Terrell, & Oakley*.

Solicitors for the defendant, *Cooper, Turner, & Evans*, for *Morrisons & Nightingale*, Reigate.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div.
Admiralty. May 6, 8.

"THE MARGERY." (a.)

Admiralty — Salvage — Associated insurance clubs — Arbitrations—Rights of a master and crew as salvors.

Where there is an agreement between amalgamated associations in which vessels are insured that the amount of remuneration payable for service rendered by one of the insured vessels to another shall be determined by a committee of the associations so concerned, if such agreement is to bind the master and crew of the salving vessel,

The Court will require cogent proof that the salvors did in fact agree to be bound by such agreement.

Quære, *whether such a contract might not be contrary to the provisions of the Merchant Shipping Act*, 1894.

This was an appeal from a decision of the Yarmouth County Court, making a salvage award to the master and crew of the steam drifter *Fifteen* for services rendered to the ketch *Margery* under the following circumstances:

On the 9th of October, 1901, about 9 a.m. *The Margery* was herring fishing about thirty-six miles out from Yarmouth. *The Margery* was a wooden screw steam drifter of thirty-one tons register, carrying a crew of ten hands, her value being £2,000, and with nets and gear £300 more, together with fish on board valued at £1 10s. At the time in question the wind was blowing fresh from the north-west, and a heavy sea was running. *The Margery* had hauled in her nets and was preparing to make for port when it was discovered that she had lost her rudder. Two balls were hoisted to show that the ship was not under control, and being insured in an insurance club the house flag of the club was flown. She was worked in this condition by means of her propeller and sails until she was within about fourteen miles of Yarmouth when she fell in with the steam drifter *Fifteen*.

The Fifteen was a vessel of twenty-five tons, and was manned by a crew of ten hands, her value being £3,200, and she also was making for Yarmouth, having also been engaged in herring fishing.

A rope was passed to *The Margery*, but it shortly

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

afterwards parted and fouled her propeller, and a wire hawser was then successfully passed and after about two hours' towage she was brought safely into Yarmouth by *The Fifteen*.

The Margery was insured in the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields, and *The Fifteen* was insured in the Total Loss Mutual Steamship Insurance Co. of Sunderland.

In the policies of both insurance companies it was provided that the articles of association of the assurer's company should be deemed to be part of the policy and should be binding upon the assured and assurers as fully and effectually as if such articles had been inserted in the policy, and that any breach of them should invalidate the policy.

The articles of the two clubs in which the vessels were respectively insured provided that the vessels insured with them should render each other mutual assistance if broken down or in distress, and it was further agreed in the articles by the insurance companies in question that compensation for services rendered should be decided and determined by the committees of the associations in which the vessels were insured.

Accordingly, in pursuance of the rules of the two clubs, a committee drawn from the directors of the United Kingdom Association and the Sunderland Association made an award on the 16th of December, 1901, of £25 to the owners of *The Fifteen*, which they accepted.

The master and crew were offered £12 10s. of this sum between them, but they refused to accept it, and on the 6th of January, 1902, they instituted the action in the Yarmouth County Court against *The Margery* for salvage, and from the order made in that action *The Margery* now appealed.

In the county court action it was admitted by the master and crew of *The Fifteen* that they knew of the arrangement as to mutual assistance, and that they acted upon it, and they acted upon it when they saw the club flag of *The Margery* flying, but they denied that they knew of or had ever agreed to any arbitration as the amount of salvage.

The agreement signed by the crew of *The Fifteen* provided that "every member of the crew, including apprentices and sea-fishing boys, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise in the proportion set forth opposite to their respective names in this agreement." By way of wages they were to take seven out of sixteen shares of the profits, and in salvage awards half. In the saloon of *The Fifteen* a card was hung up, on which was written, "The Total Loss Mutual Steamship Insurance Co., Sunderland. *Notice to Masters.*—The above association is amalgamated with the undermentioned associations and companies for the settlement of towage cases." Then followed the names of the associations, and among them was the United Kingdom Association. It then proceeded: "All masters of vessels insured in the Total Loss Insurance Co., Sunderland, are bound to render and accept assistance when necessary to and from any vessel insured in the above associations and companies."

The judge of the county court, sitting with nautical assessors, held that the master and crew of *The Fifteen* were not bound by the arbitration proceedings, and after hearing the case on the merits awarded them a sum of £60 as a salvage award, that sum being a moiety of the total salvage award he would have made if the owners of *The Fifteen* had also been parties to the suit.

Scrutton, K.C., and *Roche*, for the appellant.—The clause in the policies of insurance which incorporates the articles of association compelled the owners of the vessels insured to submit questions of salvage to arbitration. The notice exhibited in the saloon of the vessels and the agreements by which the crews signed on bound them to abide by arbitration.

They cited *The Nasmyth*, 33 W. R. 736, 10 P. D. 41.

Batten, for the respondents.—The appellant has failed to prove an agreement—express or implied—under which the master and crew bound themselves to abide by arbitration. But even if they did agree, such an agreement is contrary to the spirit of the Merchant Shipping Act, 1894, for it would in effect oust the jurisdiction of the court. The articles relied on merely show what the shares in the salvage as between the master and the crew are to be, and the "notice" merely directs the masters to assist other club vessels, but does not lay down on what terms the assistance is to be rendered. The right to salvage is not dependent upon contract, but is a right given in the interests of commerce to those voluntarily undertaking risks to salve property, and if a contract be made in regard to it, the court will scrutinize such contract to see if it is against public policy. If there was a contract here the award made under it was grossly inadequate and the court below awarded nearly five times as much.

He cited *The Britain*, 1 Wm. Rob. 40; *The Sarah Jane*, 2 Wm. Rob. 110; *The City of Calcutta*, 8 Asp. M. L. C. 442, 47 W. R. Dig. 7.

JEUNE, P., in giving judgment, after stating the facts, said the question was whether the master and crew of *The Fifteen* were bound by the arbitration. Their contention was that they were not, and they asked to have the salvage award determined by the court. The court below had held that they were not so bound because they had never agreed to submit to arbitration. The master and crew as between themselves and their owners were bound to the extent that under their articles they had entered into an agreement by which they were to have half of whatever salvage amount should be awarded. But there was no agreement that as between themselves and the owners of any other ship which they might salve that they were bound by an agreement made by their owners to allow the matter to go to arbitration and take the money the arbitrators might award. Neither was it made out that there was notice of the terms of the arrangement made by the owners, nor any such acquiescence by the master of the ship which bound him, and much less the crew, to the settlement of the claim by arbitration.

The very fact that the card intituled "Notice to Masters" used the word "towage," and not "salvage," made clear that it was not intended thereby to give particulars of the agreement between the owners, for not all cases of salvage involved towage. Therefore, the notice, being limited to "the settlement of towage cases," could not be held to give notice of an arrangement for the peculiar settlement of salvage cases. It was not necessary now to decide how far this court would review a decision arrived at by arbitrators appointed in pursuance of an agreement made by persons *sui juris* and knowing all the circumstances. Neither was it necessary for the purposes of this case to decide whether such an agreement was in contravention to the provisions of the Merchant Shipping Act. As to the figure at which the court below arrived, although it was considerably in excess of the amount awarded by the arbitrators, it did not appear to this court that it was at all excessive, and it should not, therefore, be interfered with.

BARNES, J., after reviewing the facts, said it was

quite clear to him that the master and crew never in fact thought that they were bound as salvors by what was suggested was an intimation to them that they were so bound.

The alleged contract put forward by the defendant entirely failed of proof, and to establish it much stronger evidence than had been offered would have to be put forward, and unless a great deal more was proved the master and crew must be held to remain free agents to render services upon such terms as were usual. It was not necessary to go into the very difficult question of what would have been the position if it had been proved that the master and crew had agreed to go to arbitration, or whether this court would have power to review any decision which might not meet, from any cause, the justice of the case, but he was not desirous of saying anything which might be construed as lessening in any way the jurisdiction of the court, nor did he wish to express any opinion as to how far the provisions of the Merchant Shipping Act might have affected the case.

Appeal dismissed.

Solicitors for the appellant, *Williamson, Hill, & Co.*, for *R. & R. F. Kidd*, North Shields.

Solicitors for the defendants, *Dubois & Williams*, for *H. Chamberlin*, Great Yarmouth.

House of Lords.

From C. A. (England). April 29.

Wrigley v. Whittaker & Sons. (a.)

Master and servant—Employers' liability—Sub-contracting—Work ancillary to business of undertakers—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Where a workman's employers, who were engineers, contracted with a firm of cotton spinners to supply and fix a driving wheel in their cotton factory, and one of the engineers' workmen was accidentally killed while engaged in the operation of lifting the wheel into its place,

Held, that what took place in the cotton factory was not "on or in or about the factory" of the undertakers (the engineers), within the meaning of the Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Appeal from Court of Appeal (A. L. Smith, M.R., and Collins and Romer, L.JJ.), 49 W. R. 472, [1901] 1 K. B. 780.

Whittaker & Sons, the respondents, had entered into a contract with Bayley & Wright, who were cotton spinners, to supply and fix a new driving-wheel for a steam-engine in the cotton factory. A workman employed and sent by the engineers, while taking part in the operation of lifting the wheel into its place in Bayley & Wright's factory was accidentally killed in the course of his employment, and his widow, the present appellant, claimed compensation.

The lifting the wheel into its place was by means of a hand winch and pulleys.

The Court of Appeal held that the cotton spinners were not liable, and there was no appeal to the House of Lords on this question.

The Court of Appeal also held, the respondents, the engineers, were not liable, and against them was the present appeal. *Francis* v. *Turner*, 48 W. R. 228, [1900] 1 Q. B. 478, was considered binding on them, and that part of this case was not therefore gone into before the Court of Appeal.

Asquith, K.C., and *John Montefiore* (*H. Clement Edwards* with them), for the appellant.—Whittakers are the employers "on, in, or about" a factory. Nothing in Factory Acts which defines occupier within the Acts. It is of the nature of these engineering operations to carry through the work and to encounter the normal risks of the trade. If the operation is a composite operation, it is on, in, or about the work. When the occupier surrenders the premises for the operation you may say the employer (here the engineer) occupies. For the time the premises become part of a factory: see Factory Act, 1878, s. 93. Whenever the fixing requires engineering skill—mechanical power—is in fact, on the whole, an engineering work, there is a continuation of the work. And as regards engineering works, locality does not seem to enter into the test. As to temporary occupation, *Bartell* v. *Gray*, *ante*, p. 310, [1902] 1 K. B., 225, was referred to. Section 23 gives the artificial extension "actual use or occupation within Factory Acts."

Cripps, K.C., and *F. H. Mellor*, for the respondents, were not heard.

Earl of Halsbury, L.C.—After hearing the arguments that have been addressed to your lordships I must say there seems to me to be no ground for this appeal. The thing done was done not in a factory at all. When I say "not in a factory at all" the place where the thing happened was, it is true, a factory for some other purposes, but not a factory within the meaning of these words, which, I think, obviously means a factory where the original employers of the men were manufacturing—in this case big iron wheels. If the accident had happened there, I agree there would no doubt have been a liability, but in this case there was nothing of the sort. The act of manufacturing the wheel was complete and past. The wheel when completed was sent somewhere else. I will assume for this purpose (though I am sure I do not know whether it is the fact or not) that the place to which the wheel was sent was a factory—but it was a factory in another sense—and to say that you can put these two things together seems to me to be absolutely absurd. The thing that was being done was what is described as fitting the wheel to a cotton mill where the persons who were to pay for it wanted to have it put. Something was done there by a person sent by the original manufacturers, entirely away from their own place of manufacture, and an accident happened. I am wholly unable to put these two propositions together so as to make it possible to argue that thereupon that was an accident happening in the course of the employment in or about the factory, which was for the manufacture of iron wheels. I need not say any more about the case. It seems to me that the appeal is absolutely unarguable, and I move your lordships that it be dismissed.

Lords Macnaghten, Shand, Davey, Brampton, Robertson, and Lindley concurred.

Appeal dismissed.

Solicitors for the appellants, *Mills, Lockyer, & Mills.*

Solicitors for the respondents, *R. B. Wheatly Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

(a.) Reported by C. H. Grafton, Esq., Barrister-at-Law.

Privy Council.

(*From the Supreme Court of the Colony of the Cape of Good Hope.*)

April 18.

EASTERN AND SOUTH AFRICAN TELEGRAPH CO. v. CAPE TOWN TRAMWAY COMPANIES. (*a.*)

Negligence—Damage by electricity—Statutory powers.

The respondent companies were authorized by statute to work tramways by electric power, and provision was made that in the event of any electric leak taking place and damage being caused by electrolysis or otherwise, that the companies should make good the damage, &c., and also that the tram rails were not to be used for the return of the electric current without consent, which was obtained upon conditions as to reversing the direction of the current, &c., and removing the danger. A short part of the tramway was not authorized by statute. Certain disturbances in the working of the appellants' submarine telegraph took place, caused by electricity which had been stored by respondents and used in propelling their cars on the above lines. This was brought about by a part of the electricity which escaped from the tram rails and reached the appellants' cable. It was afterwards discovered that the disturbances might be effectively provided against. The result was pecuniary loss to the appellants.

Held, (1) *that the respondents were not liable at common law within the principle of* Fletcher *v.* Rylands, *L. R.* 3 *H. L.* 330, 17 *W. R. H. L. Dig.* 17, *there being no tangible injury caused by any unlawful use of their tramway by the respondents;* (2) *nor under the statutes.*

Appeal from a judgment of the Supreme Court of the Cape of Good Hope.

The action was brought by the appellants, against the respondents for damages for disturbance of the appellants' cable messages and for an injunction.

The necessary facts are set out in their lordships' judgment.

The Supreme Court of the Cape held that the respondents were protected by the statutory provisions, and as to a small part of their tramway not covered by the statutory provisions, that there had been no infringement of the appellants rights.

Bousfield, K.C., A. J. Walter, and *Sinclair*, for the appellants.

Cohen, K.C., Moulton, K.C., and *S. C. Graham*, for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON and LINDLEY) was delivered by

Lord ROBERTSON.—The question raised by this appeal is whether the respondents are liable in damages for certain disturbances in the working of the appellants' submarine telegraph cable at Cape Town. That such disturbances did take place; that they were caused by electricity which had been stored by the respondents and used in propelling their tramcars in Cape Town and its suburbs, but from time to time had left the tramway system and found its way to the appellants' cable in the sea near Cape Town; and that pecuniary losses resulted; are matters beyond dispute. In order to the adequate understanding of the question thus raised it is not necessary to enter into minute or highly technical descriptions. It may conduce to clearness in the discussion of the legal questions which result if, leaving over in the meantime the mode in which the electricity left the respondents' system, it be in the first place stated how the electricity injured the appellants. At some point, then, in Table Bay, this electricity, having escaped and being at large, was attracted by the appellants' cable, entered the sheathing of the cable and by the sheathing as a conductor, found its way back to the tramway central station whence it had started, and thus completed its circuit. While travelling along the sheathing of the appellants' cable, the current varied very frequently and at irregular intervals, in accordance with the starting and stopping of the tramway cars. It was this irregularity and jerking which did the mischief; and, but for this, the current might have used the sheathing as a conductor without any injury. As things were, the current in the sheathing induced similar irregular currents in the conducting wire of the cable, with the result that the signals were interfered with, and as recorded were confused and unreadable. None of the apparatus was damaged; but the working of the apparatus was so interfered with as to take away its utility for the time of the interruption. In order to complete the description of the nature of the injury it is necessary to add that the difficulty has now been completely got over by laying what is called a twin-core cable for several miles out, the two wires rectifying one another's action. Now that this has been done the electricity from the tramways can pass along the sheathing without any harm being done. The cost of this remedial measure forms a large part of the claim in the suit, much of the rest representing experimental and tentative measures. Into this, however, it is unnecessary further to enter, as the quantum of damage is not raised in this appeal, but only the question of liability. Turning now to the mode of escape of the electricity from the tramways there is again no controversy; and for present purposes a succinct statement is sufficient. The respondents' tramway runs along the shore of the sea, and their tramcars are run by the tolerably familiar system of overhead trolley. All that is necessary to take note of is that the electricity which is used is generated at a power station erected by the respondents for that purpose, and that the conductor, which is provided for the return of the current, after driving the tramcars, consists of the tramway rails. Now, when uninsulated (and safety requires that this should be their condition), the rails are so far from being (even comparatively speaking) a perfect conductor, that necessarily and as a matter of course a considerable proportion of the electricity, instead of going directly back to the station, leaves the rails; and some portion of the escaped current it was, which reached the appellants' cable.

Upon these facts the appellants' main contention is that on the principle of *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, 17 W. R. H. L. Dig. 17, the respondents are liable for the interruption of the appellants' business, and must recoup them for the protective measures necessarily taken to prevent a recurrence of such interruption. To this the respondents have a twofold answer: (1) They say that they are protected as regards all but a small portion of their tramway system by certain provisions which occur in each of the series of colonial statutes incorporating their constituent companies; and (2) as regards the part of their line not so protected by statute they maintain that *Fletcher* v. *Rylands* does not apply to the facts. Two other contentions have been advanced on the latter branch of the case (the first of which received more countenance in the Supreme Court than support at their lordships' bar)—viz., (1) that the law of *Fletcher* v. *Rylands* has no place in

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

and then offered a large brewery known as the Caerphilly Brewery, Cardiff, to the defendants. This they at first refused to consider, but eventually they came to the conclusion that it would be more advantageous to cancel the agreement they had to brew and supply beer to Crosswell's (Limited), and to join with that company in promoting a new company to take over the houses owned by Crosswell's (Limited) and their own tied houses and to purchase the Caerphilly Brewery as a going concern to supply all the beer required by the amalgamation. The scheme was adopted and the Caerphilly Brewery was purchased by the new company for £172,500, and also one of the Cardiff houses introduced by the plaintiff—the Queen's Chamber Hotel—for £5,000. Under these circumstances the plaintiff claimed commission, and Channell, J., having decided in favour of the plaintiff, the defendants appealed.

Hugo Young, K.C., and *Shakespeare*, for the defendants.—The commission is not payable because it has never been earned within the terms of the commission note. The defendants did not purchase either of the two properties. When the new company was formed they sold to it the tied houses they themselves then held in the town, and received compensation for cancelling their agreement to supply all beer to Crosswell's (Limited). The plaintiff might be entitled to a *quantum meruit* from the new company for negotiating the sale to them, which would be outside any term of the contract note and would not be at the rate of more than a half or at the most one per cent. on the purchase-money of the brewery. The figure of 5 per cent. on the whole business that might be done showed that at the time the commission note was signed a possible amalgamation, and therefore a buying on a large scale, was not in the contemplation of either party.

S. T. Evans, K.C., *David*, and *Sankey*, for the plaintiff, were not heard.

COLLINS, M.R., in giving judgment, said: Two questions are raised by the case—first, whether Showell's Brewery Co. are liable on the document signed by Mr. Young; and secondly, whether in the events which have happened the purchase had been brought about by the plaintiff. The plaintiff had brought his action against the two companies—Showell's (Limited) and Crosswell's (Limited), and Crosswell's (Limited) being in liquidation, judgment went against the other defendants, who now appealed. Now it is clear that although those were two separate companies their interests were intimately connected the one with the other. For instance, Mr. Charles Showell, who was the leading spirit, was a director of each company. It appeared that the directors felt it was very desirable that the business in Wales should be extended, and with that view it was decided to purchase public-houses that might come into the market which would be suitable for tied houses. It was on that footing that Mr. Young, who was a director of Crosswell's only, approached the plaintiff, and the result of his interview was the sending of the commission note. It was said that this commission note did not bind Showell's Brewery because there was no evidence that Mr. Young had authority from that company to make a contract. It seems to me clear on the evidence that Mr. Young had first consulted and had in fact obtained the authority of Mr. Charles Showell, who as managing director had unquestionably power to bind the appellant company, before he gave the note. There is cogent evidence that Mr. Charles Showell knew that the contract note was to be sent; and it is clear that the document was given by Mr. Young under circumstances that bound the appellant company. Then the second question arose—namely, whether the sale was brought about by the introduction of the plaintiff. His evidence showed that at first the plaintiff only submitted small licensed property, and then offered the Caerphilly Brewery. That offer was carefully considered by the directors, and it was thought that it was too big a concern for them to take up. Then it appeared to have been pointed out that there were other brewers ready to buy, and that the opportunity ought not to be lost, and then for the first time the scheme was formulated by which Showell's cancelled their right to supply all the beer sold by the tied houses of the Crosswell Co., and agreed to join with that company in promoting a new company to acquire the Caerphilly Brewery, the Crosswell Co.'s interest, and such other houses as the Showell Brewery held in that district. The scheme was for the benefit of Showell's Co., for they got compensation for the cancellization of their right to supply beer to Crosswell's, and disposed of their houses, retaining, nevertheless, an interest in the new company. It was said that this was not a purchase by the two defendant companies of the property within the meaning of the commission note. If Showell's Brewery had purchased the Caerphilly Co., and then transferred that property to the new company, the state of affairs would have been the same and this question could not have been raised. In my view the mere buying to sell again to the new company was but an immaterial link in the chain of events. By it being cut out, the position of the parties was not changed. Here, then, there is evidence, first, that if the property was bought through the introduction of the plaintiff the defendants are liable to pay him commission, and there is evidence that the property had been purchased under those circumstances. Therefore the plaintiff is entitled to his commission, and the judgment appealed from must stand and this appeal be dismissed with costs.

MATHEW and COZENS-HARDY, L.JJ., gave judgment to the same effect.

Appeal dismissed.

Solicitors, *Timbrell & Deighton*, for *William Shakespeare & Co.*, Birmingham; *Smiles & Co.*, for *George David & Evans*, Cardiff.

From K. B. Div. (Mathew and Cozens-Hardy, L.JJ.) June 11.

HUGHES v. PUMP HOUSE HOTEL CO. (LIMITED). (a.)

Practice—Assignment of debt—Absolute assignment—Security for moneys due or to become due on a banking account—Right of assignor to sue—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

The plaintiff, a builder, entered into a contract with the defendants to execute certain building work at their hotel. Subsequently the plaintiff, by an instrument in writing, assigned to his bankers, by way of continuing security for all moneys due or to become due to them from him, all moneys due or to become due to him from the defendants under the contract. Notice of this assignment was given to the defendants, and at the same time a letter was written to them by the plaintiff authorizing and requesting them to pay the moneys to the bankers, whose receipt should be their sufficient discharge. In an action by the plaintiff to recover the moneys due under the contract,

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Held, that this was an absolute assignment not purporting to be by way of charge only, within the meaning of section 25, sub-section 6, of the Judicature Act, 1873, and that the plaintiff was not entitled to sue.

Appeal from a decision of Wright, J., upon a point of law raised upon the pleadings.

The plaintiff, who was a builder, on the 1st of November, 1899, entered into a contract with the defendants, whereby he agreed to complete the new pump-room and to make certain alterations and additions to the Pump House Hotel, at Llandrindod Wells, for the sum of £6,200, any extras to be added to this amount. On the 7th of March, 1901, the plaintiff gave the following assignment in writing to Lloyds Bank (Limited):—

"In consideration of your continuing a banking account with me, the undersigned Ralph Merton Hughes, of . . . and by way of continuing security to you for all moneys due or to become due to you from me alone or jointly with others either on the said account or otherwise, I hereby assign to you all moneys due or to become due to me from the Pump House Hotel Co. (Limited), of Llandrindod Wells, under or by virtue of a certain contract dated the 1st day of November, 1899, and made between the said Pump House Hotel Co. (Limited), of the one part, and myself, of the other part (being a contract for completion of the new pump-room and for making certain alterations and additions to the Pump House Hotel, Llandrindod Wells), and all other moneys, if any, due or to become due to me from the said company, including all moneys due or to become due for extras in connection with the works contemplated by the said contract. And I hereby empower you, on my behalf and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying same from being concerned to see to the application thereof; also if necessary to sue for or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned or any part thereof; and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recovering the moneys hereby assigned are to be paid out of the amount recovered. And I hereby undertake, at your request and my cost, to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created."

On the same date the solicitors for Lloyds Bank wrote to the defendants giving them notice of the assignment, and requiring them "not to pay the said moneys or any part thereof to any person other than Lloyds Bank (Limited) without their written consent." The solicitors also enclosed a request, signed by the plaintiff, authorizing and requesting the defendants to pay the said moneys to the bank, whose receipt should be their sufficient discharge.

On the 31st of October, 1901, the plaintiff brought the present action, claiming £2,788 for the balance of account, being chiefly in respect of extras. In the statement of defence the defendants, besides denying that the balance alleged or any sum was due, pleaded that, "by reason of the said assignment and notice, the defendants will contend that the plaintiff is not entitled to sue for the sums so assigned, and that the plaintiff has no interest in the same and no cause of action." The plaintiff, in his reply, said that the assignment was not an absolute assignment, but was by way of charge only as a continuing security to Lloyds Bank for all moneys due or to become due to them from him. This point was ordered to be argued first.

Wright, J., held that the assignment was not an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873, and that the action was properly brought in the name of the assignor; and, with the plaintiff's consent, in order to protect the defendants he ordered that no payment out of court of any money which might be paid into court by the defendants should be made, and that no execution should issue for any sum recovered on judgment without the consent of Lloyds Bank or leave of the court or judge.

A summons was then taken out by the defendants at chambers asking that the action should be stayed until Lloyds Bank were joined as plaintiffs in the action.

Wright, J., at chambers, dismissed the summons. The defendants appealed from both orders, and the two appeals were taken together.

June 10.—*S. T. Evans, K.C.*, and *R. E. Vaughan Williams*, for the defendants.—This is an absolute assignment, not purporting to be by way of charge only, within the meaning of section 25, sub-section 6, of the Judicature Act, 1873. The fact that it is an assignment as a security for moneys due or to become due on a banking account does not make it the less an absolute assignment. A right of redemption in the mortgagor does not prevent the assignment from being absolute: *Tancred* v. *Delagoa Bay Railway Co.*, 38 W. R. 15, 23 Q. B. D. 239; *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 46 W. R. Dig. 9. [They also referred to *Brice* v. *Bannister*, 26 W. R. 670, 3 Q. B. D. 569; *Comfort* v. *Betts*, 39 W. R. 595, [1891] 1 Q. B. 737; *Wiesener* v. *Rackow*, 76 L. T. Rep. 448, 45 W. R. Dig. 118; *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, 48 W. R. Dig. 145; *Jones* v. *Humphreys*, *ante*, p. 191, [1902] 1 K. B. 10. Secondly, if this is not an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873, it is an equitable assignment, and in order to protect the defendants the equitable assignees ought to be joined as co-plaintiffs. If they are not joined as parties, they will not be bound by the result of this action, and the defendants may be sued a second time.

They referred upon this point to *Jones* v. *Farrell*, 1 De G. & J. 208.

Lewis M. Richards, for the plaintiff.—This is not an absolute assignment of a debt or other legal *chose in action* within section 25, sub-section 6, of the Judicature Act, 1873. It is only an assignment *pro tanto*—that is, an assignment sufficient to secure the repayment of so much as might be due upon a banking acount. Such an assignment does not come within the section: *Mercantile Bank of London* v. *Evans*. The assignment purports on its face to be by way of charge only. It is not an assignment of a fixed sum, but of an unascertained sum, which can only be ascertained by taking the accounts. It is not, therefore, an absolute assignment within the section: *Jones* v. *Humphreys*. If that is so, there is no power to compel the bank to join as plaintiffs.

S. T. Evans, K.C., in reply.—If the whole sum is absolutely assigned, as in the case of a mortgage, though it may be as security for fluctuating sums, it comes within the Act. In *Mercantile Bank of London* v. *Evans* and *Jones* v. *Humphreys* there was not an assignment of the whole sum, but only of part.

June 11.—MATHEW, L.J.—The first appeal in this case is from the decision of Wright, J., who held that the assignment was not an absolute assignment within section 25, sub-section 6, of the Judicature Act, 1873, but was only a charge, and that therefore the action was properly brought in the name of the assignor. The contention of the defendants is that the assign-

ment was an absolute one, and that therefore the action could not be brought in the name of the assignor. In every case of this kind it is necessary to refer to the terms of the assignment, and to ascertain what its true meaning is. Whatever may be the phraseology used, if no more than a charge was intended the action must be brought by the assignor. If, on the other hand, all the rights of the assignor were intended to pass to the assignee, the case would come within section 25, sub-section 6, of the Act. It was argued on behalf of the defendants that it is clear that the assignment from its terms was an absolute assignment. The plaintiff, who was a builder, had, in November, 1899, contracted with the defendants to execute certain building works at the Pump House Hotel for a fixed sum, any extras to be paid for in addition. In March, 1901, the plaintiff executed the assignment in question in favour of Lloyds Bank. Notice of the assignment was given to the defendants, and an authority was sent to them requesting them to pay the moneys to the bank. When the works were completed disputes arose as to amount of the balance payable to the plaintiff, and the plaintiff brought this action. Objection was taken that the action should have been brought in the name of the assignee and not in the name of the assignor. What is the effect of the assignment, coupled with the notice thereof to the defendants and the authority and request to the defendants to pay the moneys to Lloyds Bank? It seems to me that a clear intention is shown to pass to the bank the complete control over all the moneys payable to the plaintiff under the contract. It places the bank for all purposes in the position of the plaintiff. That being so, unless there is some difficulty in the way, it is clear that there is what may be described as an absolute assignment. An absolute assignment is one which passes all the rights of the assignor to the assignee. My brother Wright held that the assignment was not an absolute one because it was a continuing security for moneys due or to become due to the bank. If that were the true criterion, a mortgage could not be an absolute assignment within the Act. A mortgage is a security, but at the same time it is an absolute assignment within the Act, because all the rights of the mortgagor in the property assigned pass to the mortgagee. The same principle is illustrated by the cases of *Comfort* v. *Betts* and *Durham Brothers* v. *Robertson*. In *Comfort* v. *Betts* certain creditors assigned their debts to a trustee to enable him to sue for and recover them, and he was to pay the creditors the amount of their debts out of the proceeds. It was there held that there was an absolute assignment intending to pass all the assignor's interest in the debts to the assignee, and none the less so because there was a trust in respect of the moneys recovered. That principle seems to me to be entirely applicable to the present case. The two cases of *Mercantile Bank of London* v. *Evans* and *Jones* v. *Humphreys* were principally relied on by the plaintiff. In each of those cases there were general words of assignment, in the form of a security, and expressly intended only to assign so much as would be sufficient to provide the sums of £200 in the one case and of £22 10s. in the other case. It is manifest that the true character of the assignment in both those cases was to confer a charge only. The distinction between those cases and the present is sufficiently obvious and need not be dwelt upon further. Other questions were suggested during the course of the argument. One was whether an absolute assignment of part of a debt comes within the Act. It is not necessary to express any opinion upon that question further than to say that there seems to me to be considerable reason for saying that such an assignment does not come within section 25, sub-section 6. That question, however, still remains open for argument on some further occasion when it arises. Another question raised in the second appeal was whether, if this were not an absolute assignment, the assignees should have been joined as plaintiffs. It is not necessary to decide that question. This being an absolute assignment the action is not maintainable by the plaintiff. The appeal from the first order must therefore be allowed.

COZENS-HARDY, L.J., read the following judgment: The question raised by this appeal is whether a document of the 7th of March, 1901, is "an absolute assignment (not purporting to be by way of charge only)" within the meaning of section 25, sub-section 6, of the Judicature Act, 1873. Now it has been repeatedly held that the word "absolute" does not mean absolute by way of sale, and that an assignment may be "absolute" though by way of mortgage: see *Burlinson* v. *Hall*, 32 W. R. 492, 12 Q. B. D. 347; *Tancred* v. *Delagoa Bay Railway Co.* Those were decisions of Divisional Courts, but the Court of Appeal has adopted the same view. In *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 46 W. R. Dig. 9, this court held that the particular document in question was not absolute but conditional. Chitty, L.J.'s, judgment is, however, very much in point. [His lordship read from the judgment in that case, at pp. 771, 772.] It was suggested to us in argument that this was in some way inconsistent with the subsequent case in this court of *Mercantile Bank of London* v. *Evans*. I cannot, however, adopt this contention. On the construction of the particular document before them, the court in that case held that there was not an assignment of the whole debt. The position of a mortgagee of a debt was not in any way challenged. I may observe that A. L. Smith, L.J., was a party to the decision in *Burlinson* v. *Hall*. If on the construction of the document it appears to be an absolute assignment, though subject to an equity of redemption express or implied, it cannot, in my opinion, be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee. Nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance from the assignor. Both these elements were found in *Burlinson* v. *Hall*. The real question, and in my opinion the only question, is this: Does the instrument purport to be by way of charge only? It remains to apply these principles to the document of the 7th of March, 1901. In my opinion this is an absolute assignment, and it does not purport to be by way of charge only. It assigns all money due or to become due under the contract. It follows that the plaintiff Hughes has no right of action, and that the order of Wright, J., must be discharged. In the view which I take it is not necessary to express any opinion upon the second appeal.

Solicitors for the plaintiff, *Patersons, Snow, Bloxam, & Kinder*, for *Hadley & Dain*, Birmingham.

Solicitors for the defendants, *G. J. Vanderpump & Son*, for *Daniel Evans*, Brecon.

High Court of Justice.

Chan. Div. } June 25.
Farwell, J. }

In re CHENOWETH.
WARD *v.* DWELLEY. (*a.*)

Administration — Gavelkind — Descent — Partibility among heirs male—Extension to collaterals.

The rule that land held according to the tenure of gavelkind is partible among the nearest male heirs extends to collaterals to the remotest degree.

Summons.

Francis Chenoweth, the testator, died on the 23rd of March, 1901.

An originating summons was taken out to determine the construction of his will, and the court found that in the events that had happened, the testator had died intestate as to his residuary real and personal estate.

By an order of the court dated the 16th of May, 1901, it was declared that there was an intestacy of the residuary real and personal estate, and inquiries were directed as to who was the heir-at-law and who were the heir or heirs according to the custom of gavelkind.

The master was unable to determine who were the heirs according to the custom of gavelkind, and the summons was therefore adjourned to court.

At his death the testator held four freehold houses at Milton, near Gravesend, in the county of Kent. The presumption was that these houses were held by the tenure of gavelkind, and there was no evidence to rebut it. The testator left no lineal descendants and no brothers or sisters or lineal descendants of them; his nearest collateral male relatives on the paternal side at the time of his death being two first cousins and the three sons of a deceased first cousin.

The point to be decided was whether the rule, that land held according to the custom of gavelkind was partible among the nearest male heirs, extended to collaterals in all degrees, or to the issue of brothers and sisters only.

H. Langford Lewis, for the plaintiff, the executor of the will.

Jenkins, K.C., and *H. Greenwood*, for testator's heir-at-law.—The question was one of fact. The rule of partibility in gavelkind did not extend among collaterals beyond brothers and the issue of brothers: *Muggleton* v. *Barnett*, 6 W. R. 182, 2 H. & N. 653; *Hooke* v. *Hooke*, 11 W. R. 105, 1 H. & M. 43; Bacon's Abridgment under Descent (D), ed. 1832, vol. 2, p. 641; and Coke on Litt. 140*a*.

Upjohn, K.C., and *J. Randall Stainer*.—Gavelkind was the common law of Kent. If the question to be decided was one of fact only, then there was ample authority that the rule as to partibility extended beyond brothers and the issue of brothers. There were two unreported cases mentioned in a note in Robinson on Gavelkind (5th ed.), at p. 93*n*—viz., *Cole* v. *Wade*, 1790, and *In re Fullager*, 1812. The land was partible among all the male heirs.

Counsel referred to the Statute de Prærogativa Regis (17 Edw. 2, c. 16); An Act Changing the Custom of Gavelkind 31 (Hen. 8, c. 3); Year Books of 2 Edw. 3, 12; 3 Edw. 3, 38; 5 Edw. 3, 64; 8 Edw. 3, 42; 26 Hen. 8, 4; Chitty on Descents, 186-9; Third Report of the Real Property Commissioners, p. 8; Lambarde's Perambulation of Kent, 1656, p. 584; Cruise's Digest, tit. 29, cap. 5, s. 2.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

FARWELL, J., held that the question was one of law and not of fact, in this respect differing from questions relating to ordinary manorial customs, which had to be established by evidence. The tenure of gavelkind was, however, part of the common law in Kent. In so far as it was a question of law it was necessary, according to the usual practice of the courts, in the absence of direct decisions, to cite the opinions of learned writers on the law. His lordship found, on consulting works such as Robinson on Gavelkind, Watkins on Descents, Chitty on Descents, the Third Report of the Real Property Commissioners, and Mr. Elton's book on the Tenures of Kent, that the opinion generally held was in favour of the absolute generality of the rule as to partibility. As against this view there were only the opinions of two conveyancers given in the case of *Gooding* v. *Gooding*, a case which was compromised, but was discussed in Chitty on Descents, 1825, p. 183, and a statement made in Bacon's Abridgment under Descent (D). But even assuming that the question was one of fact and not of law, it was clear from *Doe d. Mason* v. *Mason*, 3 Wil. 63, that a single instance was sufficient to prove a custom of the sort, and such an instance was found in an unreported case of *Cole* v. *Wade*, from which it appeared that second cousins once removed had been accepted as co-heirs in gavelkind. The result was that he found as a question of fact what he had already found as a question of law, that the rule of partibility in gavelkind extended to collaterals to the remotest degree.

Solicitors for all parties, *Calkin, Lewis, & Stokes.*

Chan. Div. } June 12.
Buckley, J. }

In re BANKES.
REYNOLDS *v.* ELLIS. (*a.*)

Married woman—Husband and wife—Settlement—Covenant to settle after-acquired property — Bequest to separate use subject to restraint on anticipation—"During the coverture"—Property acquired after decree of separation pronounced by foreign court—Marriage with foreigner—Domicil—Settlement in English form—Subject-matter of settlement in England.

Where a legacy is given to a married woman for her separate use absolutely, and by a subsequent clause in the will she is restrained from anticipation; inasmuch as she would, notwithstanding the restraint, be entitled to the interest on the legacy when the time for paying such interest arrived, the legacy is bound by a covenant to settle after-acquired property contained in her marriage settlement.

Where by the law of a foreign country a decree of judicial separation pronounced by a court in such country has no effect on the property rights of the husband and wife, property falling into possession after the pronouncement of the decree is bound by the covenant.

Davenport *v.* Marshall, ante, *p.* 39, [1902] 1 *Ch.* 82, *distinguished.*

On the marriage of an Englishwoman with an Italian property in England was made the subject of a settlement in English form. The settlement was executed by the intended husband and wife in Italy, where the marriage took place. By the law of Italy the settlement would have been invalid, not only through informalities attending its execution, but also because it contained dispositions of property prohibited by that law.

Held, that the settlement must be construed according to English law.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Held, also, that the covenant to settle after-acquired property on the trusts of the settlement was valid and could be enforced, even though by the law of the matrimonial domicil such trusts were illegal.

Viditz *v.* O'Hagan, 48 *W. R.* 516, [1900] 2 *Ch.* 87, *distinguished.*

Action without witnesses.

This was an action brought by the present trustee of the settlement, dated the 28th of March, 1878, made on the marriage of Kate Anderton with Angelo Faveroni, to determine whether two legacies bequeathed to her were subject to a covenant to settle after-acquired property contained in that settlement.

The settlement, which was in the ordinary English form and had reference to a sum of money which was then invested in an English security, contained a power to call in the sum and invest it in other English securities, and provided that the income should, during the joint lives of the wife and husband, be paid to the wife, and after the death of one of them, to the survivor during his or her life, and after the death of the survivor that the capital should be held in trust for the children of the marriage, and in default of such children, if the wife survived the husband, for her absolutely, but if the husband survived the wife, as she should by will appoint, and in default of appointment for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at her death if she had died possessed thereof intestate and without having been married. The settlement contained a common form covenant on the part of the wife to settle after-acquired property on the trusts of the settlement.

Prior to her marriage Kate Faveroni had an English domicil; Angelo Faveroni was then a lieutenant in the Italian army. In accordance with the rules of that service she deposited £1,000 with the Italian military authorities; it appeared from the evidence that that sum constituted her "dote" or marriage portion, and could not be withdrawn until the husband had left the service or the wife had died. The marriage was solemnized in Italy, the settlement having been previously executed by both husband and wife in that country.

There were no children of the marriage, and on the 8th of March, 1898, an Italian tribunal decreed the separation of Kate Faveroni and Angelo Faveroni. Since the date of the decree they lived apart.

By his will, dated the 17th of February, 1877, Meyrick Bankes, who died on the 16th of June, 1881, and who was the father of Kate Faveroni, bequeathed to her certain property subject to the life interest therein of his widow. The will contained a declaration that all moneys by his will made payable to any female should, during any and every coverture, be paid to her for her sole and separate use free from marital control when and as the same should become due and payable and so that she should not have power to deprive herself of the benefit thereof by anticipation, and that her receipt alone, whether covert or sole, should be a good discharge for such moneys.

By her will, dated the 8th of November, 1892, Eleanor Bankes (the widow of Meyrick Bankes), who died on the 25th of January, 1899, and who was the mother of Kate Faveroni, bequeathed to her a legacy of £1,000.

It appeared from the evidence that Kate Faveroni on her marriage acquired an Italian domicil; that, in Italy, marriage does not affect the rights of the wife in respect of her property except in regard to the "dote" hereinbefore referred to; and that the decree of separation had no other effect than to sanction the separation of the husband and wife by their mutual consent, and to allow them to live apart from each other. It also appeared that, by Italian law, the settlement of the 28th of March, 1878, was invalid, for the reasons that it was not in the prescribed form, was not executed before a notary, that it violated the Italian law of succession, and that Italian law does not recognize trusts.

After the issue of the writ Angelo Faveroni became of unsound mind, and by an order of the court the official solicitor was appointed his guardian *ad litem.*

Buckmaster, K.C., and *S. B. L. Druce*, for the plaintiff, supported the settlement on the ground that it must have been the intention of the parties that English law should apply.

They cited *Van Grutten* v. *Digby*, 11 W. R. 230, 31 Beav. 561; *South African Breweries* v. *King*, 48 W. R. 289, [1900] 1 Ch. 273; *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202; and *In re Mégret*, [1901] 1 Ch. 547, 49 W. R. Dig. 37.

H. Terrell, K.C., and *P. S. Stokes*, for Mrs. Faveroni.—Whether English or Italian law governs the construction of the settlement, Mrs. Faveroni is absolutely entitled to both legacies. With respect to the property which she took under her father's will, the case is covered by *In re Currey*, 34 W. R. 541, 32 Ch. D. 361. A covenant by a woman, that if during coverture, she shall become entitled to any property as to which she is restrained from anticipation, she will settle such property, is inoperative. With respect to the legacy which she took under her mother's will, that legacy did not fall due until after the separation, and she is released from the covenant to settle that legacy on the principle of *Davenport* v. *Marshall*, *ante*, p. 39, [1902] 1 Ch. 82. The object of the covenant is to exclude the husband; in England the wife is protected by a separation order, and thereupon becomes a *feme sole.* There is no difference between such a case and the present case, where the wife is treated as a *feme sole* by the Italian law both before and after the separation.

Astbury, K.C., and *T. T. Methold*, for Mr. Faveroni.—The restraint on anticipation endures only to the date of payment, and then becomes inoperative; the legacy under her father's will thereupon became payable to her: *In re Bown*, 33 W. R. 58, 27 Ch. D. 411; *In re Holmes*, 67 L. T. Rep. 335; and *In re Wood*, 61 L. T. Rep. 197, 38 W. R. Dig. 125. This legacy is therefore caught by the covenant to settle. *Davenport* v. *Marshall* has no application; that was a case of an English judicial separation which resulted in section 57 of the Divorce Act coming into operation. It is absurd to say that a voluntary separation has the same effect: on this point they cited *Dawes* v. *Creyke*, 33 W. R. 869, 30 Ch. D. 500.

O. L. Clare, for the legal personal representatives of Mrs. Bankes.

Terrell, K.C., in reply.—In regard to the legacy as to which she was restrained from anticipation, the words of Chitty, J., in *In re Currey*, 32 Ch. D., at p. 363, are in point. *In re Bown* and *In re Holmes* only say that when there is a bequest to a married woman for her separate use absolutely, and the gift is followed by a restraint of anticipation, the property may be transferred to her as soon as it falls into possession; it does not follow that she can, before the property falls into possession, covenant to alienate it. If it does, the same argument would extend to every case of restraint upon anticipation.

BUCKLEY, J.—The only question I have to decide at the present moment is this: Mr. Terrell, appearing for the wife, says it is immaterial to determine whether English law or Italian law applies, for

whether it be the one or the other, the wife is entitled. To that Mr. Astbury, for the husband, replies that if the Italian law is applicable, no doubt the covenant is inoperative, but that if the English law applies the covenant to settle after-acquired property is operative, and therefore it is necessary to say which law applies. Substantially I think what I have to decide is whether the covenant by the lady to settle after-acquired property contained in this settlement is valid if the English law is the law to be applied.

Now the settlement was executed on the 28th of July, 1878. I am proceeding now upon the hypothesis that the English law is applicable. It contained a covenant to settle after-acquired property in the usual form—that if she was, or during the then intended coverture she or the husband in her right should be or become entitled to real or personal property of the value of £100, then it should be settled. The property as to which the question arises is of two descriptions. The first which I will take is property which she derives under her father's will. Her father died in 1881—that is to say, three years after the date of the settlement. His will contained certain dispositions in her favour, and his will contained this clause. [His lordship then read the declaration above set out, and continued:] Now upon words such as those the Court of Appeal has held, in *In re Bown* and *In re Holmes*, that when the time comes at which the legacy is payable or transferable, the married woman, whether under coverture or not, is entitled to ask for payment or transfer, notwithstanding the words that she should not have power to deprive herself of the benefit thereof by anticipation. To express that in my own words as matter of construction, a clause such as this, directing payment at a date, and then saying that the payee shall not have power to deprive herself of the benefit thereof by anticipation, means by way of anticipation before the date, because, if the date for payment comes, and the lady receive the money, then the donor or grantor cannot say that she shall not spend it or do what she pleases with it, give it away—and, as matter of construction, the restraint on anticipation is one which endures up to the date of payment, and as from the date of payment becomes inoperative. That seems to me to be the effect of *In re Bown* and *In re Holmes*. Then Mr. Terrell says, and says truly, that in *In re Currey* Chitty, J., following previous decisions, and in particular one of Sir George Jessel in *In re Ellis' Trusts*, 22 W. R. 448, L. R. 17 Eq. 409, held that a restraint on anticipation is equivalent to a restraint on alienation, and that, therefore, when there is an effectual restraint on anticipation the person so restrained cannot alienate, because that is a form of anticipation. Now what took place here? In 1878 the lady, who was not entitled to this property at all at that time, because it came under the will of a person who died in 1881, covenanted that if she became entitled to any money she would settle it. Under the will of a testator who died in 1881 she became entitled to property upon which there was a restraint on anticipation until the date of payment, if my view of the construction is right as to the effect of *In re Bown* and *In re Holmes*. As soon as the date of payment arrived that was money which simply belonged to her. She could take it and spend it, and if she would take it and spend it I am unable to understand why she should not by her ante-nuptial settlement executed in 1878 have bound herself that that money, which she might have spent, she would not spend, but would settle. I do not think that *In re Currey* applies to a state of things in which the clause is in the form of *In re Bown* and *In re Holmes*, and in the form in which it is here. Directly you find that, under the operation of the gift, she becomes entitled to the money, so that, under the form of the gift, there is no longer any restraint on anticipation, or, which is the same thing, restraint on alienation, I do not know why she should not become bound by her covenant to deal with it in a particular way. It seems to me, therefore, that, as regards this property under the father's will, this covenant is a covenant operative as from the date when the interest under that will became payable.

Now the other property was property which she derived under her mother's will, and that, so I am told, was simply a legacy of £1,000. There is no clause about any restraint on anticipation as regards that. That is money which came to her during the marriage, and the question is whether the covenant to settle applies to that. As to this sum—and if I was wrong as to what I have said as to the sum under the father's will also—another argument is raised, and it is this—namely, that there was in March, 1898, a decree of separation pronounced by an Italian court, and it is said that the covenant to settle after-acquired property became, as from 1898, a dead thing, because the covenant was to settle what came to her during any coverture, and that the coverture was then over; and it is said that a decision of my own in *Davenport* v. *Marshall* is applicable to that state of things. I do not think *Davenport* v. *Marshall* has anything to do with it. The ground of *Davenport* v. *Marshall* was this, that as from a decree pronounced by the Divorce Court in this country, or a judicial separation pronounced by the court, a section of the Matrimonial Causes Act enacts that the wife shall, from the date of the order, be considered as a *feme sole* with respect to property, and I thought that a covenant to settle after-acquired property was only intended, according to its true construction, to apply during such time as that state of things did not exist, when she was not a *feme sole* with respect to property. Now the evidence as to this Italian order is that it has no such effect as a judicial separation decree of the English court. The evidence as to the Italian law is that neither the marriage of an Italian person, nor a separation order, as a separation order, has any effect on the wife's property, and that she remains entitled to property as if she had never been married, and that a separation order does not alter her right in respect of property. The whole ground, therefore, of the decision in *Davenport* v. *Marshall* is different, and I think the point does not arise. Under these circumstances it seems necessary to determine whether the English or the Italian law is applicable.

H. Terrell, K.C.—This contract must be construed as an Italian contract. In marriage settlements, in the absence of a contrary intention, the rule of construction is that the law of the domicil of the husband applies: Dicey's Conflict of Laws, p. 652. Here, admittedly, the matrimonial domicil was Italian. The settlement was executed by both parties in Italy. The marriage was solemnized in Italy, where the parties intended to permanently reside. *Van Grutten* v. *Digby* is distinguishable. If the settlement is construed according to Italian law, it is wholly invalid. Furthermore, by the alteration in the wife's domicil her power to carry out the contract to settle after acquired property came to an end, for her covenant that she will, at a date when she is subject to Italian law, do something which is not allowed by that law.

He referred to *Chamberlain* v. *Napier*, 29 W. R. 194, 15 Ch. D. 614, and *Viditz* v. *O'Hagan*, 48 W. R. 516, [1900] 2 Ch. 87.

T. T. Methold.—There are clear evidences of a

contrary intention within *Van Grutten* v. *Digby*; for example, the investment clause, which confines investment to England, and the ultimate limitation to the next-of-kin according to the statute. The whole of the settlement would have been invalid according to the Italian law. It is impossible to suppose that a contract should be entered into with reference to a law by which it would be invalid. [He referred to *In re Barnard*, 56 L. T. Rep. 9, 35 W. R. Dig. 177; Co. Litt. 42*a*.] The covenant to assign after-acquired property operated in equity as a conveyance.

H. Terrell, K.C., replied.

BUCKLEY, J., stated the facts, and continued: It seems to me that, upon those facts, I ought to arrive at the conclusion that the parties intended to contract according to the English law. The general proposition as stated in Dicey's Conflict of Laws, at p. 653, is this, that "a marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicil." The matrimonial domicil here was Italian, no doubt, so that *primâ facie* this ought to be construed with reference to the law of the matrimonial domicil. But is there reason to the contrary? It seems to me, on the facts I have mentioned, there is reason to the contrary. I therefore think the English law, and not the Italian law, ought to be applied.

Then this is further argued, that, though according to the English law, which, I think, has to be applied, the lady covenanted that she would, at a future time, so dispose of her after-acquired property as that it would come within the settlement, yet that when she married an Italian she acquired an Italian domicil, and could not, according to the Italian law, do that thing and therefore, upon the doctrine of *Viditz* v. *O'Hagan*, it is said that the covenant cannot have effect. Now it seems to me that that is not so. In *Viditz* v. *O'Hagan* the point was that the settlement was executed by an infant who could not bind herself at all, and the question was whether, by acts done after attaining majority, there had been such an affirmation of the settlement as that it became binding; in other words, the settlement, when executed, was nothing, and unless you applied the English law as to affirmation and confirmation it bound nothing. Now here, if I am right, the settlement at the outset was binding because it was executed by a person competent to bind herself. Then if I am entitled to treat the English law as being applicable to it, she could, according to our law, bind herself in respect of her after acquired-property, and although it took the form of a covenant, and not of an assignment, that would make no difference. On that ground it seems to me that the covenant was effectual, and I therefore hold that this matter is to be governed by English law.

Solicitors, *Woodcock, Ryland, & Parker*, for *A. S. Reynolds*, Liverpool; *Rowcliffe, Rawle, & Co.*, for *Peace & Ellis*, Wigan; *W. H. Winterbotham Crosse & Sons.*

K. B. Div. (Phillimore, J.) — June 18.

JACKSON v. THE COMMISSIONERS OF INLAND REVENUE. (*a*.)

Inland revenue—Stamp duty—Separation deed—Agreement in consideration of fixed weekly payments—Duty assessable on covenant—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 4, *and Schedule I.*

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

By the Schedule to the Stamp Act, 1891, *a bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity) or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument or rent reserved by a lease or tack, is chargeable if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same* ad valorem *duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of* 2*s.* 6*d. for every* £5, *and also for any fractional part of* £5, *of the annuity or sum periodically payable.*

A deed of separation entered into by the appellant and his wife contained a clause to the effect that the appellant would and should during the joint lives of himself and his wife, if his wife should continue to perform and observe the stipulations therein contained and on her part to be performed and observed, pay to his wife "the clear weekly sum of £1," *and in the event of the wife surviving the appellant and not having forfeited payment during his lifetime, the sum should continue to be paid to her by her husband's representatives.*

Held, that the agreement was a security for an indefinite period for a sum of money at weekly periods, and not for an annuity or yearly sum payable by weekly instalments, and was, therefore, only liable to ad valorem *duty upon the sum agreed to be paid weekly, and not upon the total amount of such weekly payments for a year.*

Clifford *v.* Commissioners of Inland Revenue, [1896] 2 *Q. B.* 187, 44 *W. R. Dig.* 76, *followed.*

This was a special case stated by the Commissioners of Inland Revenue, and was argued before Phillimore, J., sitting for a Divisional Court.

The facts stated were as follow: On the 14th of March, 1902, an instrument was presented on behalf of John Jackson, the appellant, to the Commissioners of Inland Revenue, under the provisions of the 12th section of the Stamp Act, 1891 (54 and 55 Vict., c. 39), for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument in question was a deed of separation between the appellant and his wife, and contained the following clause: "The said John Jackson will and shall, during the joint lives of himself and the said Emma Jackson, if the said Emma Jackson shall continue to perform and observe the stipulations herein contained, and on her part to be performed and observed, pay to the said Emma Jackson the clear weekly sum of £1; and, in the event of the said Emma Jackson surviving the said John Jackson, and not having incurred a forfeiture of the said weekly sum in his lifetime, the same shall continue to be paid by the representatives of the said John Jackson during the remainder of the life of the said Emma Jackson. The said weekly sum shall be paid in advance on the Monday of each week, the first payment to be made on Monday, the 10th day of March instant, and the said Emma Jackson shall not have power during her covertare to anticipate the same." It was admitted by the appellant that the deed was liable under section 4 (*a*) of the Stamp Act, 1891, to two duties—(1) a duty of 10*s.* as a deed, and (2) an *ad valorem* duty by reference to the heading of charge in the first schedule to the Stamp Act, 1891, of "Bond, covenant, or instrument of any kind whatsoever." The appellant contended that the *ad valorem* duty payable under this latter head was to be calculated on the amount payable weekly—namely, £1—and that the above clause of the deed was a "covenant, being the only security for a sum or sums of money at stated periods," and that the sum

periodically payable was £1, and the duty thereon was 2s. 6d.

The Commissioners were of opinion that the instrument was, as to the above clause, the only security for an annuity for the term of life, or at any rate for an indefinite period; that the amount of the annuity was £52, and that duty was payable at the rate of 2s. 6d. for every £5 of the said sum of £52.

They accordingly assessed the duty at £1 7s. 6d., and they assessed a further duty of 10s. in respect of other matter contained in the deed. The appellant admitted the correctness of the assessment as to the further duty of 10s., but was dissatisfied with the assessment so far as it related to the sum of £1 7s. 6d., the amount of the *ad valorem* duty held to be chargeable.

The questions for the court were (1) whether the instrument was chargeable with the *ad valorem* duty of £1 7s. 6d. in accordance with the assessment; (2) if not, with what *ad valorem* duty it was chargeable.

J. A. Foote, K.C., and *Woodcock*, for the appellant. The agreement is one for an indefinite period, it does not purport to deal with an annuity or with annual payments, and owing to the uncertainty as to the period during which the agreement may last, the parties have themselves stipulated for weekly payments. The case is covered by that of *Clifford* v. *Commissioners of Inland Revenue*, [1896] 2 Q. B. 187, 44 W. R. Dig. 76, and the duty is chargeable on the amount of the weekly sum only.

Sir R. B. Finlay, A.G. (*Rowlatt* with him), for the Commissioners.—The Commissioners have rightly decided, looking at the agreement as a whole, that it is one for an indefinite period and is intended to provide for a yearly sum to be paid by the husband to the wife, the actual payments being made weekly. The case is really governed by the decisions in *Jones* v. *Commissioners of Inland Revenue* and *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue*, reported in 43 W. R. 318, [1895] 1 Q. B. 484, where instruments which provided for the payment of the consideration by quarterly payments were held to be chargeable with an *ad valorem* duty upon the same principle as that which has been acted on by the Commissioners here. If the contention of the appellant is right, then the shorter the periods at which payment is to be made the less will be the stamp duty, and parties to such agreements will deprive the revenue of duty by fixing payments at very short intervals.

PHILLIMORE, J.—I am unable to distinguish the present case from that of *Clifford* v. *Inland Revenue Commissioners* which has been relied on by the appellant, and therefore in my judgment this appeal must be allowed. In both cases there was the same contemplation by the parties of an endurance of the payment for more than a year, and they contemplated also the possibility that the matter might be brought to an abrupt conclusion. In the present case that latter consideration is even more patent than in *Clifford's case*. In both instances the actual payment was weekly. Pollock, B., and Bruce, J., who considered their judgment in *Clifford's case* held that there the weekly payments made the period a weekly one, and that it was not an annuity or yearly sum payable by weekly instalments, and on that authority I must hold the same in the present case. There will therefore be judgment for the appellant with costs, and the sum to be paid as *ad valorem* duty will be assessed at 2s. 6d.

Solicitors for the appellant, *Brown & Aylen.*

Solicitors for the Commissioners of Inland Revenue, *The Solicitor of Inland Revenue.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) March 5.

MONK v. ARNOLD. (a.)

Factory—Provision against fire—Power of county court judge to apportion cost of safety appliances—Factory Act, 1891 (54 & 55 *Vict. c.* 75), *s.* 7.

By section 7 *of the Factory Act*, 1891, *the use of certain safety appliances is made compulsory on the owner, but if he alleges that the tenant "ought" to bear any part of the cost he can apply to the county court judge, who is to make such order as may appear just and equitable under the circumstances.*

Held, that the word "ought" was not to be construed as a word of legal liability, the Legislature intending to insure the safety of the factory and to leave it to the county court judge to do what was right between the parties.

This was an appeal by the defendant from his Honour Sir John Edge, sitting at the Clerkenwell County Court.

The plaintiff was the owner of a certain factory and the defendant was the tenant under a lease dated the 1st of November, 1897; the lease contained a covenant by the tenant to pay all rates, taxes, charges, assessments, and outgoings whatsoever, whether parliamentary, parochial, local, or of any other description, which might be assessed, charged, or imposed upon the demised premises, or the landlord or occupier in respect thereof.

By section 7, sub-section 1, of the Factory Act, 1891, every factory of which the construction is commenced after the 1st of January, 1892, and in which more than forty people are employed shall be furnished with a certificate from the sanitary authority that the factory is provided on the storeys above the ground floor with such means of escape . . . as can reasonably be required under the circumstances of the case. (2) With respect to all factories to which the foregoing provisions of this section do not apply, and in which more than forty persons are employed, it shall be the duty of the sanitary authority to ascertain, from time to time, whether all such factories are so provided . . . and in the case of any factory which is not so provided to serve a notice on the person being within the meaning of the Public Health Act, 1875, the owner of the factory a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry out the same before a specified date; and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements, and unless such requirements are so complied with the owner shall be liable to a fine not exceeding one pound for every day that such noncompliance continues. . . . If the owner alleges that the occupier ought to bear or contribute to the expenses of complying with the requirements, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances."

The plaintiff having been served with an order under the Act, did the work and brought an action in the county court to recover from the defendant the sum so expended. The county court judge divided the cost between the owner and the lessee.

The defendant appealed. There was also a cross-appeal by the plaintiff, who alleged that under

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the terms of the covenant in the lease the defendant ought to bear the entire cost.

C. A. Russell, K.C. (*Bonner* with him), for the defendant.—The words of the sub-section import legal liability. The tenant ought not to bear any part of the cost unless it can be made out from the terms of my covenant. The plaintiff can still sue the defendant on the covenant in the High Court.

Dickens, K.C. (*Chester Jones* with him).—The county court judge was authorized by the Act to do what was right in the matter, and he has rightly exercised his discretion. On the cross-appeal I say that the words of the covenant cover the liability, and that therefore the county court judge should have ordered the tenant to pay the whole.

Lord ALVERSTONE, L.C.J.—In the view that we take of this case it is not necessary to deal with the question of the defendant's liability on the covenant. I think the governing consideration of this case is section 7 of the Act of 1891. The primary object of the Act was to make factories safe from fire, and to see that they were properly furnished with safety appliances. The second consideration was to get the work performed by the person who had control over the building. In the course of the passage of the Bill the cost of structural alterations in cases where the property was let on lease was adverted to, and the above-mentioned addition was accordingly made to the sub-section. Cases might arise in which it would be right to impose the whole burden on the owner or the lessee respectively. Both counsel contend that the word "ought" imports a legal obligation. Mr. Russell says that in his view the tenant ought to pay nothing, as his covenant does not impose it upon him. Mr. Dickens, on the other hand, contends that he should pay the whole. I cannot but think that the county court judge has taken the right view. I cannot think that the words in the section "may make such order as is just and equitable under all the circumstances of the case" apply only to the terms of the covenant or contract between the landlord and the tenant. In my opinion they give to the county court judge an equitable jurisdiction to apportion the amount having regard to the length of the lease, the character of the building, and other matters. Of course it is right that he should take into consideration the contract between the parties, but unless there is something in it which makes it unjust that he should apportion the amount he is given a discretion to do so. Mr. Russell says that the tenant may still be sued upon his covenant in the High Court, and that an order under this Act would not be an answer to the claim. That may be so, and it may be a *casus omnissus* in the Act, but I do not think that we ought therefore fail to give effect to plain words of the Act. Mr. Russell's plea therefore fails. Mr. Dickens says, then, that the covenant plainly imposes an obligation on the tenant. Even if Mr. Dickens had satisfied us as to that, the county court judge had a discretion under the section on dealing with the case, and I am of opinion that he exercised his discretion rightly. Each appeal therefore fails.

DARLING, J.—I am of the same opinion. The section was not merely meant to tell the judge to decide according to the strict legal rights of the parties, which is the ordinary duty of every judge. I think they meant something more. Many cases must arise in which if only strict legal justice were done it might not meet the full justice of the case, "To do what was just and equitable under all the circumstances of the case" one would have to go further and exercise "attributive justice," to use a somewhat technical word.

CHANNELL, J.—I agree with the judgments already delivered as to the construction of the section. In my opinion the Legislature deliberately imposed the burden of providing these fire escapes on the landlord in the first place, leaving to the county court judge a power over the contract entered into between parties. If there was an express contract by the tenant to put up these fire escapes, the judge would, of course, so order; but if there is no express contract, but some general provision, then I think that the Legislature gave the county court judge a discretion to deal with the matter. The only difficulty is Mr. Russell's point that the landlord could still sue the tenant in the High Court on his covenant, but in the view I take of the statute there is no imposition on the landlord until the county court had so held. But even if that is not so, and there is a *casus omnissus*, it is not, I think, sufficient to prevent us from giving the effect we do to this Act.

Appeal and cross-appeal dismissed.

Solicitors for the appellant, *Stanley Evans & Co.*

Solicitors for the respondent, *Shaen, Roscoe, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) March 1, 3.

DARLOW v. SHUTTLEWORTH. (*a.*)

Practice—Appeal—Bills of exceptions—Proceedings in error—Common Law Procedure Acts, 1852 (15 & 16 *Vict. c.* 76), *ss.* 146-167, *and* 1854 (17 & 18 *Vict. c.* 125)—*Judicature Acts*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45, *and* 1884 (47 & 48 *Vict. c.* 61), *s.* 23—*R. S. C., ord.* 59, *rr.* 10-17.

Bills of exceptions and proceedings in error from inferior courts have been impliedly if not expressly abolished. Appeals from inferior courts must therefore be by notice of motion in the King's Bench Division in cases where there is no statute regulating the appeal. But all of substance in the old procedure must still be observed.

This was a hearing of a rule *nisi* obtained at the suit of the plaintiff calling upon the master of the Crown Office to show cause why an appeal should not be entered in the list. The arguments appear sufficiently from the judgment of the court.

Rowlatt showed cause.

Danckwerts (*Firminger* with him), in support of the rule.

THE COURT reserved judgment.

The judgment of the COURT (Lord ALVERSTONE, L.C.J., and DARLING and CHANNELL, JJ.) was delivered by

CHANNELL, J.—In this case a rule *nisi* was granted calling on the master of the Crown Office to show cause why he should not be directed to enter in the list of appeals from inferior courts a notice of motion by way of appeal from a case tried in the Borough Court of Record of Preston. The notice of appeal complained of alleged misdirection by the judge of the borough court. The master of the Crown Office refused to enter the appeal on the ground that no appeal lies from the Borough Court of Preston. The rule has been argued before us; and in considering whether it should be made absolute we have to determine, shortly, whether there is

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

now any such right of appeal, and if so in what cases. The court in question is an ancient court of record held in the borough under a charter. There is no modern Act of Parliament regulating its procedure and giving an appeal from it, as in the case of the Mayor's Court, the Liverpool Court of Passage, and the Salford Hundred Court, and possibly other similar courts. The report of the case of *Addison* v. *The Mayor of Preston* in 12 C. B. 108 may be referred to for statements as to the history and jurisdiction of the court. It is admitted that in the absence of a statute giving an appeal from the court in question to this court no appeal would lie, otherwise than by substitution for proceedings in error; but it is contended by Mr. Danckwerts, who supported the rule, that a litigant in the borough court could formerly have tendered a bill of exceptions to the ruling of the judge in case of an alleged misdirection by him, and then have brought error to the Court of King's Bench (or, indeed, at his option to the Court of Common Pleas), and that the effect of the Judicature Acts and rules is that an appeal by notice of motion is now substituted for these proceedings in error. Several of the steps in this argument are clear. It is clear that before the Judicature Acts error lay to the King's Bench from all inferior courts of record in the kingdom, and also that in all such courts a bill of exceptions to the ruling of the judge might be tendered as in the superior courts. A misdirection of the judge might, therefore, if the objection to it was duly taken by a bill of exceptions, be reviewed and set right in the Court of King's Bench by the litigant issuing a writ of error, which he could do as of right. Mr. Danckwerts quoted to us many authorities in support of these propositions, but it is unnecessary to refer to them as the law is now well settled, though not perhaps very familiar at the present day. These authorities are, however, useful upon the question which we have to consider, as to how far these various steps in these proceedings were mere machinery or were matters of substance. The Common Law Procedure Acts of 1852 and 1854 first made changes in the ancient practice, and these Acts have now to be considered. The Act of 1852 contains a number of sections, beginning with section 146, as to the forms of proceedings in error. By section 148 "a writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause." This appears not to apply to error from an inferior court, but only to causes in the superior courts. The writ of error had been practically the commencement of a new action, and by this enactment error was to be only a step in the cause. This it could not be when the proceedings on which error was brought had been taken in an inferior court, but it is of no importance in the present case whether in the period between 1852 and 1875 error from an inferior court ought to have been commenced by issuing a writ of error or by filing a memorandum with the master, as was done in the case of proceedings in error from one of the superior courts. Mr. Danckwerts is clearly right in saying that the jurisdiction of the King's Bench to entertain proceedings in error from inferior courts was part of the original or inherent jurisdiction of the court to examine or correct all errors in inferior courts (*vide* Coke, 4 Inst. 71), and that the writ of error was not really in the nature of a special commission under which the judges entertained the matter, as appears to have been sometimes thought. No doubt it was the writ of error which in one sense gave the jurisdiction, but only in the same way that a writ in an ordinary action is required to give jurisdiction. The other provisions of the Act of 1852 require no notice. Then came the Act of 1854, and though it did not deal directly with proceedings in error it contained enactments as to appeal to the Exchequer Chamber which proved the death-blow to bills of exception in the superior courts, as from that time they were little required, and were rarely resorted to. In the inferior courts of record the right to tender bills of exception of course remained, at least down to the time when the Judicature Acts came into operation. There are, however, few, and possibly no reported instances, of bills of exception being in use at this period—none were quoted to us in the argument, and we have not found any ourselves. But this may be accounted for by the fact that at the time we are considering, between 1852 and 1875, the new county courts had been for some time in operation, and the local courts of record themselves were very little resorted to, and in fact almost obsolete, except those courts which, like the Mayor's Court, London, had special Acts of Parliament giving appeals and rendering the resort to bills of exception as unnecessary as in the superior courts. We come now to the Judicature Acts. By section 4 of the Act of 1873 the High Court of Justice was to have such appellate jurisdiction from inferior courts "as is hereinafter mentioned," which reference appears to be the 45th section. But by section 16 the High Court of Justice expressly got all the jurisdiction of the existing Court of King's Bench, and thus clearly got the jurisdiction to deal with error from inferior courts of record. By the 45th section "all appeals from petty or quarter sessions, from a county court, or from any inferior court," are to be heard and determined by Divisional Courts. Now on this section Mr. Rowlatt, showing cause against the rule, remarked that at that date error and appeal were distinct things, and that the lawyers who framed the Judicature Act would never have included "error" in "appeal." There is some force in this, but although it is true that the two things were distinct, yet the word appeal is undoubtedly the larger and more general of the two, and in its wider sense is quite capable of including error, and when it is seen that there is neither in the Act or in the rules in the schedule, any other provision whatever as to error from an inferior court (unless perhaps the 49th rule mentioned below abolishes it), we think the more reasonable construction is to hold that the words "all appeals from inferior courts" in the 45th section include error. If this is not correct, by the 73rd section the old procedure in error would have been continued by this Act. If the 45th section does include it, the procedure would still have been the old procedure until new rules were made under the 74th section. By the 49th rule in the schedule to that Act it is said that "bills of exception and proceedings in error shall be abolished," but as this comes amongst the rules relating to procedure in the Court of Appeal it is doubtful whether proceedings in error from inferior courts were referred to; and as the Act was only dealing with the High Court, it can hardly be said that bills of exception in the inferior courts of record would have been abolished by these words. So that while there is no clear abolition by the Act of 1873 of proceedings in error from inferior courts, there is certainly no clear expression of intention to continue them either under the old form or in any new form. It is of course absolutely clear that there is in the Judicature Acts and rules, which were passed to improve procedure and enlarge jurisdiction, no indication of any intention to take away any previously existing rights of suitors, whether of originating proceedings or bringing error or appealing, without substituting new procedure for giving effect to those rights. The schedule to the Act of 1873

was repealed by the Act of 1875, but the same words, "bills of exceptions and writs of error shall be abolished" appear in ord. 58, r. 1, in the schedule to the Act of 1875, but again the words appear in conjunction with provisions relating to the Court of Appeal. The Act of 1875 contains in the 15th section an enactment that the enactments as to appeals from county courts might be extended by Order in Council to any other inferior court, and if this power had been acted upon in the case of the Preston Court it would have prevented the question before us arising; but no such Order in Council has been made, at all events as to Preston Court. Practically the Act of 1875 left all the questions we have to consider just as they were left by the Act of 1873. Nor were any rules which throw any light on the matter before us made until after the passing of the Judicature Act, 1884, which by section 23 enacted that the power to make rules conferred by section 17 of the Judicature Act, 1875, should be deemed to include power to make rules for regulating the procedure on appeals from inferior courts to the High Court. Under this Act the present rules as to appeals from inferior courts were made, including ord. 69, r. 10, that all such appeals shall be by notice of motion. This concludes the history of the matter, and gives us the material on which our decision is to be based. The result is, that unless error from inferior courts is included both in the Acts and rules under the words "appeals from inferior courts" there is no provision for it. All through these enactments and rules there is no mention whatever of "error from inferior courts," and no mention of proceedings in error at all except to abolish them; and although it is doubtful whether this express abolition relates to error from inferior courts, it is, we think, impossible not to hold that so far as the superior court and the procedure in it is concerned, the old form of proceedings in error from inferior courts is gone and the new forms of appeal are substituted for them. The High Court of Justice on its creation got the jurisdiction to entertain error from inferior courts, and that jurisdiction cannot have been lost. If the true view is that the old forms have been abolished without any clear substitution of the new forms for them, the new forms would nevertheless apply; just as it was held after the abolition of real actions that a personal action could be maintained for a matter on which previously no personal action lay: *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368. In fact, however, the old forms appear to have gone, not so much by express abolition as by the substitution of the new forms for the old. Turning now to the cases, the only case quoted to us of error brought since the Judicature Acts from an inferior court was *Le Blanche* v. *Reuter's Telegram Co.*, 25 W. R. 115, 1 Ex. Div. 408. That came from the Mayor's Court, and was brought on notice of motion to the Divisional Court for hearing appeals from inferior courts; and as the Court of Error from the Mayor's Court, prior to the Judicature Acts was the Exchequer Chamber and not the Queen's Bench, the Divisional Court held that the appeal must go to the Court of Appeal as having the jurisdiction of the Exchequer Chamber. Mellor, J., however, appears to have been clearly of opinion that "error" was abolished and "appeal" substituted. And in *Pryor* v. *The City Offices Co.*, 31 W. R. 777, 10 Q. B. D. 504, Brett, M.R., seems to have been of opinion (see p. 507) that error on the face of the proceedings in the Mayor's Court was properly brought before the Court of Appeal by way of appeal. We hold, therefore, that error from an inferior court is now properly brought in the High Court by notice of motion. No difficulty arises from the abolition of the writ of error, by which proceedings in error were formerly commenced; for many matters are now commenced in the High Court without a writ—for instance, by originating summons, and county court appeals by notice of motion, and when such matters are, in accordance with the practice of the court, daly commenced without a writ there is jurisdiction to hear them.* There is a somewhat greater difficulty as to the part of the proceedings in the inferior court prior to the error coming before the High Court, particularly as the bill of exceptions. In *Reg.* v. *Kettle*, 17 Q. B. D. 762, 34 W. R. Dig. 50, a case which decided that the statutory appeal from a county court by way of special case had been abolished by the High Court rules and appeal by way of motion substituted for it, Wills, J., pointed out that the Act of 1884 was unnecessary if it was meant to authorize only rules for the part of the procedure on appeal from inferior courts which took place in the High Court, and that the power given by the Act of 1884 clearly extended to altering so much of the procedure in the county court as was merely machinery for the appeal. Again in *Eder* v. *Levy*, 19 Q. B. D. 210, 34 W. R. Dig. 152, it was held that for the old appeal from the Mayor's Court by special case in cases over £20 there was substituted an appeal by motion, and that the former mode of appeal having been as of right and without the necessity of the leave of the court below, the new appeal by motion might be made without leave, notwithstanding a section of the Mayor's Court Act, providing that appeals by motion required leave. With these cases quoted by Mr. Danckwerts, we must compare the cases quoted by Mr. Rowlatt—viz., *West Devon Great Consols Mine*, 36 W. R. 342, 38 Ch. D. 51; *Morgan* v. *Bowles*, 42 W. R. 269, [1894] 1 Q. B. 236; *Kirby* v. *North British Mercantile Insurance Co.* (*Limited*), 44 W. R. 529, [1896] 2 Q. B. 99. In the first of these cases it was held that the Judicature Acts and rules under them as to inferior court appeals had not dispensed with the necessity for a deposit as a condition of appeal under the Stannaries Act. This was put on the ground that the Stannaries Act was special legislation, and per Bowen, L.J., "*generalia specialibus non derogant.*" In *Morgan* v. *Bowles*, it was held that the condition as to deposit imposed by section 8 of the Mayor's Court Act had not been abrogated by the new rules as to inferior court appeals. *Eder* v. *Levy* was not quoted to the court, but the two cases as reported are not necessarily inconsistent, for it does not appear by the report of *Eder* v. *Levy* that the question of deposit was raised. The two cases together bring out clearly the distinction that while matters of mere procedure for the purpose of getting the appeal before the higher court can be altered by rules, conditions—subject to which only is there a right of appeal—cannot be so altered. In *Kirby* v. *North British Mercantile Insurance Co.*, a similar decision was given by the Court of Appeal as to the condition of time imposed by the same section by the Mayor's Court Act, and the court clearly held that the giving of notice in proper time and the giving of the security were conditions precedent to the existence of the right of appeal. In addition to the cases quoted to us on the argument we may refer to the case of *The Attorney-General* v. *Sillem*, 12 W. R. 641, 10 H. L. Cas. 704, in which there was both in the Exchequer Chamber and in the House of Lords a very great difference of opinion upon the question whether the Court of Exchequer, under the powers given to it by the Queen's Remembrancer Act for making rules for regulating the process, practice, and procedure of the court in revenue cases, could make rules applying the provisions of the Common Law Procedure Acts as to appeals to the decisions of the Court of Exchequer in revenue cases. It was held by a majority, both in the Exchequer Chamber and in the

House of Lords, that there was no such power and that the creation of a right of appeal requires legislative authority. This decision is not in point in the present case, as no question arose there of altering an existing right of appeal by new procedure; but the judgments in both courts contain much learning on the differences between error and appeal, and as to what is procedure and practice, and what can be done by rules, all of which throws light on the question before us, and, as we think, justifies the conclusions at which we arrive. To apply these conclusions it becomes necessary whether it was formerly a condition precedent to a right of appeal, or perhaps we should say to a right to bring error in respect of a misdirection in an inferior court of record, that the party should have tendered a bill or whether tendering and getting the seal of the judge to a bill of exceptions was only machinery for the purpose of bringing the case under review in a higher court. Bills of exceptions were not known to the common law, but were introduced by 13 Edw. 1, st. 1, c. 31 (1285), and as appears from Coke's 2nd Inst., p. 426 the statute was applied in practice (though it did not in express terms extend) to all courts of record, and the case of *Thompson* v. *Davenport*, 2 Sm. L. C., 10th ed., p. 368, is one of several reported instances of error in a bill of exceptions from an inferior court being entertained. The object of the bill of exceptions was to put the matter complained of on the record. Then the right to bring error followed. It must be tendered before verdict, and it was held by Holt, C.J., in *Wright* v. *Sharp*, 1 Salk. 288, that though it need not be drawn up in form at the time it is tendered, yet, as it is to become a record, the substance of it should be reduced into writing while the thing is transacting. When sealed by the judge both parties were concluded by it as to the truth of the matters contained in it: Tidd's Practice (9th ed.), p. 864. The bill of exceptions was, therefore, if procedure, certainly procedure of an important character; but in many points it much resembled a special case signed by the judge at the request of the parties for the purpose of an appeal. As it has been held in *Reg.* v. *Kettle* and *Eder* v. *Levy* that the statement of a special case was not a condition precedent to the right of appeal from the county court and from the Mayor's Court, but was procedure only, and was abolished by the new procedure, we think that we ought not to hold that the actual tendering of a bill of exceptions and getting it sealed is now a condition precedent to the right to bring under review in a superior court the matters which could have been so brought by taking that course. We ought to hold that the bill of exceptions was form only, abolished now, either expressly, or if not, then abolished by the substitution of new forms. At the same time we must hold that all which was matter of substance in the old form is still a condition precedent to the new appeal. The misdirection must be of a character which could be the subject of a bill of exceptions, and the old authorities on that subject would apply, and, further, the objection must have been taken distinctly and brought to the judge's attention before verdict. It may be that this latter requirement adds little, if anything, to what the House of Lords has laid down in the case of *Smith* v. *Baker*, 40 W. R. 392, [1891] A. C. 325, is always required on an appeal from an inferior court. Further, if there were any conditions as to bail or otherwise, which were conditions precedent to the right to bring error, they will still be conditions precedent to the right to appeal: *Kirby* v. *North British Mercantile Insurance Co.* It rather seems that bail in error was only required as a condition of a stay in execution, and not of a right to bring error (19 Geo. 3, c. 70, s. 5, and 7 & 8 Geo. 4, c. 71, s. 6), but that, and any other question of non-compliance with conditions precedent to the existence of the right to appeal in this case, we must leave open to the argument of the appeal. Neither the notice of motion in the case before us nor the affidavit in support of the rule, shows that there was in fact anything analogous to the tender of a bill of exceptions, but that is probably owing to the fact that, until Mr. Danckwerts was instructed no one had seen that the only way to support the appeal was as a substitute for error on a bill of exceptions. The notice of motion was refused in the Crown Office on the broad ground that no appeal lay in any case; and we think we ought to direct the appeal to be entered, and the appellant will have, as in a county court appeal, to show at the hearing that he took the point of law sufficiently, and took it in time. As to the materials on which the appeal has to be heard there may be some difficulty, and it may be that it will be found desirable to make some further rules of court as to appeals from inferior courts in substitution for proceedings in error; but if the rules are defective on this point it does not create any difficulty as to the jurisdiction to entertain the appeal, as ord. 59, r. 8, does, however imperfectly, provide for the case. We think that the rule must be made absolute. Of course it is not a case for costs, as cause was only shown against the rule on behalf of the recorder with a view no doubt of assisting the court, and we are indebted to counsel on both sides for the assistance given to the court in a matter of some difficulty, and which required considerable research.

Solicitor for the appellant, *H. W. H. Rance*, for *J. C. Milton*, Chorley.

Solicitor for the respondent, *Solicitor to the Treasury*.

C. C. R.
(Lord Alverstone, L.C.J., and Wright, Ridley, Bigham, and Walton, JJ.) — Feb. 1.

REX *v.* PENFOLD AND ANOTHER. (*a*.)

Criminal law — Evidence of previous convictions — Admissibility of at trial—Prevention of Crimes Act, 1871 (34 & 35 *Vict.* c. 112), *s.* 7.

Where the evidence of previous convictions is necessary in order to constitute a statutory offence, evidence of such convictions may be given at the trial of the prisoner.

Rex *v.* Brown, 65 *J. P.* 136, *overruled.*

Case stated by Mr. Loveland, K.C., deputy-chairman of the London Sessions.

In this case the question was raised as to the power of receiving evidence of previous convictions in certain statutory offences created under the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 11), s. 7, the material words of which are, "Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him he shall at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year under the following circumstances or any of them . . . Thirdly, if he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit a felony or to aid in the commission of any

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction."

From the case it appeared that the defendants James Penfold and George Edwards were convicted on an indictment under the above section, the indictment charging them with having been in Goswell-square and Northampton-square in such circumstances as to show that they were about to commit a felony, they having been previously convicted of felony, and within seven years of their previous convictions.

On being charged at the police-court they elected to go before a jury. At the trial Mr. Kershaw, for the Crown, proposed to call a witness without mentioning to the jury for what purpose, and he contended that under the Prevention of Crimes Act, 1871, s. 7, the evidence of the proposed witness was necessary before an indictable offence could be made out, meaning that the offence could not be proved until evidence had been given of the previous convictions, it being no offence by itself to be found in a place in such circumstances about to commit an offence. Mr. Burnie, for the defendants, argued that there were two issues, and that the jury must be satisfied that the defendants were about to commit an offence under section 7 of the Act, and that after the jury were so satisfied previous convictions should be proved. He drew attention to section 7 of the Act incorporating the rules contained in the Larceny Act, 1861, s. 116, and he cited *Rex* v. *Brown*, 65 J. P. 136, which is to the effect that in such a case previous convictions may not be proved before the jury until the other facts constituting the subsequent offence have been found by them. Mr. Kershaw, in reply, contended that section 7 did not apply, as the offence was not within the definitions set out in section 20 of the Prevention of Crimes Act. In *Reg.* v. *Floyd*, 56 J. P. 713, before Sir Peter Edlin, the indictment was in similar terms, and there was a second term for attempted housebreaking and the judge deprecated adding a second count as the jury in trying the first count would become aware of the previous convictions.

Bearing in mind the previous practice, the deputy-chairman admitted the evidence. The jury found both prisoners guilty, but sentence was deferred. The question for the opinion of the court was whether the evidence was properly received in the hearing of the jury for the purpose of proving the offence under the Act.

Henry Sutton appeared for the prosecution.

The defendants were not represented.

Lord ALVERSTONE, L.C.J.—In this case it appears there has been some doubt as to the practice in cases of trial by indictment for offences under section 7 of the Prevention of Crimes Act, 1871. In cases where there is a subsequent crime charged, and that crime is complete in itself, but different degrees of punishment may be inflicted according to the antecedents of the prisoner, evidence of the previous conviction ought not to be given until the subsequent charge has been proved. To prevent any difficulty, section 116 of the Larceny Act, 1861, was passed, which enacts that the offender shall in the first instance be arraigned on so much of the indictment as charges the subsequent offence, and after that inquiry is concluded—not before—that he shall be asked whether he had been previously convicted. Section 7 of the Prevention of Crimes Act, 1871, provides that a combination of circumstances shall create an offence which would be no offence at all but for the offender having been previously convicted within a certain limit of time. The indictment here alleges all the necessary ingredients of the offence. If these men had been tried before the magistrates the whole story must have been gone into, and the previous convictions must have been proved; but the prisoners claimed a jury. In my opinion, where the offence is made a statutory offence and requires the ingredients to constitute it which are stated in the section, it is right that those ingredients should be proved in evidence whatever be the tribunal before which it should be tried. I am clearly of opinion that the judge was right in allowing the previous convictions to be proved, and the convictions must be affirmed. Our judgment, of course, overrules the judgment of the recorder in *Rex* v. *Brown*.

WRIGHT, J.—I agree.

RIDLEY, J.—I agree.

BIGHAM, J.—I agree. I think it is sufficient to say that this evidence was necessary to prove the offence and therefore was admissible.

WALTON, J.—I agree.

Conviction affirmed.

Solicitor, *Solicitor to the Treasury.*

C. C. R.
(Lord Alverstone, L.C.J., and Wright, Ridley, Bigham, and Walton, JJ.) — Feb. 1.

REX *v.* PIKE. (*a.*)

Criminal law—Evidence—Statement of affairs—24 & 25 Vict. c. 96, ss. 80, 85—Bankruptcy Act, 1890 (53 *& 54 Vict. c.* 71), *s.* 27.

A statement of affairs made by a bankrupt in the course of bankruptcy is admissible as evidence against him on a charge of misappropriation, and does not come within the protection afforded by section 27 *of the Bankruptcy Act of* 1890.

The following are the facts of the case:

William Good Pike was tried at the Worcester Assizes on the 22nd of December, 1901, being charged in two counts under 24 & 25 Vict. c. 96, s. 80, with having unlawfully converted and appropriated to his own use certain sums of money, of which, under the will of William Ayre, deceased, he was trustee, for the benefit of his brother's (Samuel Robert Pike) three children. The jury found the prisoner guilty. In the course of the trial Mr. Lawrence tendered in evidence the prisoner's statement of affairs in bankruptcy, which showed the receipt of the moneys in question. The statement of affairs was the statutory one made in the course of bankruptcy and verified by oath before the assistant official receiver and filed by the assistant official receiver in accordance with the provisions of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 54), s. 16, and General Rule 217. Mr. Mathews objected to the receipt of this evidence on the ground that it was evidence which was rendered inadmissible by 24 & 25 Vict. c. 96, s. 85, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27. He based his contention upon the words contained in section 27, sub-section 2 of the Act of 1890, which provides that an admission made by any person in any compulsory examination shall not be admissible in evidence against that person in any proceeding in respect of any of the misdemeanours referred to in section 85 of 24 & 25 Vict. c. 96. His lordship overruled the objection and sentenced the prisoner to three years' penal servitude, but stated a case. The question for the opinion of the court was whether the convictions should stand.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

J. B. Mathews, for the prisoner.—The examination is compulsory and therefore the section applies. The word examination does not necessarily mean a series of questions.

He cited *Green* v. *Lord Penzance*, 30 W. R. 218, 6 App. Cas. 657; and *In re Mysore West Mining Co. (Limited)*, 37 W. R. 794, 42 Ch. D. 534.

Lawrence, K.C. (*Munroe* with him), for the prosecutor.—There is a broad distinction between the compulsory examination on which the debtor can be cross-examined and the statement of affairs which is to be made as a matter of course. [He was stopped by the court.]

THE COURT affirmed the conviction.

Lord ALVERSTONE, L.C.J.—We are all of opinion that this evidence is admissible. The prisoner was charged with having misappropriated trust funds. As part of the proof of their receipt, his statement of affairs made by him in the course of his bankruptcy was put in. Mr. Mathews contended that because it was the debtor's duty to make a true statement, it was therefore inadmissible. I think that the words in section 27, "in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy" were *primâ facie* intended to protect the debtor where he was being cross-examined, or had made a deposition on which he could be cross-examined. Mr. Mathews said that one must connect the hearing and the questions that might be put to him on the public compulsory examination with the statement on which he might be questioned, and that, therefore, the statement was part of the hearing. I think if that had been intended that different language would have been used. I am of opinion that the statement filed by the bankrupt in pursuance of his duty under the Bankruptcy Act was not a statement made by him within the words of the section 27.

WRIGHT, J.—I agree, but it may be right to alter the law. This is a certain unfairness in using a man's compulsory admission against him, and there is the chance that he will not make a full admission if it can be used against him.

RIDLEY, J.—I agree

BIGHAM, J.—I agree. I think it enough to say that this is not a deposition made in the hearing of any bankruptcy matter.

WALTON, J.—I agree.

Solicitor for the prosecution, *Solicitor to the Treasury*.

Solicitors for the defendants, *Dobbs & Hill*.

House of Lords.

From C. A. (Scotland). May 15.

LORD ADVOCATE v. STEWART AND ANOTHER. (*a*.)

Inland revenue—Estate tail—Scotch testator—Money to be laid out in the purchase of land in England—Discretion—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s* 23.

Where a testator gave a sum of money in trust for the purpose of purchasing land in Scotland to be entailed in accordance with the directions of his will, and by codicil authorized his trustees (if in their discretion they should think it desirable) in place of purchasing land in Scotland to purchase land in England to be entailed according to English law.

Held, that the money, or so much of it as for the time being remained uninvested in land, was not "entailed estate" within the meaning of the provisions of the Finance Act, 1894, *applicable to Scotland.*

Appeal from a judgment of the First Division of the Court of Session in Scotland, 38 Sc. L. Rep. 318, which reversed that of the Lord Ordinary.

The respondents were the trustees of the late James Sprot, who died in 1882, and by his will left £100,000 to be applied by his trustees in the purchase of lands which were to be entailed on his nephew, and a series of heirs. Until the purchase should be made, and the entail executed, the income or rents, as the case might be, were to be paid to the nephew, E. W. Sprot, whom failing, to the substitutes of entail.

The trustees spent part of the sum in the purchase of the estate of Drygrange, and they conveyed that estate to Mr. E. W. Sprot and the substitutes of entail in 1888.

E. W. Sprot died on the 1st of February, 1898, at which date there remained unexpended a balance of about £60,000, which was still held in trust for the purchase of lands, in terms of Mr. James Sprot's will.

On the death of E. W. Sprot, his son succeeded to Drygrange, and to the income of the entailed money.

Estate duty and settlement duty were paid on Drygrange in February and September, 1899.

Estate duty was also paid on the unexpended balance of £60,000, but it was contended that this payment was made in error, and they reclaimed it from the Crown.

Settlement estate duty, in respect of the entailed money, was claimed as due under the Finance Act, 1894 (57 & 58 Vict. c. 30), but was refused, and an action claiming account and payment was thereupon raised.

The Lord Ordinary, was of opinion that this money was "entailed estate" within the meaning of the Act, but the First Division took an opposite view.

The testator by codicil authorized his trustees in their discretion to purchase land in England, to be entailed according to English law.

Scott-Dickson, S.G., and *A. J. Young* (both of the Scotch Bar), for the appellant.

Asher, D.F., *Campbell Lorimer* (both of the Scotch Bar), and *R. G. Seton*, for the respondents.

Earl of HALSBURY, L.C.: I do not think it necessary in this case to say more than this—that the question is whether a sum of money resulting in a balance from certain investments in Scotland is or is not entailed estate within the meaning of the Scottish Finance Act. I suppose that no one, apart from some interpretation clause, would say that it was entailed estate, nor do I think it important to consider that the Court of Chancery in this country, when money has been irrevocably devoted to the purchase of land, may apply to it the considerations which would apply to it if it were land itself. The questions which have been argued in the Scottish courts have been applied only to the first hypothesis which I have suggested, and the division of opinion appears to have been on the question whether a technical phraseology applicable to Finance Acts is supposed to run through all the Finance Acts when they are enacted to be read together, or whether the technical phraseology is only to be so interpreted as to belong to the particular statute in which it is found. I hesitate to express any opinion on that question,

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

because I think it inaccurate to say that that question arises here. The sum which was devoted by a trust in the first instance for purchasing land in Scotland to be entailed in accordance with the directions of the testator's will, was materially altered from the disposition originally made, by a codicil to his will, the effect of which never seems to have been suggested as influencing the discussion to which I have referred in the Scottish courts. To my mind it has completely altered the question. The codicil permitted the money in trust to be invested at the discretion of the trustees, in England to which, of course, the interpretation clause of the Scottish Act does not attach. That discretion and the consequence of it appears to me to dispose of the argument, and I am prepared, therefore, to move that the appeal be dismissed, though, as I have said, without determining the question which appears to have been decided by the Scottish courts without reference to the matter to which I have referred.

Lord MACNAGTEN.—The question in this case is whether the unexpended balance of the estate of Mr. James Sprot, who died on the 5th of May, 1882, is or is not "property held under entail" and "entailed estate" within the meaning of the Finance Act, 1894, as applied to Scotland. Mr. James Sprot, by a trust disposition dated the 17th of May, 1879, gave a large sum of money, afterwards reduced by a codicil to the sum of £100,000, in trust for the purpose of purchasing land in Scotland to be entailed in accordance with the directions of his will. The Lord Ordinary held that the unexpended balance of this sum (now about £60,000) was "entailed estate." The First Division, on appeal, held that it was not. Unfortunately the attention of neither court was called to the provisions of the codicil of the 17th of May, 1879, which authorizes the trustees (if in their discretion they should think it desirable), in place of purchasing land in Scotland to purchase land in England to be entailed according to English law. The effect of this codicil was that the money was no longer dedicated to the sole purpose of purchasing lands in Scotland to be entailed according to the law of that country, and therefore it seems to me impossible to hold that the money, or so much of it as for the time being remains uninvested in land, comes within the meaning of the expression "entailed estate" in the provisions of the Finance Act applicable to Scotland. Under the directions of the codicil the trust to purchase lands in Scotland ceased to be imperative. On this ground I think that the decision of the First Division must be upheld. Inasmuch, however, as the question on which the courts in Scotland were divided was argued at length at the Bar, it seems to me that it would not be right to pass it over in silence. On this point I am inclined to agree with the Lord Ordinary, for the reasons which will be stated presently by Lord Robertson. It seems to me that when you have to construe a technical expression introduced into the legal vocabulary by a series of statutes forming one code, you naturally turn to the code for light and help. The key to the true meaning of the expression will, I think, be found in the latest development of legislation rather than in its earliest effort. I think that the appeal must be dismissed with costs.

Lord SHAND.—My Lords: I am of opinion that as the testator has provided that his money may be invested in England to be entailed according to the law in England, it cannot be said that this makes the property entailed estate within the meaning of the Finance Act, 1894, as applicable in its provisions to Scotland. But I must add that, apart from the provision of the codicil of 1879, I should arrive at the same result, for I agree with the views expressed by the First Division of the court in reversing the judgment of the Lord Ordinary. The question is one of difficulty having regard to the provisions of the Entail Acts of 1875 (38 & 39 Vict. c. 61) and 1882 (45 & 46 Vict. c. 53), but I find nothing in these statutes which makes money directed to be invested in the purchase of land "entailed estate" in the ordinary acceptance and meaning of that term, or anything which can be held to enact that the words "entailed estate" shall, except for a defined and limited purpose, be held to include such money, which is otherwise personal estate. Such money is not entailed. It is money which, in the first place, must be converted into land, for money does not admit of being entailed. Again, even after land has been purchased, it does not become entailed estate till the land purchased has been entailed by a deed of strict entail, which has been duly registered as such in the appropriate register of entails. In this case lands were not even acquired, much less entailed by the necessary deed duly registered. The direction to convert the money into land and to entail the land did not, and, as I think, could not, entail the money, which remained purely personal estate, though directed to be used in a particular way. What, then, is the effect of the provisions of the entail statutes? Not, I think, to convert personalty to realty, and to entail that realty by enactment, but merely that for the purposes of these statutes in disentailing and otherwise providing that the property of entailed proprietors may, with the requisite consent of expectant heirs, be made free from the restrictions of entails, money which has been directed to be converted and employed in the purchase of lands to be entailed shall be treated as if these directions had been carried out and lands had been bought and entailed. In short, that the entire estate, land entailed, and money, shall be treated in the same way and under the same conditions as one estate. I agree in the judgment of the First Division that the statutes enact only that in these statutes, and only for the purpose of these statutes in their provisions (which are really intended and calculated to break down entails and not to enforce or enlarge their provisions), money which is there called "entailed money" shall be regarded as "entailed estate." The words of the statute of 1882, are that "In this Act" the following words shall have the meanings hereby assigned to them, and the enactment to that limited effect is made very properly to apply to the proceeds of entailed land which has been sold, and money ordered to be invested in land to be entailed, which money is made subject to the same provisions for obtaining freedom from the fetters of the entail as the entailed lands themselves. There is no such general provision, and one could scarcely conceive of such a provision that, in all circumstances—*e.g.*, in contracts and in all future statutes—the words "entailed estate" shall include in their meaning money directed to be converted into land to be thereafter entailed. The Entail Act of 1875 does not seem to be in any way different in the effect of its provisions from the Act of 1882. On the whole, then, I am of opinion that the words "entailed estate" in the Finance Act of 1894 must be taken in their ordinary and proper signification as referring to an estate which has been entailed, and not to money intended and directed to buy lands to be entailed, and that the latter entail statutes give a wider meaning to these words only where used in these statutes, and only for the special purpose of making such money liable to be dealt with, as the lands really entailed may be dealt with, under the general provisions of the statute.

Lord BRAMPTON concurred in the judgment of the Lord Chancellor.

Lord ROBERTSON.—The proposition maintained by the appellant, affirmed by the Lord Ordinary, and negatived by the First Division, is that money held in trust and directed to be laid out in land to be strictly entailed is entailed estate in the sense of the Finance Act, 1894. Subject to one limitation, that proposition seems to me to be sound; but the limitation, in my opinion, excludes from the proposition the money now in dispute. In order to be entailed estate in the sense of the Finance Act, the money must be directed to be laid out in land to be strictly entailed according to the Scotch law of entail, and therefore in Scotland. This, as it seems to me, is not merely the necessary condition of the doctrine maintained by the appellant, but is its foundation, and without it the doctrine seems to me to have no support at all. Yet this condition renders the doctrine inapplicable to the appellant's case. His whole argument (which I think sound) is founded on Scotch statutes which form part of the land laws of Scotland, and have no application to land or to entails outside Scotland. But it turns out that in a due exercise of the discretion of the trustees who hold this money it need never go into Scotch land at all. In order to show the limitation of the doctrine in question it is necessary to examine its origin and ascertain its merits. No one has denied that the only power to execute an entail, using that word in the only operative sense of the term, must be found in the Act of 1685, or has asserted that under that statute you can entail money. I fully allow that this is a good beginning to the argument against the appellant; and the statute of 1685 is regarded by the First Division as the proper criterion of the meaning of the words in question. Again, it is quite true, as far as it goes, that all the entail statutes subsequent to 1685 have gone towards breaking down rather than towards constructing entails. But when from this fact the inference is drawn that those statutes are unlikely to contain the means of determining the scope of the term entailed estate my assent is less readily given. We are in search of the sense in which those words are used in a statute in 1894; the vocabulary of that day is to be looked to, and if, as is the case, the words entailed estate and their equivalents are now in fact more in use in relation to relaxing than to constructing entails, that does not invalidate the criterion to which appeal is made. The purpose for which men speak of a thing is immaterial if they have occasion to speak of it. Now the case of the appellant is that in 1894 the word "entailed" had come to be applied to moneys which stood in certain relations to entailed land, either as being its proceeds and standing under the same trusts or as destined and held in trust for the purchase of land to be entailed. I think that this is true in point of fact, and I must say that I think that the Act of 1882, let alone the Act of 1875, demonstrates this. The 27th section declares that the price of an entailed estate shall be entailed estate within the meaning of the entail Acts; the 28th assumes (which is even more than asserting) that an entailed estate may consist of money, and that this assumption is not rested on the 27th section is manifest, for the 28th is applying the provisions of the 27th to other entailed estates than those which fall under its terms. Not less significant is the use, without any explanation or apology, of the words "entailed money" in both the 4th and the 5th sub-sections of section 23. The Act of 1882 has this double significance in the present question—it was in 1894 the latest expression of the Legislature on Scotch entail (and there is none since 1894), and it gathers up and brings together all the preceding statutes. But when we go seven years back, to the Act of 1875, we find that the term entailed estate had been already expressly extended to include all money held in trust for the purposes of being entailed. Now I am willing to assume, as is quite justly pointed out, that this is (and it could hardly be otherwise) for the purposes of that Act (observing only that the same criticism can hardly be applied to the Act of 1882 in view of its 2nd section). But the Act of 1875 covers a large area of the law of entail, and accordingly the use in their wider sense of the words "entailed estate" became from 1875 onwards correspondingly frequent, and made the additional sanction and stimulus given to that use in 1882 all the more decisive. If, as the learned counsel for the appellant invited us to do, we observe the progress of legal thought antecedent to 1875 as illustrated in judicial decisions, we see evidence that the working of the earlier of the modern entail Acts, particularly that of 1848, had fully prepared men dealing with those matters to call moneys so situated (as they were, in fact, being treated) "entailed estate." Accordingly the legislative appellation or description in the Acts of 1875 and 1882 of such moneys as "entailed estate" is not a case of the Legislature calling one thing by the name of another, but is a recognition of the fact that for practical purposes those moneys had come to possess the attributes of entailed lands, so far as such now remained. This topic might be more fully developed, but the matter does not admit of dispute. What I deduce from these considerations is that if the existing state of the law, especially as exhibited in its most unmistakable form, legislation, be the proper criterion of the meaning of words descriptive of legal rights, "entailed estate" did in 1894 include moneys directed to be applied in purchase of lands to be entailed. The principle that in statutes words are to be taken in their legal sense has, as Lord Stormonth Darling points out, a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them. I say this because I observe that in the judgment delivered by Lord McLaren some reliance is placed on the "ordinary use of language." Now, it seems to me that this would prove too much in the present case. If the phrase in question represents anything definite in popular use, I suspect the meaning is determined quite as much by a misuse of the word "estate" as equivalent to landed property as by any intelligent use of the word "entailed," and that popular use would reject the words if applied to anything else than a landed property. Yet it is perfectly certain that other estate than landed property may be the subject of entail, as, for instance, a right to salmon fishing. In what I have hitherto said it has been assumed that the words to be construed in the Finance Act are "entailed estate," and that the Act itself gives no further aid in the construction of that term. This, however, is to understate the appellant's case. The words directly descriptive of "settled property" (which is the appellation under which the respondents seek to claim exemption) are those in the 14th sub-section of section 23—"The expression 'settled property' shall not include property held under entail"; and then in sub-section 15 occurs the phrase "entailed estate," manifestly used as equivalent to what is in sub-section 14—the indefinite article "an" entailed estate being inserted because the form of illustration postulates an individual estate in relation to an individual proprietor. The matter, however, may be brought to a much sharper point. In the face of the express and

direct enactments in the Acts of 1875 and 1882 which I have cited, I am at a loss to see how it can be affirmed of money directed to be applied in purchase of land to be entailed that it is not entailed estate, at least in some sense and to some effect. And if this be so, then *quomodo constat* that it is not in the sense of this Finance Act? I have not myself realised in what sense it is not entailed estate except that some of the many provisions about entails do not apply to it. But this, again, proves a good deal too much. Some of the empowering entail Acts assert that it would be for the public benefit if villages were built on entailed estates. Now exactly the same reasoning as the respondent advanced would deduce from this that salmon fishings do not fall within the scope of the entail Acts, because you cannot build villages on salmon fishings or the right to salmon fishings. But when we are told that, at all events, a Finance Act cannot be supposed to view as entailed estate moneys situated as those which I have been considering, I completely fail to see the reason. Even if a more rationalistic method be applied than is permissible in taxing Acts, I should have thought that, in a definition, section 23 (14), the object of which is to distinguish something from settled property, the subject-matter of the rights, as land or money, was very much less relevant than the quality and correlation of the rights in that subject-matter; and, so far as these are concerned, it is just because they are practically identical in the one case and in the other, that land and money are now massed under the common denomination entailed estate. From the somewhat detailed examination now made of the question argued in the Court of Session it is at least apparent that the argument of the appellant begins and ends in the Scotch entail statutes. The third section of the Act of 1875, which puts at its sharpest the appellant's contention, requires that money in order to be entailed estate must be "invested in trust for the purpose of purchasing land to be entailed." The whole theory of the identification of such money with land is that it is directed and destined to be put into land, and its inevitable fate is merely anticipated in order to prevent circuity of procedure. But if, instead of it being so inevitably destined, the trustees may or may not so apply it, the whole ratio of those enactments is gone. Now it seems to me that the combined effect of Mr. Sprot's will and his first codicil was simply to make it discretionary and optional to the trustees whether they bought Scotch land or bought English land, and the mere circumstance that the will "directed" Scotch land to be bought has no effect at all in saving that direction from being reduced to an option by the codicil. The appellant vainly endeavoured to save the situation by relying on the direction to "entail" whether the land was in Scotland or in England. But an English entail is one thing and a Scotch entail is another. And the whole argument of the appellant on the main question rests, not on the word entail, but on statutes which have no application to England. On this sole ground I am of opinion that the appeal must fail.

Lord LINDLEY concurred in the judgment of the Lord Chancellor.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellant, *F. C. Gore*, Solicitor of Inland Revenue, for *Philip J. Hamilton Grierson*, Solicitor of Inland Revenue, Edinburgh.

Solicitors for the respondents, *Martin & Leslie*, for *Blair & Cadell*, Edinburgh.

Privy Council.

(*From the Supreme Court of the Colony of Natal.*)

May 14.

DOUGLAS v. SANDER & CO. (a.)

Natal, Law of—Fraud—Prescription—Roman-Dutch law.

Where the same fraud which has induced a contract has also operated to deprive a plaintiff of his other remedies, the actio doli *is still open to him, and under the Roman-Dutch law for the general period of prescription, which is thirty years.*

Appeal from an order of the Supreme Court of Natal, which had reversed a decision of the Circuit Court of Durban.

The facts are given in their lordships' judgment.

Hume Williams, K.C., and *Arnold Statham*, for the appellant.

Loehnis, for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY, and Sir FORD NORTH) was delivered by

Lord ROBERTSON.—On the 14th of May, 1897, the respondents, who were carriers at Durban, in the colony of Natal, sold to the appellant the whole of their business and plant for £4,400. The appellant took possession of and carried on the business in the buildings which had been occupied by the respondents for that purpose. Those buildings were held by the respondents under a lease from one Acutt, and it had been been contemplated that the appellant *should* take over the lease. Owing to the disputes out of which the appeal has arisen, this was never done; and Acutt compelled payment from the respondents of the rent due for the period of the appellant's occupation. On the 2nd of April, 1900, the respondents sued the appellant to recover the sum thus paid by them; and in answer to this suit the appellant made, in reconvention, a claim for £750 as damages. The present appeal relates solely to this claim in reconvention; and no question is raised as to the merits of the principal suit. On the 3rd of August, 1900, the judge of the Durban Circuit Court gave judgment in the appellant's favour for £600. On the 2nd of November, 1900, the Supreme Court of the colony reversed this judgment and disallowed the claim. The present appeal is to have the Circuit Court's judgment restored. The appellant's demand is clearly set out in his claim in reconvention, and is expressly made for damages for fraud. The fraud alleged consisted in a false statement by Franz Sander, one of the partners of the respondents' firm, which statement induced the appellant to enter into the contract of sale of the 14th of May, 1897, whereby he suffered damage. The statement made by Sander was that no *post-mortem* examination had been held of any horse belonging to the respondents, whereas the fact was that such a *post-mortem* examination had, to the knowledge of Sander, been held and had proved the horses of the respondents' establishment to be infected with glanders, at the time of the negotiations for the sale. This disease, having, by that time, got hold of the stables, again broke out in the time of the appellant's occupation and caused a loss in horses amounting to the sum of damages claimed. The answer made by the respondents to this claim was that at the time of the sale of the business and plant,

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the appellant was well aware that sickness had occurred among the horses, that several animals had been shot and that a *post-mortem* had been held which clearly "established the existence of the disease called glanders." On all the questions raised by the pleadings the evidence was highly conflicting, but at their lordships' bar the conflict was greatly narrowed by the admission of the respondents that Sander did make to the appellant the false statement that no *post-mortem* examination had been held, although he had, in fact, been present at a *post-morten* examination, and knew that it revealed glanders. The sole question therefore came to be whether in fact the appellant knew before the bargain that there had been glanders in the stable in 1897. If he did, then plainly the false statement did not induce the contract. The appellant had for some time prior to the bargain in question acted as manager for Benningfield & Co., who were carriers at Durban, and had, besides, business concerns at Johannesburg. The respondents' firm consisted of Franz Sander, whose fraud is the central fact in the case, and R. H. Tatham. Their lordships consider that the evidence justifies the conclusion of the judges who heard the witnesses, and they hold that the appellant had no independent knowledge preventing his accepting the statement made by Tatham, his vendor, according to Tatham's own testimony. This conclusion is supported by the admission of Sander that the price paid was a high price, and one which he for his part would not have given if he had known there were glanders in the stable. On a specific point made by the respondents about a notice of the outbreak appearing in a local newspaper, their lordships have no reason to reject the explanation given by the appellant and accepted by the Circuit Court that he was at Johannesburg at the time and did not see it. The incredulity expressed by the Supreme Court does not rest on any positive basis, and has no affirmative evidence to support it, having regard to the desperate position of both Tatham and Sander as witnesses of credit.

The respondents, however, have maintained an argument against the present claim which is independent of testimony. They say that the appellant has lost his remedy, and that the present claim is untenable in Roman-Dutch law. Shortly stated, the argument is as follows: In Roman law a person induced by fraud to enter a contract may elect to set aside the contract by the *actio redhibitoria*, in which case he may sue within six months, or he may sue in an action *quanti minoris* to recover the difference between what he ought to have had and what he has had, in which case he must sue within twelve months. The appellant, say the respondents, was in this case; according to his own showing, he might have had either action, and he has sued in neither. What he has done is to sue in an *actio doli* (or action of deceit), but this remedy is only given to those to whom no other action was ever available; and that, as already pointed out, is not the case of the appellant. Now, assuming that the question is to be determined exactly as if it had occurred in Rome and before the praetor, one important qualification must be made of the doctrine thus stated. In the chapter in the Digest *De Dolo Malo*, it is indeed laid down that if another action had been open to the plaintiff the *actio doli* must be refused. But the text goes on to give the reason—*sibi imputet* that he has not a remedy—"*qui agere supersedit*," and then it is added, "*nisi in amittenda actione dolum malum passus est.*" It thus appears that if the same fraud which has induced the contract also operates to deprive the plaintiff of his other remedies, the praetor will give the *actio doli*. This is the same as saying that if the plaintiff only discovers the fraud more than a year after the bargain, the *actio doli* is open to him. Now, their lordships are satisfied that this is the case of the appellant. He says, and their lordships believe, that he only learned in August, 1898, of the *post-mortem* examination and of the fact of glanders, and that was more than a year after the date of the sale. The *actio doli* would thus be open to the appellant even on pure Roman law as administered by the praetor. To the objection that the *actio doli* was itself limited to two years, the Supreme Court give the answer that in Roman-Dutch law the Roman rule has been departed from in favour of the general prescription of thirty years; and their lordships see no reason to question this conclusion. On these grounds the action is defensible and the decree given by the Circuit Court was right. Their lordships think it right, however, to add that they do not desire to assert as on their own authority that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman law. The argument at their lordships' bar on this matter was, to say the least, not copious; and no reference was made to authorities more modern than Van Leeuwen. On such an argument they would be reluctant to stereotype according to ancient procedure what is a matter of practice affecting mercantile transactions, the more especially as the reluctance of the praetor to grant the *actio doli* was expressly rested on the ground that it was *actio famosa*, involving infamy to the person against whom fraud was proved. This consequence would not follow a successful action of deceit in Natal; and it is impossible to avoid asking whether this chapter of the Roman texts is part of the living Roman-Dutch law, and whether the action of deceit is hampered for those obsolete reasons, the more especially seeing that in the comparatively modern work of Van Linden an action of damages is spoken of as the normal remedy for fraud inducing a contract. In the meantime it is not necessary to enter on these questions, for the present case admits of decision on grounds consistent with the archaic procedure invoked. Their lordships will humbly advise his Majesty that the judgment of the Supreme Court ought to be reversed, with costs, and the judgment of the Circuit Court of Durban restored. The respondents will pay the costs of the appeal.

Solicitors for the appellant, *Blyth, Dutton, Hartley, & Blyth.*

Solicitors for the respondents, *Harrison & Powell.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Cozens-Hardy, L.J.) } July 21.

HUGHES v. PUMP HOUSE HOTEL CO. (LIMITED) (No. 2). (a.)

Practice—Parties—Substitution of plaintiff—Bonâ fide *mistake—Ord.* 16, *r.* 2.

The plaintiff in an action to recover a balance due under a building contract had executed an assignment of all moneys due or to become due to him under the contract. On the trial of the preliminary question whether the assignment was such as to bar the plaintiff's right of action, the judge held that it was not an absolute assignment, and that the action might proceed, but the Court of

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal held that it was an absolute assignment, and that therefore the plaintiff had no cause of action. In an application to substitute the assignees as plaintiffs in the action,

Held, that, as it was clear that there had been a bonâ fide *mistake of law, there was jurisdiction under ord.* 16, *r.* 2, *to substitute the assignees as plaintiffs.*

Application for leave to appeal from an order of Channell, J., at chambers.

The action was brought by a builder to recover a balance alleged to be due under a building contract.

The plaintiff having executed an instrument in writing whereby for a certain consideration he assigned to Lloyds Bank (Limited) all moneys due or to become due to him from the defendants under the building contract, a preliminary point of law was directed to be tried—viz., whether the assignment was such as to bar the plaintiff's right to maintain the action.

Wright, J., held that the assignment was not an absolute assignment within the meaning of section 25, sub-section 6, of the Judicature Act, 1873, but was by way of charge only, and he therefore decided that the action might proceed.

The Court of Appeal reversed the decision of Wright, J., holding that the assignment was an absolute assignment not purporting to be by way of charge only, and that the plaintiff therefore had no right of action, *ante*, p. 660, where the facts of the case and the terms of the assignment are set out.

An application was then made on the part of the plaintiff, under ord. 16, r. 2, that Lloyds Bank (Limited) might be substituted or added as plaintiffs in the action.

An order for such substitution was made by the master, and affirmed by Channell, J.

The defendants appealed.

S. T. Evans, K.C., and *R. E. Vaughan Williams*, for the defendants.—There is no power, under ord. 16, r. 2, to substitute one plaintiff for another, where the original plaintiff has no cause of action: *New Westminster Brewery* v. *Hannah*, [1877] W. N. 35; *Clowes* v. *Hilliard*, 25 W. R. 224, 4 Ch. D. 413; *Walcote* v. *Lyons*, 29 Ch. D. 584, 33 W. R. Dig. 159.

J. E. Bankes, K.C., and *L. M. Richards*, for Lloyds Bank (Limited), cited *Duckett* v. *Gover*, 25 W. R. 455, 6 Ch. D. 82; *Ayscough* v. *Bullar*, 37 W. R. 529, 41 Ch. D. 341; and *The Duke of Buccleugh*, 40 W. R. 455, [1892] P. 201.

COLLINS, M.R.—The right of the plaintiff Hughes to maintain this action depended on the question whether the assignment made by him to Lloyds Bank was an absolute assignment or an assignment by way of charge only. Wright, J., held that it was by way of charge only; this court took the contrary view. That points to this, that a *bonâ fide* mistake of law had been made, and it lets in the jurisdiction of the court under ord. 16, r. 2.

In my opinion it is clear that the learned judge had jurisdiction to make the order. I will not go through all the authorities, but I think that the last one, *The Duke of Buccleugh*, is conclusive on the point.

COZENS-HARDY, L.J., concurred.

Application refused.

Solicitors for the plaintiff, *Paterson, Snow, Bloxam, & Kinder*, for *Hadley & Dain*, Birmingham.

Solicitors for the defendants, *G. J. Vanderpump & Son*, for *Daniel Evans*, Brecon.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 14.

Ex parte WALLACE. (*a.*)

Practice—Rule against justices—Applicant moving in person—Justices' Protection Act, 1848 (11 & 12 *Vict. c.* 44), *s.* 5.

A motion for a rule against justices under section 5 *of the Justices' Protection Act*, 1848, *must be made by counsel.*

Motion by the applicant in person for a rule under 11 & 12 Vict. c. 44, s. 5, calling upon certain justices to show cause why they should not hear and determine an application for a summons against Sir Mountstuart Grant Duff and others in respect of certain matters when they were upon the Governing Council of Madras. The Divisional Court had refused to hear the applicant upon the ground that a rule, under 11 & 12 Vict. c. 44, s. 5, could only be moved for by counsel. *Reg.* v. *Byron*, 14 Q. B. D. 474, 33 W. R. Dig. 113, decided in 1884, and *Ex parte Lewis*, 37 W. R. 13, 21 Q. B. D. 191, decided in 1888, were referred to.

Master Coleridge handed to the court a note from his book of four decisions of Divisional Courts, in all of which the court refused to hear an applicant in person for a rule under 11 & 12 Vict. c. 44, s. 5—namely, Mathew and Charles, JJ., in October, 1894; Wills and Wright, JJ., on the 21st of December, 1896; Wright and Bruce, JJ., on the 15th of January, 1897; and Wills and Kennedy, JJ., on the 25th of April, 1898, where Wills, J., said that section 5 of 11 & 12 Vict. c. 44, was merely passed to save the expense of the prerogative writ of *mandamus*.

COLLINS, M.R.—In this case the Divisional Court refused to hear an application for a rule under section 5 of 11 & 12 Vict. c. 44, calling upon certain justices to show cause why they should not do an act relating to their office, upon the ground that the rule could not be moved for by an applicant in person, but could only be moved for by counsel. The master has referred us to a series of decisions in the Divisional Courts which have not found their way into the reports, but of which he has a note in his book, to the effect that such an application can only be made by counsel. It is therefore a rule of practice of the court not to hear these motions except when made by counsel. We must therefore refuse to hear this application until the applicant appears by counsel.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Application dismissed.

Appeal. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 9, 11.

In re EDGCOMBE. (*b.*)

Practice—Attachment—Non-payment of rates—Committal—Bankruptcy of debtor—Legal process—Jurisdiction—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4 *—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 10 (2).

Committal for non-payment of rates is punitive, and is not "a legal process against the property or person of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(*b.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the debtor" within section 10 (2) *of the Bankruptcy Act,* 1883. *The court has, therefore, no jurisdiction to order the release of the debtor under that sub-section upon proof of the presentation of a bankruptcy petition.*

This was an application on behalf of James Edgcombe, a debtor, at present confined in Holloway Prison, for his release.

Edgcombe was the occupier of No. 12, St. James's-square. He was duly assessed to the general rate of the parish of St. James in respect of those premises, and became liable to pay a sum of £174 16s. 4½d. under a general rate made on the 12th of April, 1901. No part of this sum was paid.

On the 19th of September, 1901, a distress warrant was issued directing a levy of this sum by a sale of Edgcombe's goods and chattels. A return of *nulla bona* was made.

On the 1st of July, 1902, Edgcombe was arrested and lodged in prison under a warrant of commitment issued at the instance of the Corporation of Westminster. The warrant directed that Edgcombe should be imprisoned in Holloway Prison for one month "unless the said sum of £174 16s. 4½d., together with the costs, shall be sooner paid."

On the 2nd of July Edgcombe presented a bankruptcy petition upon which a receiving order was at once made. Thereupon he applied to Mr. Registrar Hope, sitting in bankruptcy, for his release under section 10, sub-section 2, of the Bankruptcy Act, 1883. The registrar refused the application, holding that as the order had been made by a court of competent jurisdiction, he could not interfere; and further, that the order being punitive, the receiving order did not have the effect of releasing the debtor.

Edgcombe appealed against the registrar's decision.

The Debtors Act, 1869, 4, provides as follows: With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

There shall be excepted from the operation of the above enactments:

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract.

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace.

3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control.

4. Default by an attorney or solicitor in payment of costs when ordered to pay the same in his character of an officer of the court making the order.

5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order.

6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made.

Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money.

Section 5 of the same Act provides for the committal to prison for a term not exceeding six weeks, or until payment of the sum due, if any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of a competent court.

By sub-section 2 of section 10 of the Bankruptcy Act, 1883, "The court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

Haldenstein, for the debtor.

Muir Mackenzie, for the Corporation of Westminster.

Haldenstein replied.

The arguments used and cases cited appear sufficiently from the judgments.

VAUGHAN WILLIAMS, L.J.—In this case we think that the appeal must fail. I confess that I have arrived at that conclusion with some reluctance, and my reluctance is based upon this, that in the application of the Debtors Act and the effect thereon of the making of a receiving order it does not seem to me that the decisions of the courts and the rules that have been made with reference thereto all follow the same principle. But that is not what we have to consider. We have to determine whether this case is really covered by authority, and whether or not those authorities are right and consistent with the view that has been taken in other respects of the Debtors Act. It is our duty if this case is covered by authority to act upon that authority. [His lordship referred to the facts, and continued:] The section upon which the appellant relies is section 10, sub-section 2, of the Bankruptcy Act, 1883. [His lordship read the section, and continued:] It is said that this process which has resulted in this order for imprisonment for one month is a legal process against the property or person of the debtor for the purpose of enforcing payment of these rates, and therefore that the court in bankruptcy has jurisdiction either to allow or prohibit the continuance of the process. Whether that is so or no depends really upon this, whether the imprisonment which has been ordered is intended as a means of enforcing payment or as a punishment. If it is intended as a punishment there is no jurisdiction under section 10 to order the discharge of the bankrupt from his imprisonment. Now, there can be no doubt that if the law as it was expressed by Mellish, L.J., in *Cobham* v. *Walton*, 23 W. R. 865, L. R. 10 Ch. App. 655, is still to be regarded as law we must treat this order for imprisonment merely as process instituted for the purpose of enforcing payment of the debt, because he says, speaking generally of arrest for debt, that it "is intended as a means of enforcing payment, not as a punishment," and he gives as a proof of that this fact, "for if the party pays the debt he is entitled to be discharged." The Distress for Rates Act, 1849, s. 2 of which gives the power of committal to prison for non-payment of rates, recites that by the Poor Relief Act, 1601, a power of imprisonment was given, not for a limited time, but a power to commit the party to gaol "there to remain without bail or mainprize until payment"; and goes on to authorize a person in default of payment "to be imprisoned in the common gaol or house of correction for any time not exceeding three calendar months unless the sum or sums therein mentioned shall be sooner paid." If we could apply the observations of Mellish, L.J., and the reason which he gives for treating the arrest as a mere means of enforcing payment, it would follow in this case we should have to treat the order as a mere means of enforcing payment, for undoubtedly on the terms of the section and on

the face of the warrant the debtor is entitled to his discharge on payment of the debt. But if we look at the authorities it seems that we must not regard that observation of Mellish, L.J., as being still law. The general effect of the Debtors Act, 1869, is this. Section 4 says: "With the exceptions hereinafter mentioned no person shall after the commencement of this Act be arrested or imprisoned for making default in the payment of a sum of money." There is a general abolition of imprisonment for debt subject only to the exceptions which follow, which are, (1) Default in payment of a penalty, (2) default in payment of any sum recoverable summarily before a justice or justices of the peace." That is this case. I need not read them all, but there is a list of exceptions as to which the liability to imprisonment is continued notwithstanding the general abolition of imprisonment for debt. It is right to observe in passing that there is another saving on this general abolition of imprisonment; that is, under the 5th section, which provides that "subject to the provisions hereinafter mentioned and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks or until payment of the sum due any persons who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court"; and amongst the conditions under which that order may be made one finds in sub-section 2, "that such jurisdiction shall only be exercised when it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects to pay the same." Lord Hatherley in *Middleton* v. *Chichester*, 19 W. R. 369, L. R. 6 Ch. App. 152, considers the exceptions in section 4 under which the liability to imprisonment still continues, and says this: "Now, the first exception is the case of a penalty, and that makes the distinction I have pointed out extremely clear, because if it is merely a penalty in respect of a contract that is not to deprive the person who has incurred it of the benefit of the section; but if it is any other sort of penalty, by which is meant a penalty for non-observance of a positive law, then he is to be exempted from the benefit of the section. The second exception is default in payment of any sum recoverable summarily before a justice or justices of the peace. That again would be something in the nature of a penalty and not in the nature of a simple debt." He goes on to deal with the other exceptions. I need not read what he says at length—but he mentions the case of default by a trustee and misconduct by a solicitor, and he says, "Therefore in every case there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference with reference to the question of delinquency whether a person has the money in his possession at the time the order is made or had parted with it some short time before the making of the order." The view of Lord Hatherley undoubtedly was that each one of the exceptions in section 4 retained imprisonment because the Legislature treated each of the cases as one in which there was a delinquency, and that the imprisonment was therefore a punishment, and differed from a mere process for the recovery of a debt. Later on, in 1893, this question had to be considered again in the Court of Appeal in *In re Smith, Hands* v. *Andrews*, 41 W. R. 289, [1893] 2 Ch. 1, at p. 17, where Lindley, L.J. says "Although *Cobham* v. *Walton* was decided in 1875 and *Middleton* v. *Chichester* was decided in 1871, and the Lords Justices who decided *Cobham* v. *Walton* were members of the court which decided *Middleton* v. *Chichester*, the view then taken and expressed with reference to the punitive character of section 4 of the Debtors Act, 1869, seems to have been overlooked by them." It will be observed that he is not there speaking of any particular sub-section, but generally of section 4. He continues: "James, L.J., does not allude to it. Mellish, L.J., said, 'Now, arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged.' This observation was true of ordinary debts in *In re M'Williams*, 1 Sch. & Lef. 169, *Lees* v. *Newton*, 14 W. R. 938, L. R. 1 C. P. 658, but not of obligations to pay under orders made under section 4, sub-section 3, of the Debtors Act, 1869. The punitive character of section 4 of the Debtors Act, 1869, which was pointed out in *Middleton* v. *Chichester* has been since so often recognized that it cannot now be questioned." He cites some cases and goes on to say: "In all these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised. Having regard to the Debtors Act, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply Mellish, L.J.'s, observation in *Cobham* v. *Walton* above quoted to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4, sub-section 3."

It is quite true that when he goes on to say what they should do with the case then before the court, he speaks only of section 4, sub-section 3, that being the one which deals with trustees who have had trust funds in their possession, but I have read the whole passage in order that it may be seen clearly that although his language at last only applies to sub-section 3, the principle in terms applies to the whole of the exceptions in section 4, and not only to sub-section 3. In other words, Lindley, L.J., did what Lord Hatherley had so carefully and plainly done in *Middleton* v. *Chichester*, where he went through, one by one, every one of the exceptions to section 4, and pointed out that they were all punitive and not to be treated as process for enforcing payment of the debt.

In these circumstances I think we have no choice but to treat this as a punitive order, and one from the stringency of which James Edgcombe cannot obtain relief under section 10 of the Bankruptcy Act. I think this is unsatisfactory, because it is plain that the practical non-application of relief under the Bankruptcy Act to these cases as to which imprisonment has been continued by the Debtors Act has not been consistently followed. It is obvious that section 5 is just as much an exception from the general abolition of imprisonment for debt as is section 4. The exception is put in a different section because it is a section which deals with the power of the court to commit a debtor to prison for non-payment of a judgment debt; and when one looks at the conditions under which such an order is allowed to be made, it is perfectly plain that it can only be made when there is a contumacious debtor who has the means or has had the means to pay the debt, and his conduct is in the nature of contempt. His imprisonment is for a fixed time not exceeding six weeks, and is a punishment for the contempt, and the suffering of that imprisonment in no way discharges the debt, and one would have thought that if the principles I have been dealing with had been applied consistently, the result would have been that no relief could be given under sections 9 and 10 of the Bankruptcy Act after a receiving order had been made. That is not the case. So far from that, under the County Court Rules, 1889,

which have been made applicable to all courts with jurisdiction in respect of judgment debtor summonses by ord. 25, r. 29, "Where a judgment debtor shall upon the return day of a judgment summons satisfy the judge that a receiving order has been made for the protection of his estate, or that he has been adjudicated bankrupt, and that the debt was provable in the bankruptcy . . . no order of commitment shall be made except in accordance with the provisions of the last-mentioned section" (section 122 of the Bankruptcy Act, 1883). Under these circumstances it does seem to me a little unfortunate that the same principle has not been acted on with regard to exceptions under section 5 that has been acted on with regard to exceptions under section 4, although one would have said that if any of these exceptions were in respect of the conduct of the debtor being such as merited punishment they would have been those under section 5. However, we have not to deal with that here.

The result is that, in respect of this particular debt, a debt for rates, the getting of a receiving order does not entitle the debtor to ask for relief under these sections of the Bankruptcy Act, notwithstanding the fact that at any time during the imprisonment he could get rid of the imprisonment by payment of the debt. Notwithstanding that, it seems to me that unless we disregard *Middleton* v. *Chichester* and *In re Smith, Hands* v. *Andrews* we are bound to say with regard to the exceptions in each one of the subsections of section 4 that the orders were punitive orders. The appeal must be dismissed.

ROMER, L.J.—I also think that this appeal fails. It is true that a committal under an order of a magistrate, if and when made under the statute 12 & 13 Vict. c. 14, terminates on payment by the debtor, but the committal nevertheless is of a punitive character and not merely a legal process to compel payment. That is made clear by the express provision of the Act; for by the Act a discretion is given to the magistrate as to whether he will or will not commit, and, if he does commit, a discretion as to the period for which he will commit not exceeding three months. To my mind, in making an order under the Act the magistrate is bound to exercise his discretion, and in so doing he must have regard to the existing circumstances, and must consider what in these circumstances, if the money is not paid, the duration of the imprisonment ought to be. That shows that it is something in the nature of a punishment apart from legal process to procure payment. If the order is punitive the court of bankruptcy has no power to interfere. The same view is arrived at by a consideration of section 4 of the Debtors Act, 1869. The exceptions there mentioned from the general rule that there shall be no imprisonment for debt form a class of cases standing on the same footing; and these were excepted because imprisonment under them all, was meant to be a punishment. That was the view expressed by Lord Hatherley in *Middleton* v. *Chichester*, and by Lindley, L.J., in *In re Smith, Hands* v. *Andrews*, and also by Jessel, M.R., in *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338.

STIRLING, L.J.—I am of the same opinion, and for the same reasons; but I should like to add this: This case is one of rates, and depends on particular statutes. If it were an isolated case one might have supposed that it had escaped the notice of the persons who framed the Debtors Act, 1869, but in truth there must be a large class of orders of the same kind made by magistrates; for instance, orders for imprisonment for non-payment of costs under section 18 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); 23 & 24 Vict. c. 32, rioting in church; 62 & 63 Vict. c. 32, enforcing attendance at school. I think that this is not an isolated case, and that the appeal must fail.

Solicitors, *R. G. Davis; Caprens, Hitchens, Brabant, & Hitchens.*

High Court of Justice.

Chan. Div. Kekewich, J. March 18.

In re BARNETT'S TRUSTS. (*a.*)

Administration — Intestacy — Illegitimate foreigner — Personalty in England—Bona vacantia—*Conflict of laws.*

The Crown is entitled to the personal property in England left by an illegitimate unmarried foreign intestate, who was domiciled and died abroad, for the Crown takes such property, not by right of succession, but as being bona vacantia *in England, and the* lex domicilii *does not therefore apply.*

Petition.

By his will William Barnett, of Old Bracknell, in the county of Berks, and of the city of Vienna, gave the residue of his estate in England, subject to two annuities, to Aloysius, otherwise Louis Heller, who was a natural son of the testator.

On the 22nd of November, 1837, the testator died.

Aloysius or Louis Heller died on the 9th of March, 1883, a bachelor and intestate.

The two annuitants died in 1880 and 1885 respectively.

On the 27th of April, 1900, letters of administration of the personal estate of Aloysius or Louis Heller were granted to the solicitor of the Treasury, who now presented this petition praying that after payment of sums due to the representatives of the deceased annuitants, and subject to due provision being made as to the costs of the respondents the money might be transferred to the account of the Treasury solicitor and the Assistant Paymaster-General.

The official solicitor of the court, the legal personal representative of the testator, and the Finance Minister of the Imperial Royal Austro-Hungarian Government were respondents.

Succession in the German hereditary provinces of the Austrian monarchy is regulated by the General Civil Code. So far as concerns the point in dispute the Code was proved to be as follows:

Art. 380.—Immovable things are subject to the laws of the district in which they are situated. All other things, on the contrary, are the same as the person of their proprietor under the same legislation.

Art. 754.—Illegitimate children have in regard to the mother, as far as the legal succession in the free inheritable property is concerned, equal rights with the legitimate children. No legal right of inheritance belongs to the illegitimate children in regard to the succession of the father and the paternal relations; and further, in regard to the succession of the parent's grandfather and grandmother and other relations of the mother.

Art. 756.—The right of succession to the property of a child which has remained illegitimate belongs only to the mother; the father, and all the grandfathers and grandmothers and other relations of the child, are excluded from it.

Art. 559.—If neither a relation of the deceased

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

belonging to one of the six lines mentioned (these dealt with succession to the legitimate children), nor another line appointed by Arts. 752 to 756 (relating to certain cases of legitimation and adoption) exists, the whole inheritance falls to the spouse.

Art. 760.—If the spouse is no longer alive, the succession is confiscated as heirless property either by the fiscus or by those persons who according to the political ordinances are justified in confiscating heir less estates.

In Vienna there were no such political ordinance which justifies any person other than the fiscus in confiscating such heirless estates. The fiscus is the Imperial Royal Treasury Office of the Austrian Empire, the official head of which is the Imperial Royal Finance Minister.

Sir R. B. Finlay, A.G., Sir E. H. Carson, S.G., and *R. J. Parker*, for the petitioner.—This fund is *bona vacantia*, and the Crown is entitled to it. According to the Austrian code the fiscus is entitled not by way of succession, but by the right to confiscate property to which there is no heir. The property is in this country, and the Crown is entitled to it as *bona vacantia*: *Dyke* v. *Walford*, 5 Moo. P. C. 434. This is a rule of general application and applies to corporations as well as to natural persons: *In re Higginson and Dean, Ex parte Attorney-General*, 47 W. R. 285, [1899] 1 Q. B. 325. As it is not a case of succession, but of confiscation, the law of the domicil does not govern this case. The only two cases which bear on this point—*Aspinwall* v. *Queen's Proctor*, 2 Curt. 241, and *In the Goods of Beggia*, 1 Add. 340—did not decide it.

They also referred to Lausant Le Droit Civil International (1st ed.), vol. 6, pp. 435, 446; Westlake's Private International Law (3rd ed.), p. 168; Foelix Traité du Droit International Privé, s. 62.

Warrington, K.C., and *A. Adams*, for the Austrian Finance Minister.—In the case of a deceased foreigner the law of the domicil prevails, and the court will give it to whomsoever it is given by that law. Here the State succeeds to the property in default of heirs, the fact that the word used is "confiscate" does not make any difference—it is enough that in applying the Austrian law the court finds a person entitled to the property. The rule is *mobilia sequuntur personam*, and there is no reason for making an exception here. No English authority or text-book has been cited in which such an exception is referred to. Westlake (3rd ed.), pp. 93-95, 130, makes no mention of it, nor does Dicey's Conflict of Laws, pp. 677 and 179. The law of the domicil here disposes of this property in every event; it cannot, therefore, be *bona vacantia*.

Methold, for the official receiver.

Herbert Robertson, for the personal representative of the testator.

KEKEWICH, J.—We have had a very interesting discussion, and reference has been made to many authorities, including some decided cases, and I think rather more text-writers. None of those are out of place as tending to throw considerable light on the discussion, which I agree has been of an interesting character; but, after all, it seems to me we are brought back to questions of English law, which must be decided in the absence of direct authority according to principle, and that principle which governs English law on this particular subject. Reference has been made to many writers, both English and foreign writers, on what is termed private international law. What those writers have said is apposite, because in dealing with a question of this kind one is thrown back on maxims and principles, and the exposition of them by text-writers is important and is always accepted as a guide, but it is admitted on all hands that they fail to deal in an authoritative manner with the particular question which I am called upon to decide. There is no doubt the *dicta* go to this, that in a case where a man dies heirless (I naturally use the expression in the affidavit for the respondents) his personal property must go in the manner indicated by the law of the deceased's domicil. There are *dicta*, and sometimes *dicta* that are probably clear on that point, but those *dicta* do not profess to lay down general propositions. In each case that has been cited to me, I think it true to say it is given with a modification and a possibility of an application of a different rule elsewhere. Now, the respondent's argument is that this case is governed by the old maxim which is embodied in our English law, and which is to be found repeated in one form and another by all the text writers, *mobilia sequuntur personam*, and the respondents' point is that that maxim is applicable to the case of a man dying heirless and leaving personalty, or strictly speaking movable property, outside his domicil. That is the position. Now *mobilia sequuntur personam* is translated over and over again by text writers, as well by foreign as English, and reduced to definitions and rules, and they are all more or less in the same form and to the same extent. I do not know that anyone can find anything better than the rule from Mr. Dicey's book, which is cited on behalf of the respondents, rule 179, on p. 677. You cannot read that rule so as to understand it without reading the preceding rule, No. 178, which deals with the payment of debts with which we are now concerned, it being admitted on all hands that the debts of the intestate would have to be paid according to the law of the country in which the property was found. The debts being out of the way, you have to deal with what Mr. Dicey calls the distributable residue, and there he lays down his rule, "The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicil (*lex domicilii*) at the time of his death." On the next page he describes what he means by "the law of the deceased's domicil." I need not read the passage because I think it may be taken we all mean the same thing by that term. That seems to me to exactly illustrate the meaning and extent of the rule. It is the distribution of the distributable residue. When you come to distribute the deceased's property then you must follow the law of the deceased's domicil, whether it is according to some statute—whether it is according to what the English call common law, whether it is among relations because they claim in that character, or among persons who are entitled under the will—in whatever aspect you look at it the distribution must follow the law of the domicil; but that is distributing it exactly as is meant, or rather part of what is meant by *mobilia sequuntur personam*. Now we have to deal with a case here where there is no distribution at all—where there is really no *persona* to follow. Mr. Warrington argues that the Crown or any other person, his own client for instance, coming in and obtaining administration to the deceased's estate is for all intents and purposes the deceased's personal representative. He says that he is so, and that we call him "the legal personal representative" of the deceased. But that is only the language of our law. He does not represent him at all, except that by our law he is put in his place to defend actions brought by creditors, or it may be of persons who are claiming the estate against him. In

no other sense does he claim any estate. He does not claim through the *persona*, through the deceased. He claims what in some old authorities is called the *glanscaduca*—the acorn which has fallen from the tree, and not the acorn on the tree or connected with the tree. It is the acorn which has fallen on to the ground from the tree. There is no possibility of getting at this property through the deceased. It is because there is nobody who can claim through the deceased, no one who can be entitled, that the Crown steps in and takes the property. In other words, the Crown takes it because it is, as described in the cases, *bona vacantia*—it is property which no one claims. It is property at large. There is no succession. The Crown does not claim it by succession at all. It claims it because there is no succession. All the learning on this subject of the *bona vacantia* is to be found in the case of *Dyke* v. *Walford* which was cited in argument, and to which I need not refer. It was there, no doubt, a contest of a peculiar character, and the judgment delivered by Lord Kingsdown goes into the duties and the powers of the ordinary, and goes to get rid of any claim on the part of the church, but the principle is that the Crown comes and claims it, as was put in the case cited by the Attorney-General as *jura regalia*, the right to take that which belonged to no one; and if that is really the sound view I cannot see how, according to English law, there can be a right in anyone else to say that the maxim *Mobilia sequuntur personam* applies, and there should be an administration and distribution and settlement of rights according to the domicil of the deceased person, who in effect by dying lost the claim not only for himself, but those left behind, to his domicil. If that is the sound view it seems to me that concludes the question. I am not dealing here with any case in which another claimant may be desirous to enforce a different rule. It may be—I do not say it will be, but it may be—that hereafter, if a case arises where there is a conflict between the two countries respecting the law on the subject, a more difficult question may have to be decided, and decided on the ground of international comity; but with that I have not to deal at all, because it seems to me perfectly clear on the statement of law in this learned affidavit which states the code, that as between Austria and England there is no real difference on this subject. I have not forgotten the previous paragraphs, which have been referred to in argument, but it is really article 760 which is directly applicable. The words with which it commences, "If the spouse is no longer alive," must be read in connection with the immediate preceding clause, which gives the whole inheritance to the spouse with certain conditions there mentioned. Reading article 760 alone, those words, "If the spouse is no longer alive," are equivalent to this, that if there be no person to claim as heir, then the succession is confiscated as heirless property. The great difficulty in the case, to my mind, is in dealing with the poverty of language—the poverty, at any rate, of the English language. The word "confiscated" is a word capable of being used in many senses. In the ordinary sense it is where the Crown intervenes not to take up as belonging to it a thing because it is vacant, but to take up by way of penalty in exercise of sovereign rights, different from those which are asserted in a case like this, and which must be the meaning, I think, of "confiscated" here. Here it does not mean "confiscated" in the sense of taking by way of penalty. It is taken to the Crown—assumed by the Crown—as its own property. What the code says, it is confiscated as heirless property—that is, as property which we call in England *bona vacantia*. That is the same thing—property to which there is no heir because neither country admits the right of the passing traveller, and therefore the property must fall to the Crown as a matter of right in the exercise of its sovereign power. The rest of it is really of no importance for this purpose. It only says "Either by the *fiscus* or those persons who according to the political ordinances are justified in confiscating heirless estates"—that is to say, by the person appointed for the purpose, whether it be the Minister of Finance in one country or the Solicitor to the Treasury in another is immaterial—it is as heirless property. That seems to me to be precisely on our lines—that when there is no heir, then some paramount authority steps in and claims it—not as against anyone else, because there is nobody to claim it at all. But then it is said "You must remember the law is different as regards succession in Austria from what it is here, that there is a limit to the persons to take, and that makes a difference." I notice that argument because it was urged, but I confess I fail to see the force of it. What matters it, looking at it from an Austrian point of view, to them, that according to English law those related by half blood are allowed to come in? What would it matter if the relation of half blood was excluded? It must come back to this: under what circumstances does the succession stop, or rather perhaps I should say under what circumstances does no succession arise; under what circumstances is the paramount authority entitled to come in and say, I take because there is nobody else to take? That seems to me to be the whole question, and it matters not in the least whether any description of person is allowed to come in or not, or whether there is a limit or no limit to those entitled to claim. It seems to me to be all upon the same lines, and that really when once you have got at the principle which I have endeavoured to express, if not all, by far the large majority of the passages which have been quoted of the *dicta*, can all be construed by reference to that principle, having regard to the unfortunate poverty of language which makes you speak of "succession" when there is no succession, simply because there is no other expression which fits in so well with ordinary parlance. An excellent illustration was given of that by the Attorney-General in opening the case, and which is to be found in several of the books (I think in *Dyke* v. *Walford* more than once), which speaks of the Crown as *ultimus hæres*. It is not only not English, but it is perfectly inaccurate—as inaccurate really as an expression could well be, and yet, like many other inaccurate expressions, it is thoroughly well understood and is very convenient. Only, when you come to use convenient expressions which are inaccurate technically, and deduce therefrom principles and thereon found a rule, you are likely to be led into error, and in fact almost sure to be led into error. I think the principle is that which I have stated, and that it must govern this case. There must be a declaration in favour of the Crown's rights. The costs of the Crown, the official solicitor, and the trustee must come out of the fund in court, but the costs of the Austrian Government, as an adverse claimant, cannot be allowed.

Solicitors, *Solicitor to the Treasury; Tatham & Lousada; The Official Solicitor; Francis Fearon.*

Chan. Div. Joyce, J. } April 9, 19.

ANDERSON v. BERKLEY. (a.)

Will—Construction—Bequest—Compound designation—Inaccurate description—Validity.

Where the description of a legatee is made up of more than one part, and one part is true but the other false, if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected, and will not vitiate the gift. Thus the description of a legatee as "L., the wife of my son F.," is sufficient to pass the gift to L., although she was not in fact the lawful wife of F., although the testator believed that she was.

By his will dated the 22nd of November, 1892, the testator bequeated to his son Francis the sum of £1,000 absolutely, and he bequeathed to his trustees the sum of £5,000 upon trust to invest the same and pay the income to arise therefrom "to my said son Francis during his life and from and after his death to pay such income to his wife Letitia during her life if she should survive him, and after the death of the survivor of my said son Francis and Letitia his wife" upon trust for all the children of his said son Francis as therein mentioned, and in default of children upon trust for such of the testator's other children as should then be living. At the date of the will and for some years previously the testator's son Francis had resided in New Zealand. In the year 1888 he had written home to the testator to the effect that he had married and that the name of his wife was "Letitia Lilian." This lady was then living with him and continued to live with him till his death as his wife. They were reputed to be and were treated as lawfully married. The testator never saw or had any direct communication with the lady. The testator's son Francis died in 1899. In September, 1899, the testator's trustees discovered that the testator's son Francis and Letitia had never been lawfully married. This action was therefore commenced to settle who was entitled to the income of this sum of £5,000 during the life of Letitia.

Hughes, K.C., and *A. H. Jessel*, for the plaintiff.—This is only an error of description; the person to whom the bequest is made is clearly indicated, and the gift is therefore good, as a misdescription will not defeat the legacy: *Giles* v. *Giles*, 1 Keen 685; *In re Petts*, 8 W. R. 157, 27 Beav. 576; *Turner* v. *Brittain*, 3 N. R. 21. In *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319, 14 W. R. Ch. Dig. 146, the one gift was held void through the fraud of the devisee in having concealed the fact that she had a husband living at the time she went through the form of marriage with the testator, yet a gift to her daughter under the description of the testator's step-daughter was held to be good. No question of fraud can arise here, as if there was any at all it was the fraud of the testator's son, not of the legatee, and if it were proved that any part of the will was obtained by fraud it would then be a question for the Probate Division: *Allen* v. *M'Pherson*, 1 H. L. Cas. 191; *Meluish* v. *Milton*, 24 W. R. 892, 3 Ch. D. 27. *In re Boddington*, 32 W. R. 448, 25 Ch. D. 685, is distinguishable, as there the gift was made during widowhood.

W. F. Hamilton, K.C., for persons entitled under the gift over.—There is no wife of the testator's son Francis; the gift therefore fails, and the court is entitled to look at the probable motive of the testator in giving the legacy. This legatee was not known personally to the testator, and there is no evidence to justify the court in arriving at the conclusion that no other person but this lady was in the mind of the testator when he framed this gift: *In re Davenport's Trusts*, 1 W. R. 103, 1 Sm. & Giff. 126; *Kennell* v. *Abbott*, 4 Ves. 802.

Whinney, for the trustees of the will.

Jessel, in reply.—The testator knew the lady sufficiently for the purpose of identification.

April 19.—JOYCE, J.—George Berkley, the testator, who died in December, 1893, by his will, dated the 22nd of November, 1892, bequeathed to his son Francis the sum of £1,000 absolutely, and he bequeathed to his trustees the sum of £5,000 upon trust to invest the same and to pay the income to arise therefrom to his said son Francis during his life, and from and after his death to pay such income to his wife Letitia during her life if she should survive him, and after the death of the survivor of his said son Francis and Letitia his wife upon trust for all the children of his said son Francis as therein mentioned. The testator's son Francis was at the date of the will in New Zealand. In or about November, 1888, he wrote from Dunedin to some members of his family in this country, including the testator, stating that he had married Letitia Lilian Cumberland; and there was no doubt that she was then living with the testator's son Francis and continued to live with him until his death as his wife. They were reputed to be, and were treated as, lawfully married. It would appear, however, that the testator never saw or had any direct communication with the lady, but his will contains the disposition I have read. It now turns out that the testator's son Francis and Letitia Cumberland were never lawfully married, though they represented themselves to be so. In registering the birth of a daughter, born of their union in the year 1894, the date and place of their marriage was stated to be "1880, January 19, London, England." If entitled to conjecture upon the subject, it is possible and probable that what induced the testator to confer any benefit by his will upon this lady was the belief that she was the wife of his son. It was not, however, a legacy to anyone under the simple description of "the wife of my son Francis" without any reference to a particular individual. If it had been, any person claiming must, I suppose, have shown that she really sustained that character. The bequest was to "my son's wife Letitia" if she should survive him—that is, to a legatee named with an additional description which was not satisfied, inasmuch as there was not any lawful wife of the testator's son Francis in the strict legal sense of the term, though perhaps in a secondary sense Letitia Berkley or Cumberland might be called his wife. Now this is not a case of a competition between rival claimants to a gift where one part only of the description fits one claimant and the other part of the description only fits the other, as in *Garland* v. *Beverly*, 26 W. R. 718, 9 Ch. D. 213, where the various considerations applicable to such a case will be found. The simple question here is whether in the circumstances Letitia Berkley can take under the gift, or whether it fails and sinks into residue. There is no question of any fraud by the legatee in the obtaining of the bequest. It is not like the cases of *Kennell* v. *Abbott*, 4 Ves. 802, or *Wilkinson* v. *Joughin*, where a gift to a supposed husband or wife of a testatrix or testator not being actually such was held to fail by reason of a fraud practised on the testatrix or testator by the legatee: Jarman on Wills, p. 895n. The question is whether, according to the true construction of the will, the gift is in effect conditional upon Letitia's being the lawful wife of the testator's son Francis. In *In re Boddington* Lord

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Selborne, L.C., held that upon the true construction of the will in that case the bequest of an annuity to the testator's wife, Emily Caroline Boddington, was expressly conditional upon her being and remaining his lawful widow. There are not any such words of condition here. The legacy is intended for some person of whom the name, with a description, is given for the purpose of ascertaining and identifying the individual. We have a compound designation consisting of the name Letitia—there is no doubt to whom that refers—and the description, "wife of my son Francis." It is a rule, however, that where the description is made up of more than one part, and one part was true but the other false, then if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected and will not vitiate the gift: Jarman on Wills, p. 742, cited and approved by Lord Lindley in *Cowen* v. *Truefitt* (*Limited*), 47 W. R. 661, [1899] 2 Ch. 309. And as Lord Cottenham says in *Rishton* v. *Cobb*, 5 My. & Cr. 145, at p. 151, the rule that where the identity of the legatee is certain, the gift will not be avoided by an inaccuracy in the description, would be destroyed if the court permitted itself to speculate without proof, upon what might have been the object of the testator in giving the legacy. It was impossible to say what the testator in the present case would have done if he had positively known the precise facts in reference to the relation between his son and this lady. I hold, therefore, that the gift to "my son Francis' wife Letitia if she shall survive him" does not fail, and my decision is in accordance with that of Lord Romilly in *Turner* v. *Brittain*, which is, I think, the nearest case to the present that was to be found in the books.

Solicitors, *McDiarmid & Hill*, for *F. C. Manley*, Hull; *Markby, Stewart, & Co.*

K. B. Div. (Phillimore, J.) June 18.

HUDSON v. GRIBBLE. (*a*.)

Inland Revenue—Income tax—Deductions—Sum payable or chargeable by virtue of any Act of Parliament—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *rr.* 1 *and* 9—*Manchester Corporation Act*, 1891, *s.* 5.

The Manchester Corporation Act, 1891, *empowered the corporation to establish a fund for encouraging thrift amongst its officers and servants, and for providing a fund for them or their representatives on their retirement or death. The scheme passed by the corporation provided that persons who were in their employ previous to the passing of the Act should, on their applying in writing, be admitted to the benefits of the fund, and having been admitted they could not, while in the service of the corporation, withdraw from the fund.*

Held, that a servant of the corporation who had been so admitted on his own application could not deduct the amount of his payments to the fund from the amount payable by him for income tax on the ground that it was a deduction pursuant to section 146, *r.* 1, *of the Income Tax Act*, 1842, *by which duty is payable on salaries after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament.*

Beaumont v. Bowers, 48 *W. R.* 557, [1900] 2 *Q. B.* 204, *distinguished.*

This was an appeal by the deputy town clerk in the employ of Manchester Corporation disallowing a deduction which he claimed to make in respect of contributions made by him to the Manchester Corporation Thrift Fund. The special case set out the following facts:

By section 5 of the Manchester Corporation Act, 1891, the corporation were empowered to set up a fund for the encouragement of thrift among the officers and servants of the corporation, and with a view to providing a sum of money which in the event of the retirement or death of any person in the service of the corporation should be available for himself or his representatives.

The corporation were empowered to approve by resolution what classes of persons should be entitled to contribute to and participate in the benefits of the fund, and to what extent such contribution should be payable by persons entering or who should have entered the service of the corporation after the service of the Act, and also upon what terms and conditions persons in the service of the corporation at the time of the passing of the Act should on their application be admitted to the benefit of the Thrift Fund.

On the 3rd of August, 1892, the corporation of the city approved and adopted a scheme for the establishment of the thrift fund.

The scheme contained (*inter alia*) the following provisions:

Article I.—Every person who is now employed by the corporation with a salary or wages of less than 30s. per week, but who shall or may hereafter be so employed with a salary or wages at a rate of not less than 30s. per week, and who has been taken into such service since the 5th of August, 1891, or may hereafter be taken into such service as from or after the date on which he shall commence to be employed with a salary or wages at a rate of not less than 30s. per week . . . shall contribute and pay to the Thrift Fund 3·15 per cent. upon his actual salary or wages for the time being which contributions and payments may be deducted.

Each of the following persons as from the dates or times specified—namely:—

Every person who is or shall be employed by the corporation with a salary or wages of not less than 30s. per week, and who has been taken into the service of the corporation since the 5th of August, 1891, the date of the passing of the Act, and who may be taken into such service before the 1st of October, 1892, as from and after the 30th of September, 1892.

Or, every person who shall be employed by the corporation with a salary or wage of not less than 30s. per week, and who may be taken into such service on or after the 1st of October, 1892, as and from the date of his being taken into such service *pro rata* by the corporation from time to time as and when the salary or wages shall become payable, and no person shall cease to so contribute to the Thrift Fund while in the service of the corporation.

II.—Each of the following persons, namely:—

(*a*) Any person who on the 5th of August, 1891, was in the service of the corporation, whatever his remuneration.

(*b*) Any person employed by the corporation with a salary or wages at the rate of less than 30s. per week who has been taken into such service since the 5th of August, 1891, or shall hereafter be taken into such service, may by an application in writing under his hand be admitted to the fund and become and continue a contributor in the summons and upon the same terms and conditions as if he were one of the persons to whom Article I. of the scheme applies, provided that no person who shall have been so admitted and shall so become a contributor shall

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

cease to contribute to the Thrift Fund while in the service of the corporation.

The appellant, Thomas Hudson, was in the service of the corporation prior to the 5th of August, 1891, and on the 31st of August applied in writing to be admitted to the benefit of the fund, pursuant to Article 2 of the scheme, and he thereupon became, and still continues to be, a contributor to the fund, and under the provisions of the scheme cannot cease to contribute to the fund while in the service of the corporation. He claimed to be allowed to deduct the amount of his contribution to the fund by reason of section 146 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), rules for charging the duties under schedule.

By rule I. it is provided that the duties shall be annually charged on the persons exercising the office or employments mentioned in the schedule.

For all salaries, fees, wages, perquisites, or profits accruing by reason of such offices or employments, "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament when the same have been really and *bonâ fide* paid and borne by the party to be charged."

By the 9th rule it is provided that in estimating the duty payable for any such office or employment of profit all official deductions and payments made upon the receipt of the profits and salaries thereof shall be allowed to be deducted, provided that a due account thereof be rendered to the Commissioners and proved to their satisfaction.

The appellant contended that under these rules he was entitled to deduct the amount of his contribution to the Thrift Fund, and that he was only chargeable on the amount of his salary after making such deduction.

The Commissioners disallowed the deduction, but stated this case.

Asquith, K.C. (*Ryde* with him), for the appellant.—The case is indistinguishable from *Beaumont* v. *Bowers*, 48 W. R. 557, [1900] 2 Q. B. 204. In that case the appellant was bound by the scheme if he did not exercise his option. Here the appellant did exercise his option under the Act, but that can make no difference.

They also cited *Herbert* v. *McQuade*, [1901] 2 K. B. 761, 49 W. R. Dig. 78.

Sir E. Carson, S.G. (*S. A. T. Rowlatt* with him), for the Crown.—*Beaumont* v. *Bowers* does not apply. There the deduction was made by virtue of the appellant's contract with the corporation, and the fact that the appellant cannot now withdraw from the scheme is not the result of the Act of Parliament, but of the appellant's acceptance of the provisions of the scheme.

Asquith, K.C., replied.

PHILLIMORE, J.—In this case the question is whether the appellant can claim to deduct the sum which he pays to the corporation of Manchester under a Thrift Fund scheme on the ground that what he pays to the corporation is a deduction from "the salary" of an amount of duty or other sum payable or chargeable on the same by virtue of any Act of Parliament.

The corporation of Manchester are enabled by Act of Parliament to make this deduction from salary if the appellant chooses to let them do it, and they are enabled by Act of Parliament to supplement the fund by contributions; they are to invest the fund so created for the benefit of the appellant and his fellows. They are enabled by Act of Parliament to compel their future servants to come in on these terms, and it has been admitted by the Crown that, as regards the future servants who are under such compulsion by virtue of the Act of Parliament and the scheme, they may claim to deduct the sum they pay by virtue of it in assessing the amount of their income tax. With regard, however, to the servants who were in the service of the corporation of Manchester before and on the 5th of August, 1891, there is no compulsion on any such servant to accept the terms of the scheme; he does not pay the deduction or allow the corporation to make the deduction by virtue of an Act of Parliament. The only way the Act of Parliament comes in is to enable the corporation to contract—and, it may be said, to compel the corporation—to receive applications from the appellant and persons in his position if they choose to make them, but again only subject to such terms and conditions as the corporation may think fit to impose. No doubt it is contemplated by the Act of Parliament that the corporation shall hold out the same terms to everybody by the scheme; and, no doubt, so long as the scheme remains they must accept any application upon the terms set out in the scheme; but they are entitled to vary the scheme, and the utmost that can be said is that the corporation are enabled, and in certain circumstances compelled, to deal with the appellant if he chooses to apply to them to be admitted to the benefits of the Thrift Fund; but there is no compulsion upon him by the existing scheme, which they may modify as long as they do not modify it to his disadvantage. No doubt after his application and his admission by the corporation to the benefits of the Thrift Fund he is bound by the scheme. So long as he continues the servant of the corporation he cannot cease to contribute his due proportion to the fund; but that is not by virtue of any Act of Parliament. There is no such provision in the Act of Parliament. I cannot find that this sum is chargeable or payable upon the appellant's salary "by virtue of any Act of Parliament." I think that the case differs very widely from *Beaumont* v. *Bowers*, where the actual compulsion was on the applicant. He was certainly compelled in that case to submit to the deduction, unless he chose on a day then past to express positively once and for all his refusal to be bound by the Act. I do not see that the power of option was much discussed or dwelt upon by the court in that case; but even supposing it was, it is a quite different power to the power in this case. The deduction is not really charged upon him by any Act of Parliament at all.

It might almost as well be said than an Act of Parliament has said that every contract in writing shall be enforced and charged upon any man who enters into such a contract. This deduction is chargeable here upon him by virtue of his application, which the corporation are enabled, and to some extent compelled, by Act of Parliament, to accept.

I think that there must be judgment for the Crown with costs.

Appeal dismissed.

Solicitors for appellant, *Austin & Austin*, for *Thomas Hudson*, Manchester.

Solicitor for the Crown, *Solicitor to the Inland Revenue.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) — May 1, 2.

SMITHIES (*Appellant*) v. BRIDGE (*Respondent*). (a.)

Adulteration—Food—Sale of article not of nature, substance, and quality of article demanded—Milk as taken

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

from cow deficient in fat—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

A purchaser demanded to be supplied with new milk, and was given an article which came direct from the cow and which had not been tampered with or adulterated in any way, but which, on analysis, was found to be deficient in milk fat. This deficiency was caused by the abnormal method employed in milking the cows—viz., an interval of sixteen hours between the evening milking and the morning milking, at which the milk in question was drawn.

Held, by Lord Alverstone, L.C.J., *and* Channell, J. (Darling, J., *dissenting*), *that there was sufficient evidence on which the justices might find that the seller had committed the offence under section* 6 *of the Sale of Food and Drugs Act,* 1875, *of selling to the prejudice of the purchaser an article not of the nature, substance, and quality of the article demanded.*

Case stated by the justices at the Essex Quarter Sessions.

On the 7th of October, 1901, the appellant, W. Smithies, was convicted at a court of summary jurisdiction, in the county of Essex, under section 6 of the Sale of Food and Drugs Act, 1875, for that he did on the 15th of August, 1901, unlawfully sell to the respondent, J. T. Bridge, to his prejudice, an article of food, to wit, milk, which was not of the nature, substance, and quality of the article demanded by the purchaser. The appellant was fined £20 and costs.

On appeal to the quarter sessions the following facts were proved:

On the 15th of August, 1901, the respondent, an inspector under the Sale of Food and Drugs Acts, stopped a hand-cart on which was a churn of milk belonging to the appellant, and asked to be supplied with a pint of new milk. This on analysis was found to contain only 2·09 per cent. of fat. The analyst's certificate was as follows: "I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under, viz., only 2·09 per cent. of fat, and was therefore deficient to the extent of at least 30 per cent. of the fat proper to genuine milk, seeing that normal milk of even poor quality contains at least 3·00 per cent. of fat. Observations.—No change had taken place in the constitution of the article that would interfere with the analysis."

It was further proved that the cows from which the milk had been obtained had been milked at about 4 o'clock in the morning of the 15th of August, and that the milk had not been tampered with or adulterated in any way, but was in exactly the same condition as when it came from the cows.

The cows before the 4 o'clock milking had not been milked for sixteen hours, and it appeared that the small percentage of fat in the milk was caused by the long interval which had taken place between the hour at which the milk in question was drawn from the cows and the previous milking.

The owner of the cows had been advised by veterinary surgeons that this system of milking, while it increased the quantity of milk at the morning milking, caused it to be deficient in fat, as the latter became absorbed while retained by the cows, and went to the nourishment of the calves.

The cows were not the property or under the control of the appellant, but of one Thomas Lilly, from whom the appellant purchased the milk under a guarantee of its genuineness and purity as new milk; but the appellant did not rely upon this guarantee as a defence, or in any way allege a compliance with section 25 of the Act.

The justices at quarter sessions were of opinion that there had been no adulteration of or abstraction from the milk, but that, nevertheless, the offence charged had been proved. They accordingly affirmed the conviction, but reduced the fine to £1.

By No. 657 of the Statutory Rules and Orders, 1901, made by the Board of Agriculture, dated the 5th of August, 1901, and which came into operation since the aforesaid sale of milk, namely on the 1st of September, 1901, it is provided that "Where a sample of milk (not being milk sold as skimmed, or separated, or condensed, milk) contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat, or the addition thereto of water."

Warburton, for the appellant.—The conviction was wrong, as there had been no offence under the Act. The milk was pure new milk as taken from the cows, and was, therefore, of the nature, substance, and quality of the article demanded. There had been no abstraction from the milk or adulteration, and there was no suggestion that the mode of milking the cows had been adopted with any improper motive. At the time of the alleged offence there was no standard of genuine milk. The order made by the Board of Agriculture fixing the amount of milk fat at not less than 3 per cent. did not come into operation until the 1st of September, 1901. The Sale of Food and Drugs Acts deal with adulterated articles, and not with articles of inferior quality.

Hoyle v. *Hitchman*, 27 W. R. 487, 4 Q. B. D. 233.

Lord ALVERSTONE, L.C.J., referred to *Lane* v. *Collins*, 33 W. R. 365; 14 Q. B. D. 193.

C. E. Jones, for the respondent.—The conviction was right. The purchaser asked for new milk and the article he was supplied with did not contain the ordinary constituent parts of new milk, and the milk did not contain those parts owing to the method of milking adopted. The purchaser, therefore, had not obtained an article of the nature, substance, and quality of the article he demanded: *Hewitt* v. *Taylor*, 44 W. R. 431, [1896], 1 Q. B. 287; *Dyke* v. *Gower*, [1892], 1 Q. B. 226; 40 W. R. Dig. 6.

Cur. adv. vult.

May 2.—CHANNELL, J.—In this case the court is not entirely agreed as to the result, but I do not think that there is any great difference of opinion between us as to the principles which ought to be applied. I therefore proceed to deliver judgment first. This prosecution was brought under section 6 of the Sale of Food and Drugs Act, 1875. That section differs very considerably from the other sections of the Act. It has been decided that under that section there is no question of guilty knowledge or fraudulent intent. The only question is whether the person charged has sold something which is not of the nature, substance, and quality of the article demanded by the purchaser. The knowledge of the seller—that is, the *mens rea*—is not an essential element of the offence (see *Betts* v. *Armstead*, 36 W. R. 720, 20 Q. B. D. 771). A master may be convicted under it when the sale is the act of his servant—*Brown* v. *Foot*, 61 L. J. (M. C.) 110; 40 W. R. Dig. 6, and as was decided in *Pearks, Gunstone, & Tee, (Limited)*, v. *Richardson, ante*, p. 286; [1902], 1 K. B. 91, a corporation may be liable for the offence: *Goulder* v. *Rook*, 49 W. R. 701, [1901], 2 K. B. 290, illustrates those propositions. There it was held that the innocent retailer of beer, which was a manufactured article with which arsenic had been accidently mixed, was liable to be convicted under this section. That was a

case of a manufactured article; in the present case the article in question is a natural product. There is necessarily a certain amount of difference between the two, but, in my opinion, the same principle is applicable to both. In the present case the purchaser asked for new milk, and if he was supplied with something which he would not expect under that description, then I think the offence has been committed. In ordinary cases, if the vendor is able to prove that what he has sold as milk is the identical thing that came from the cow, without alteration or manipulation, then, unless there was some further evidence, I think that would be sufficient to show that the article sold was milk. But if the analyst's statement shows that it has not the proper constituent parts of milk, and if the seller were to prove that he had made inquiries and had discovered that the cow had some illness, and that the milk therefore was not of its normal strength and richness, then that evidence would confirm the analysis, and go to show that the thing sold was not of the nature, substance, and quality of the article demanded. It would be true that the seller had sold something which was the direct product of the cow, but of a cow which was not producing milk, but another liquid which had not the constituent parts of milk, and on those facts I think that the seller, although acting in good faith, ought to be convicted under section 6. No doubt it would be a hard case, and the justice of the case would probably be met by the infliction of a merely nominal fine, but I think there ought to be a conviction. Applying those principles to the present case, the justices have found that the milk in question did not contain the normal quantity of fat, although it was sold in exactly the same condition it came from the cow, and had not been tampered with or adulterated in any way. They have further found that this liquid was not of the nature, substance, and quality of milk. In my opinion, that is a question of fact which it was within the jurisdiction of the justices to find, and we ought not to interfere with their conclusion if there were evidence upon which they could so find. It is true that this may be a hard case, but if we do not lay down a rule in this way, it appears to me that mischief may be done in other cases.

DARLING, J.—I regret I am unable to agree. In this case the purchaser asked for new milk, and he got milk exactly as it came from the cow. It seems to me clear that if what the purchaser was given was of the nature, substance, and quality of the article he demanded, the conviction cannot be upheld. The article which was given to him was undoubtedly new, and the only question is, therefore, whether it was milk. By milk I understand cows' milk, and I do not think that a purchaser who asks for milk would expect to get asses' milk or that of any other animal. I do not think that if a purchaser asked for milk, that of a diseased cow would come within that description; for seeing that it was an article of food, the purchaser must be understood to demand milk fit for human consumption. It was contended that this was not milk because it did not contain a certain proportion of essential fats. At the time of the alleged offence there was no fixed standard as to the proportions of fat and water to be contained in milk such as now appears to have been fixed by the regulations of the Board of Agriculture dated the 5th of August, 1901. But if it was not milk, what was it? The certificate of the analyst says that normal milk of even poor quality contains at least 3 per cent. of fat, and that this did not. It is well known that some cows give richer milk than others, and particular kinds of cows are kept by some persons for that very reason.

In my opinion, as there is no standard, the vendor supplied that which he was perfectly entitled to describe as milk. It is true that this milk was not as rich as other milk, owing to the manner in which the cows were milked, but under these circumstances I do not think it is possible to say that that with which the purchaser was supplied was not new milk. I should probably not have thought it necessary to express my dissent from the conclusion at which the other members of the court have arrived if I thought that our decision would only apply to milk; but I am afraid lest it should apply to other natural products where there is no standard; and I cannot help foreseeing the difficulties that might arise in such a case if it is to be held that a natural product is not of the nature, substance, and quality of the article demanded because it does not contain all the elements in the same proportions in which they are usually found in normal examples of the natural product. It would be easy to suggest instances; for example, a purchaser who had asked for apples and had received them as they were gathered from the trees, might complain that they did not contain so much of malic acid—or of some other distinctive constituent of apples—as a chemist might declare to be normal. They would still be apples, though poor in quality.

It is, I think, a principle capable of dangerous application if it is to be laid down that a person can be convicted under section 6 of the Sale of Food and Drugs Act, 1875, for selling a natural product in the state in which it was produced.

Lord ALVERSTONE, L.C.J.—This is a case of some difficulty, but I have arrived at the conclusion that the conviction ought to be affirmed. The justices dealt with the matter as a question of fact, and if there is any evidence upon which they could arrive at that decision, we cannot interfere with it. I agree with my brother Darling that the real question in this case is whether that which the appellant sold was milk. In order to constitute an offence under section 6 of the Act it is not necessary, as my brother Channell has pointed out, that the seller should know the condition of the article sold. If it is not of the nature, substance, and quality of the article demanded he is liable under section 6, although he may know nothing about it. In my opinion, as the question of warranty arises here, it is impossible to distinguish between the appellant and Lilly, the man who originally provided the milk. The only question is whether there was evidence that the article sold was not of the nature, substance, and quality demanded. The analyst's certificate shows that the milk was deficient in 30 per cent. of the fat which milk ought properly to, and usually does, contain. I agree that if the evidence had been that the milk came direct from the cow, and if there were no evidence of anything abnormal in the condition of the cow or in the way in which it had been treated, the conviction would have been wrong. But the magistrates have found as a fact that although the milk came direct from the cow, yet that its abnormal condition was due to the way in which the cow had been treated, that is, that there had been the abnormal interval of sixteen hours between the milkings. The magistrates have found that the article supplied was not of the nature, substance, and quality of the article demanded because it was so deficient in fat that it could not fairly be described as milk. I do not say that I should have come to the same conclusion, but it is impossible to say that there was no evidence upon which they could so find. With regard to the recent order of the Board of Agriculture, I do not think that it purports to set up a standard of what is or is not

genuine milk, but only means to say that the want of a certain percentage of fat is to be *primâ facie* evidence that the milk is not genuine. It is still open to a defendant to prove that the milk is in fact genuine. If, however, it turns out that the article produced, although a natural product, is the result of an abnormal condition of things, whether arising from disease or from unusual treatment of the cow, I think that that does amount to evidence upon which a magistrate may find that the article is not of the nature, substance, and quality of the article demanded. *Lane* v. *Collins*, 33 W. R. 365, 14 Q. B. D. 193, may seem to be in conflict with our decision, but that case was decided upon a special state of facts, though I am not sure that I should have arrived at the same conclusion. I am therefore of opinion that we cannot reverse the finding of fact by the justices, and that this appeal must be dismissed.

Appeal dismissed; Conviction affirmed.

Solicitors for the appellant, *Speechly, Mumford, & Co.*, for *A. Prior*, Colchester.

Solicitors for the respondent, *Doyle, Devonshire, & Co.*, for *Jones & Son*, Colchester.

House of Lords.

From C. A. (Scotland). Feb. 14.

DOUGAN *v.* MACPHERSON. (*a.*)

Trustee — Purchase from beneficiary by trustee — Fiduciary position — Non-disclosure — Valuation in hands of trustee.

By the law of Scotland, as well as by the law of England, although there is no rule of law that a trustee shall not buy trust property from his cestui que trust, *still, if a transaction of that kind is challenged in proper time, a court of equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the* cestui que trust *when it was sold (following Lord Cairns' opinion in* Thomson *v.* Eastwood, 2 *App. Cas.* 215, *at p.* 236, 25 *W. R. Dig.* 341).

Where, therefore, a trustee purchased his cestui que trust's *share in trust funds, the transaction was set aside on account of the non-disclosure of a valuation which the trustee has previously obtained.*

Appeal from an interlocutor of the Second Division of the Court of Session.

The action was brought by the trustee of the sequestrated estates of James Gibson Dougan against the bankrupt's brother, to set aside a transaction whereby the bankrupt conveyed certain property to his brother.

The bankrupt's sole estate consisted of his interest under the marriage contract of his parents and under the will of his father which only vested in him under either of these instruments until the death of his mother on the 17th of April, 1898. The appellant was a trustee under both the marriage contract and the will, and after an attempt to sell to the appellant in 1897 negotiations were resumed in the following year — on the understanding that the appellant took over certain debts, paid others, and a certain sum in cash. Then followed further negotiations. Some time passed, and the bankrupt, being in great pecuniary straits, again approached the agents for the appellant. The result was that, in January, 1899, the assignation now sought to be reduced was executed, and the cash consideration of £450 was paid to the bankrupt.

In June, 1898, before the sale, the appellant obtained a valuation of the trust estate, which estimated James Dougan's share at about £3,500.

This valuation was never shown by the appellant to his brother. The debts in the *cessio bonorum* and the other specified debts which were discharged by the appellant amounted to nearly £2,400—the total amount paid, including the £450 cash, being £2,846.

The Lord Ordinary ordered repayment of the £450 to the appellant and the reduction of the agreement of sale, and his interlocutor was adhered to by the Second Division.

J. Crabb Watt (of the Scottish bar) and *J. G. Joseph*, for the appellant.

Graham Murray, L.A., and *Robert Munro* (of the Scottish bar) were not heard.

Earl of HALSBURY, L.C.—I cannot help saying that I feel somewhat surprised at the persistent argument that has been placed before your lordships in this case in spite of the, to my mind, perfectly clear rule of equity, which cannot be departed from, and upon which, for the first time, I believe, we are asked to place a different construction. Arguments have been addressed to your lordships as if this were a question between two persons perfectly independent of each other, each man having a right to make the best bargain he can for himself. Undoubtedly that was the view taken by the defendant here, for he frankly says so: "I do not see that fairness has anything to do with it; if a man sells at his own valuation and another man buys, it has nothing to do with fairness." He had no conception of the duty he himself owed as trustee to the person with whom he was dealing as beneficiary and *cestui que trust*.

The result, to my mind, is manifest. The defender acted in pursuance of what his own belief was, that he had no such duty at all, and that if he had secret information in his possession of what the value was, he might, by concealing that information, obtain £300 or £400 more than if the person with whom he was dealing had been acquainted with the value which had been placed by a skilled valuer upon this property. Certainly, it is to my mind an absolute novelty to hear it gravely argued that such a transaction as that can stand. I think every learned judge who has dealt with this question has always said that a court will regard with great suspicion such a transaction, and will call upon the trustee to show that he has given full information—that he has kept nothing back, and that he has given an adequate price. Both these things failed here: the trustee did not give an adequate price. We know now that the price was too little in any view of it. He certainly did not communicate the information he possessed; and when I say that, it is not for those who are impeaching this transaction to prove negatively; it is for the trustee to prove affirmatively that the information was given.

To my mind it is perfectly manifest that the information was not given; and I say so for two reasons. In the first place, when the defender is challenged in cross-examination to show that he did give it, he never suggests that he did, or that he had taken any means to do it, or that he had taken care that the information should reach his brother. On the contrary, he says, "If he want to find out, let him go to his own agents and not come to me" —that is the line he takes. Therefore I assume, from his own statement, that he could not prove

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

that the knowledge was imparted to his brother. There is another reason, applying one's common sense to it. Seeing the view that he took of his rights and of his own position—namely, that he was perfectly independent, that he was transacting business with a person to whom he owed no obligation at all, am I to suppose that he went out of his way to do what no ordinary person dealing with another would do—to show him something that would enhance the value of the property he was buying? That is not the ordinary course of mankind. Although these were brothers, they do not seem to have been on particularly good terms with each other, and he himself repudiates the idea that he was giving anything out of the way to his brother. He says, "If he does not know, let him ask his own agents." Under these circumstances it seems to me that it is burning daylight to say that this transaction cannot stand. It is perfectly obvious to my mind that it must be set aside.

The only further observation I wish to make is that I am a little surprised to find that Lord Young in his judgment uses two phrases, and never gives any exposition of the sense in which he uses them. He says: "There is no legal objection to a trustee under a settlement purchasing the interest of a beneficiary so long as the trustee acts uprightly and fairly"; and later on he says: "The transaction will be held to be legal if it is proved that the trustee has acted fairly and honestly"; then the transaction will stand. That is quite true; but the whole question is, upon what facts does his lordship rely to justify the use of those adverbs "uprightly," "fairly," and "honestly"? To my mind it was neither honestly, fairly, nor uprightly done, and the transaction must be set aside.

I therefore move your lordships to dismiss the appeal with costs.

Lord ASHBOURNE.—I entirely concur. I think it is impossible to conceive a clearer case. It was the absolute and obvious duty of the defender in this case, if he thought he could maintain the transaction upon which he had entered, to have present to his mind the distinct duty which he owed to his brother. In his evidence he says, "I do not see that fairness has anything to do with it." I think that governs his entire conduct. He was thinking of the best kind of bargain he might obtain for himself. In common with all your lordships who have taken part in this hearing, I am of opinion that that is not dealing fairly—that keeping back and non-disclosure, non-bringing forward of Binnie's valuation, is a circumstance that cannot be explained and cannot be got over, and makes the case an overwhelming one for affirming the decision of the court below.

Lord MACNAGHTEN.—I entirely concur. I must say I am surprised that this action was ever defended, and I am astonished that after two adverse decisions the appellant should have had the courage to come to this House.

As far as I am aware, there is no difference whatever between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their *cestuis que trust*. I do not find that the law is stated anywhere more concisely and clearly than it was in the judgment of Lord Cairns which I referred to; see *Thomson* v. *Eastwood*, 2 App. Cas., at p. 236, 25 W. R. Dig. 341.

Now, did the appellant in this case give full value? Clearly not. Did he give all the information he possessed to his brother? Most certainly he did not. He had in his pocket a valuation showing exactly what, according to the opinion of a most experienced valuator, this property was worth. He had it in his room at the time when his brother called and he did not show it to his brother; he did not even give it to the agent—the person to whom he says his brother might have gone. That was keeping back information which it was his bounden duty to have conveyed to his *cestui que trust*. And it does not matter in the least how or under what circumstances the information was gained; if he had that information, he was bound to place it at the disposal of his *cestui que trust* with whom he was dealing.

Lord SHAND.—I am of the same opinion, and I would not add a word to what has been said by your lordships if it were not that the case is one coming from Scotland. With regard to the law of Scotland, I have only to emphasise what has fallen from my noble and learned friend who has last spoken. It has not been suggested that any distinction in the law of trusts applicable to such a case as this exists between the law of England and the law of Scotland. The fiduciary relation is the same: The duties and obligations of trustees in such cases are the same in Scotland as they would be in England.

Here the trustee plainly did not realize or appreciate the duty which lay upon him to give the beneficiary full information as to his position in entering into this transaction. He makes this quite clear by his own evidence. He had in his possession—I do not care how he acquired it—the valuation which has been so much spoken of. That is a fact, and that fact he was bound to disclose when he came to transact with reference to a proposed acquisition of the share of a beneficiary. He failed to do so, and the failure is fatal in the question of the validity of the transaction.

With regard to what Lord Young said, and the expressions which have been referred to in the judgment of the Lord Chancellor, I will only say that it might have been possible to suggest that there was integrity, uprightness, and honesty on the part of the appellant if it had been a transaction between strangers, and if there had not been the relation of trustee and beneficiary subsisting between them; but the moment you bring into the case the circumstance that the appellant was a trustee having the duties lying upon him as a trustee in dealing with a beneficiary, and transacting or negotiating for the purchase of that beneficiary's share of the estate, the question of integrity and honesty drops out of the case. I do not say that he was acting fraudulently, but certainly he was acting in violation of the duty which he owed to his brother in his character of a beneficiary under the trust. Therefore I have no hesitation in saying that the case is an extremely clear one, and in concurring in the judgment proposed by your lordships.

Lord BRAMPTON.—I concur in the judgment, and I cannot help saying that I think the appeal is a frivolous and vexatious one.

Lord LINDLEY.—I am of the same opinion. I will only add that no equity lawyer, being told that that valuation was not disclosed by the trustee to his *cestui que trust*, could uphold this transaction for a moment.

Appeal dismissed.

Solicitors for the appellants, *Ernest Salaman, Ford, & Co.*, for *Clark & Macdonald, S.S.C.*, Edinburgh.

Solicitors for the respondent, *Almond & Co.*, for *St. Clair, Swanson, & Manson, W.S.*, Edinburgh.

Court of Appeal.

From K. B. Div.
(Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) July 29.

CARISBROOK STEAMSHIP CO. (LIMITED) v. LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE CO. (LIMITED). (a.)

Insurance—Marine—General average—Charter-party—Voyage out and home—General average sacrifice on outward voyage—Liability of homeward freight to contribute.

A ship was chartered to proceed to a foreign port and there load a cargo for carriage to a home port, the chartered freight to be paid on delivery of the cargo. The ship sailed in ballast, and before she arrived at the foreign port of loading she sustained a general average loss. She proceeded on her voyage, loaded a cargo in accordance with the charter-party, carried it home, and delivered it, and the chartered freight was duly paid. In an action by the shipowners against the underwriters on ship,

Held, that the chartered freight was liable to contribute in general average.

Judgment of Mathew, J. (ante, *p.* 42, [1901] 2 *K. B.* 861, *affirmed.*

Appeal from the judgment of Mathew, J., at the trial of an action without a jury, *ante*, p. 42, [1901] 2 K. B. 861.

The action was brought on a policy of marine insurance underwritten by the defendants, whereby the plaintiffs were insured for the sum of £2,000 upon the hull and machinery of the steamship *Yestor*. The plaintiffs sought to recover the cost of certain repairs as a loss by perils insured against. The defence was that the loss was a general average sacrifice to which the plaintiffs were liable to make contribution in respect of freight payable under a charter-party, and the defendants claimed to be entitled to deduct the amount of such contribution from the sum claimed in the action.

The policy of insurance was dated the 7th of February, 1900, and was a time policy for twelve months. By a charter-party dated the 11th of September, 1900, and made between the plaintiffs as shipowners and Messrs. Strachan as charterers, it was provided that *The Yestor*, which was therein described as "reported expected to leave Fleetwood about the 12th of September in ballast, calling at a Bristol Channel port for coals," should proceed to Savannah, and there, having discharged her cargo, if any, load a cargo of cotton and proceed therewith to Liverpool, Manchester, or Bremen as directed, the freight to be paid on unloading and right delivery of the cargo.

The vessel sailed on the 13th of September from Fleetwood in ballast for Savannah without exercising her option to load a cargo of coals. In the course of the voyage, and before arrival at Savannah, the vessel grounded, and in the efforts made to get her off she sustained damage to her propeller and other injuries. It was admitted that the damage to the propeller and other injuries were of the character of a general average sacrifice. She subsequently proceeded to Savannah, and, after the necessary repairs had been executed, she loaded a cargo of cotton in accordance with the charter-party and then proceeded on her homeward voyage. The cargo was duly delivered and the plaintiffs received the chartered freight in respect thereof.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The question was whether, when a vessel sails in ballast under a charter-party to bring home a cargo, the chartered freight is liable to contribute in general average in respect of a general average loss incurred on the voyage out.

Mathew, J., was of opinion that the chartered freight was liable to contribute, and gave judgment for the defendants.

The plaintiffs appealed.

Carver, K.C., and *D. Stephens*, for the plaintiffs.—The chartered freight is not liable to contribute. The homeward freight was not being earned on the outward voyage, and was not at risk when the general average sacrifice occurred. The time for the adjustment of average was when the ship arrived at Savannah on the termination of her outward voyage, and the only contributory interests were the interests which had been at risk on that voyage. The judgment of Willes, J., in *Potter* v. *Rankin*, 16 W. R. 1049, at p. 1051, L. R. 3 C. P. 562, at p. 567, shows that in such a case as the present homeward freight is not liable to contribute to a general average loss occurring on the outward voyage. In *Williams* v. *London Assurance*, 1 M. & Sel. 318, which is relied on by the defendants, and which was followed by Mathew, J., the freight which was held liable to contribute was being earned on the outward as well as on the homeward voyage. Moreover, that case has been disapproved of by Benecke in Principles of Indemnity in Marine Insurance, p. 315; by Arnould on Marine Insurance (2nd ed.), p. 956; and by Phillips on Insurance, s. 1387; see also Abbott on Shipping (5th ed.), p. 357.

J. A. Hamilton, K.C. (*F. D. Mackinnon* with him), for the defendants.—The argument for the plaintiffs is based upon the assumption that there were two voyages. In truth there was only one voyage, the voyage for which the vessel was chartered—viz., to Savannah and back; and the vessel was earning the homeward freight from the time when she sailed from Fleetwood: see *Barber* v. *Fleming*, 18 W. R. 254, L. R. 5 Q. B. 59. This case is governed by *Williams* v. *London Assurance*, which was followed in *Moran* v. *Jones*, 5 W. R. 503, 7 E. & B. 523. The practice of average adjusters has always been in accordance with the rule laid down in those two cases except during a short interval when doubt was thrown on the question in consequence of the decision in *The Brigella*, [1893] P. 189, 41 W. R. Dig. 92. The text-book writers, Benecke, Arnould, and Phillips, do not disapprove of the principle of *Williams* v. *London Assurance*; their criticisms are mainly confined to pointing out the difficulty of apportioning the relative values of the outward and the homeward freight. Other text-book writers treat *Williams* v. *London Assurance* as established law: see Lowndes on General Average (4th ed.), p. 310; and Bailey on General Average (2nd ed.), p. 152. The principle of that case was followed in the American case of *The Brig Mary*, 1 Sprague's Adm. Cas. Mass. 17. The observations of Willes, J., in *Potter* v. *Rankin* were addressed to the particular facts of that case, in which no question of general average was raised.

He also referred to *The Progress*, Edwards's Adm. Rep. 210.

COLLINS, M.R.—This is an action on a policy of insurance, and it is brought by the owners of the steamship *Yestor* against underwriters on the hull. The underwriters seek to set off against the sum claimed in the action a sum which they allege to be payable by the plaintiffs, who were the owners of chartered freight as well as owners of the hull, as a general average contribution. The question is whether the chartered

freight earned by the plaintiffs is the subject-matter of a general average contribution or not. By the charter-party *The Yestor* was chartered to sail from Fleetwood to Savannah; she was entitled to call at a port in the Bristol Channel for a cargo of coals, a right of which she did not avail herself; and, having proceeded to Savannah, she was there to load a cargo of cotton and proceed therewith to Liverpool, Manchester, or Bremen, as directed, where she was to deliver her cargo on being paid freight. She went out without any cargo, and came back safely with a cargo of cotton from Savannah to a port in England. On her way out, however, she met with a misfortune, which necessitated a general average sacrifice.

The plaintiffs bring this action on the policy to recover the amount of the loss which they so sustained, and the question is whether they, as owners of chartered freight, can be called on to contribute to the general average loss in respect of the freight. Mathew, J., held that the chartered freight had been at risk, that it had been saved by the general average sacrifice, and that it was one of the contributory factors to the general average loss. It was contended before us, in support of the appeal, by counsel for the plaintiffs, that, where a voyage out is undertaken for the purpose of earning chartered freight on the homeward voyage, the homeward chartered freight ought not to be taken into consideration as a contributory factor, if the general average loss occurs on the voyage out. They were, however, met by an old authority which was against their contention—viz., *Williams* v. *London Assurance*, decided in 1813. If that case is good law it covers the present case. In my opinion it was a stronger case than this. There the vessel was chartered for a round voyage, taking a cargo out and bringing a cargo home, and freight was payable on delivery of the homeward cargo. She was only insured for the outward voyage, and on the outward voyage she incurred a general average loss. The court, presided over by Lord Ellenborough, held that the freight was liable to contribute to general average. In the year 1857 the same point came up for consideration before the full Court of Queen's Bench in *Moran* v. *Jones*, and they either adopted the principle laid down in *Williams* v. *London Assurance*, or, as it appears to me, decided the question in the same way. Further, practically the same point had been previously decided in 1810 in the case of *The Progress* by Lord Stowell. There is also an American authority to the same effect, *The Brig Mary*.

In my opinion the rule laid down in *Williams* v. *London Assurance* is a sound working rule, and counsel for the defendants showed that the objections which have been taken to that case by the various text-book writers are not so formidable as they appear at first sight. I think that those objections are mainly directed to pointing out the difficulty which exists in estimating the proper value of the freight at risk, and are not against the taking of the freight into consideration at all. At any rate, the rule is law at this moment, and it has never been questioned in any decided case. The chief objection to the rule which the plaintiffs have been able to put forward is that which is founded on a *dictum* in the judgment of Willes, J., in *Potter* v. *Rankin*. But when that case is examined the *dictum* is seen to be merely *obiter* so far as concerns this case, for the facts there did not raise the point now in question for discussion. The words of Willes, J., were addressed to different circumstances from those of this case, and they ought to be read *secundum subjectam materiam*, and not at all as impugning the principle laid down in *Williams* v. *London Assurance*. The fact that that principle has been for so many years followed by average adjusters ought also to be taken into consideration. I think I might adopt in terms the judgment of Mathew, J., and in my opinion the appeal should be dismissed.

STIRLING, L.J.—The argument which has been addressed to us on the part of the appellants is one which would be well worthy to be weighed if it were now put forward for the first time. It is, however, admitted that, if the appellants are to succeed, the case of *Williams* v. *London Assurance* must be overruled. That case has never been judicially dissented from, it was expressly followed in *Moran* v. *Jones*, and it has been acted upon ever since till now by average adjusters, though it is true that it has been criticised by text-book writers. The only authority which the appellants have been able to cite is a *dictum* of Willes, J., in *Potter* v. *Rankin*. Two observations have to be made on that. First, the facts in that case were not the same as the facts in this case; there the voyages out and home were not dealt with, as they were in this case, by one and the same charter-party. Secondly, the case of *Williams* v. *London Assurance* was not cited to the court; and in my opinion they had no intention of overruling that case.

COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Holman, Birdwood, & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 23.

In re HOTHAM.

HOTHAM *v.* DOUGHTY. (*a.*)

Settled land—Tenant for life—Trustees for purposes of Settled Land Acts—Investment of capital moneys—Duty of trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22 (2).

When a tenant for life under section 22 (2) *of the Settled Land Act*, 1882, *directs trustees for the purposes of the Settled Land Act to invest capital money upon a mortgage, the trustees must be satisfied that such direction has been given upon a proper report as to the value of the property proposed to be mortgaged, or that a proper investigation of the title has been made and proper advice given as to the form of the conveyance, but on being so satisfied they are bound to comply with the direction.*

Order of Cozens-Hardy, J. (ante, *p.* 150, [1901] 2 *Ch.* 790), *varied.*

This was an appeal from a decision of Cozens-Hardy, J. (reported *ante*, p. 150, [1901] 2 Ch. 790).

The plaintiff, Frederick William Hotham, was tenant for life of an estate called Worlingham Hall. This estate had been purchased out of capital money settled upon the plaintiff by the will of Augustus Thomas Hotham.

On the 7th of February, 1901, the plaintiff entered into a contract with the Hon. A. J. Mulholland for the sale of the estate, and it was agreed that two-thirds of the purchase-money should remain as a mortgage on the estate.

The preliminaries were all arranged, and a draft mortgage conveying the estate to the trustees of the settlement under A. T. Hotham's will had been prepared and accepted by the purchaser.

The trustees of the settlement then raised

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

objections to the draft deed, declaring that they were entitled to check the tenant for life in the exercise of his powers under section 22 (2) of the Settled Land Act, 1882. They were also bound to satisfy themselves that proper security was offered and were entitled to the costs and charges incurred by them in procuring such satisfaction.

The plaintiff by his summons asked "that it might be declared that upon a direction under sub-section 2 of section 22 of the Settled Land Act, 1882, given by the applicant as tenant for life under the above-mentioned settlement to the respondents as trustees of the said settlement for the purposes of the Settled Land Act, 1882, to invest capital moneys in their hands as such trustees as aforesaid upon the security of a mortgage referred to in such direction, the respondents as such trustees as aforesaid are bound to invest the same accordingly, if such mortgage purports upon its face to be such a mortgage as is by the settlement or by law authorized as an investment of such capital moneys, and that they are not under obligation or entitled to satisfy themselves as to, or examine or make any inquiry as to the title to, or value of, the security included in such mortgage, and that they are not entitled to make any alteration in the form of such mortgage."

COZENS-HARDY, L.J., held that the trustees for the purposes of the Settled Land Acts must satisfy themselves as to the title and value of the proposed investment just as any ordinary trustee would.

The tenant for life appealed.

A. à Beckett Terrell and *Bovill*, for the plaintiff.

Eve, K.C., and *H. Fellows*, for the trustees.

After some argument, at the suggestion of the Court, the order was agreed to be varied as follows: Discharge order below, declare that the respondents are not bound to advance capital moneys upon the security of a mortgage unless and until satisfied that the direction of the tenant for life with reference to the property proposed to be mortgaged has been given upon a proper report as to the value of that property, and that a proper investigation of the title of the property has been had and that proper advice as to the form of the mortgage has been given, and that on being so satisfied the respondents will be bound to comply with such direction. Tax costs of all parties of this appeal as between solicitor and client and let the respondents pay and retain them out of capital moneys.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Hamilton Fulton*, Salisbury; *Collyer-Bristow & Co.*, for *Stone, Simpson, & Mason*, Tunbridge Wells.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 15.

LONG EATON RECREATION GROUNDS CO. (LIMITED) v. MIDLAND RAILWAY CO. (a.)

Lands Clauses Acts—Compensation—Injuriously affecting land—Breach of restrictive covenant—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 68.

Where a railway company, having taken land under its compulsory powers, does an act which amounts to a breach of a restrictive covenant imposed for the benefit of adjoining land, such breach may be the subject-matter of compensation for injuriously affecting the adjoining land, under section 68 *of the Lands Clauses Consolidation Act*, 1845.

Judgment of Lawrance, J. (ante, *p.* 120), *affirmed.*

Appeal by the defendants from the judgment of Lawrance, J., at the trial of an action without a jury, *ante*, p. 120.

The action was brought to recover £650, the amount of compensation assessed by a sheriff's jury, under section 68 of the Land Clauses Act, 1845, in respect of lands of the plaintiffs injuriously affected by the execution of works of the defendants.

In 1884 the plaintiffs purchased an estate at Long Eaton, which they intended to develop for building purposes, and they laid out thereon two roads, one of which was called Springfield-avenue. In 1886 they sold the land between these two roads in plots to various grantees, retaining the rest of the land in their own hands, and laying it out as a recreation ground. The conveyances from the plaintiffs to the grantees contained covenants that the grantees would not erect or permit to be erected any erection or building of any kind except a fence wall not more than 2ft. high with suitable iron palisades nearer to Springfield-avenue than the line on the plan annexed to their conveyance and marked "building line," and most of the conveyances contained covenants that the grantees would not erect any buildings on the land conveyed other than private dwelling-houses with proper conveniences thereto fronting Springfield-avenue of a certain value, and would not carry on upon the land conveyed any trade or business of a noisy or offensive character.

The defendants, in pursuance of powers conferred upon them by the Midland Railway Act, 1899 (which incorporated the Lands Clauses Acts), took the land between the two roads from the grantees to whom the plaintiffs had sold it, and built thereon a railway on an embankment about 18ft. high, with a bridge across a road called Station-road, which ran at right angles to Springfield-avenue. The embankment encroached a few feet beyond the building line for its whole length, and for about two-thirds of its length the greater part of it was upon land with regard to which the restrictive covenant as to building only private dwelling-houses applied. The defendants, when they purchased the land in question, took with notice of the restrictive covenants.

By a notice in writing the plaintiffs claimed compensation under section 68 of the Lands Clauses Act, 1845, in respect of their land being injuriously affected by the execution of the defendants' works, and an inquisition was taken before the sheriff and a jury, when the jury awarded the plaintiffs £650.

Lawrance, J., held that the interference with the benefit of the restrictive covenant was an injurious affecting of the plaintiffs' land within the meaning of section 68 of the Lands Clauses Act, 1845, and that they were entitled to compensation. He therefore gave judgment for the plaintiffs for the amount assessed by the sheriff's jury.

The defendants appealed.

Baggallay, K.C., W. J. Noble, and *C. H. Sargant*, for the defendants.

Hugo Young, K.C., and *W. H. Stevenson*, for the plaintiffs.

The following cases were cited: *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180; *Beckett* v. *Midland Railway Co.*, 16 W. R. 221, L. R. 3 C. P. 82; *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, 44 W. R. Dig. 144; *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Anderson*, [1898] 2 Ch. 394, 47 W. R. Dig. 168; *In re Masters and the Great Western Railway Co.*, 49 W. R. 499, [1901] 2 K. B.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

84; *In re London, Tilbury, and Southend Railway Co. and Gower's Walk School Trustees*, 38 W. R. 343, 24 Q. B. D. 326; *Metropolitan Board of Works* v. *Howard*, 5 Times L. R. 732.

COLLINS, M.R.—In this case Lawrance, J., has held that the plaintiffs are entitled to the benefit of the verdict of a sheriff's jury assessing the amount of compensation payable to them in respect of the injurious affection of certain lands of theirs by reason of the making of a line of railway by the defendant company. The defendants now contend that that judgment is wrong, because, although the plaintiffs have suffered damage in fact, there has been no damage in point of law. There are two restrictive covenants by breach of which the plaintiffs' lands are said to have been injuriously affected. The first relates to that part of the land taken by the defendants which lies in front of a building line marked on conveyances granted by the plaintiffs, and prohibits the erecting thereon of any erection or building except a fence wall of the height of two feet. The second relates to the land behind the building-line and prohibits the erecting of any buildings other than private dwelling-houses. The defendants admit that what is called the toe of the embankment which they have made encroaches beyond the building line, and that that constitutes a breach of the first covenant, but they contend that the embankment itself behind the building line is not a building, and therefore does not involve any breach of the second covenant. They further say that the breach of the first covenant, being a breach of a merely restrictive covenant, is not the subject-matter of compensation under section 68 of the Lands Clauses Act. This latter point is common to the whole of the case, and raises the broad question whether the breach of a restrictive covenant can be the subject-matter of compensation.

The defendant's first contention, however, is that, supposing they are wrong on this broad question, the verdict of the sheriff's jury has awarded in a lump sum compensation which might legally be awarded and compensation which could not legally be awarded, and that so long as either part of the award cannot be supported the award is bad altogether. That contention seems to me to be clearly contrary to what was laid down by the House of Lords in *Metropolitan Board of Works* v. *Howard*. In my opinion, however, it is not necessary to consider that point in this case, for I have come to the conclusion that no distinction can be drawn in this respect between the two covenants, and I am brought to the main point, whether a breach of a restrictive covenant can be the ground for compensation claimed by an owner of land for whose benefit the restriction has been imposed. I see no reason why it cannot, if it can be shown that the restriction has been imposed for the benefit of the land retained. Here it is obvious that the intention was to protect the land remaining in the hands of the vendors. It was for that purpose that the covenants were inserted, and it is admitted that there has been a breach of the first, and, in my opinion, there has also been a breach of the second. The object of the second covenant was to secure that nothing should be built on the land except private dwelling-houses, and that covenant was broken by putting an embankment on the land, for the word "building" is not confined to bricks and mortar, but is certainly applicable to an embankment. On principle, why should not the breach of such covenant be the subject-matter of compensation? A distinction is drawn between damage to a landowner and damage to land itself. Where a restriction is put on a user of land for the benefit of neighbouring land, and the value of the neighbouring land is thereby enhanced, the withdrawal of that benefit is the subject-matter of compensation.

It seems to me that the authorities are in favour of this view. [His lordship referred to *Kirby* v. *Harrogate School Board*; *In re Masters and the Great Western Railway Co.*; and *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Anderson*.] I agree with the judgment of Lawrance, J., and I think that the appeal should be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors. *Lee & Watts*, for *Whittingham & Williams*, Derby; *Beale & Co.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 3.

ROYAL EXCHANGE ASSURANCE CORPORATION v. SJOFORSAKRINGS AKTIE-BOLAGET VEGA. (a.)

Insurance—Marine—Time policy—Continuation clause—Time policy for more than twelve months—Specification of particular risk—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 93.

A policy of marine insurance on a ship, expressed to be for and during a period of twelve months, contained a clause which provided that, if the ship was at sea or abroad at the expiration of the policy, it was agreed to hold her covered by the policy until arrival at the port of final destination. The ship was lost upon a homeward voyage after the expiration of the twelve months. In an action on the policy,

Held, that the policy was invalid for failure to satisfy the requirements of section 93 *of the Stamp Act*, 1891.

Judgment of Bigham, J. (ante, *p.* 25, [1901] 2 *K. B.* 567), *affirmed.*

Appeal from the judgment of Bigham, J., at the trial of an action without a jury, *ante*, p. 25, [1901] 2 K. B. 567.

The action was brought on a policy of reinsurance. The question was whether a policy of marine insurance, expressed to be for twelve months and containing a continuation clause, was invalid under section 93 of the Stamp Act, 1891, as being a time policy for more than twelve months. The facts of the case are stated *ante*, p. 25.

Bigham, J., held that the policy was invalid, and gave judgment for the defendants.

The plaintiffs appealed.

J. A. Hamilton, K.C., and *A. H. Chaytor*, for the plaintiffs.

Scrutton, K.C., and *Theobald Mathew*, for the defendants.

COLLINS, M.R.—I am of opinion that the judgment of Bigham, J., must be affirmed. The action is brought on a policy of reinsurance. The plaintiffs are an insurance company, and having paid a sum of money on a policy granted by them they seek to recover a portion of that sum from the defendants, who are a Swedish insurance company, with whom they had effected a policy of reinsurance. At the trial the policy of reinsurance was tendered in evidence by the plaintiffs, but, as it was not stamped, the learned judge, acting in accordance with section 14 of the Stamp Act, 1891, took notice of

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the omission and proceeded to consider the question whether the policy could legally be stamped after execution; and having looked at the instrument for that purpose, he came to the conclusion that having regard to other provisions in the Act it was invalid. That is the point which we have to consider, whether this policy is or is not invalid. The question turns mainly on section 93 of the Stamp Act, which is as follows: "(1) A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance. (2) No policy of sea insurance made for time shall be made for any time exceeding twelve months. (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months." Does the policy in the present case comply with the requirements mentioned in sub-section 3? It is expressed to be a reinsurance and to be subject to the same clauses, terms, conditions and continuations as the original policy; and in the margin are the words: "Continuation clause as per original policy." The original policy was for twelve months, and it contained this continuation clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a *pro rata* daily premium to the within." The question is whether in a policy in those terms the risk is sufficiently described to satisfy sub-section 3 of section 93 of the Stamp Act. What happened to the vessel was this: She was damaged on a voyage out to America, and she put in to Quebec, where she was repaired, and after the twelve months had expired she started from Quebec on her voyage home, and was never heard of again.

The learned judge, as I have said, held that the policy was invalid. Counsel for the plaintiffs now put forward grounds on which they suggest that it may be supported. Their argument is that the policy may be considered as being, in the first place, a time policy for twelve months, the dates of the commencement and of the ending of the period being defined, and that then the continuation clause may be said to provide for a voyage after the expiration of that time, and to constitute a voyage policy. This argument puts them in the difficulty of having to answer the question where is the voyage from and where is it to. They say that the voyage is from the place wherever the vessel happens to be at the time when the time policy expires, and to the port to which the vessel ultimately comes in the United Kingdom or on the Continent. That seems to ignore the provisions of the Act, which insists on the particular risk being specified. The suggested risk might begin anywhere in the world, and it might end at any time at any port in the United Kingdom or the Continent. In my opinion such a risk is incompatible with the requirements of the section. The plaintiffs sought to distinguish this case from *Home Marine Insurance Co.* v. *Smith*, 46 W. R. 61, [1898] 2 Q. B. 351. But I think that no distinction can be drawn in their favour. I agree with Bigham, J., in holding that this policy is invalid by virtue of the statute. He pointed out the objection to the argument that this policy was in effect a time policy followed by a voyage policy—viz., that, if that were so, there would be in the same policy two contracts—one a time policy, to which ne implied warranty of seaworthiness attached; the other a voyage policy, to which such a warranty did attach. He also pointed out that the voyage was not specified, its termini not being defined. I also agree with him in thinking that this policy cannot be regarded as a time policy for twelve months followed by another time policy for an indeterminate time. The suggested second time policy would be incompatible with the statute as being too indefinite.

Then it was said that, this policy having been effected with a Swedish company and having been executed in Sweden, the parties must be taken to have intended that it should be construed by Swedish law and not by English law, and to have agreed that this particular objection should not be taken. But the policy contains this clause: "In case of any dispute under this policy the Vega Co. agree to be bound in all things by the jurisdiction and decision of the English law courts." The inference seems to me to be clear that the parties intended to be bound by English law and to have their rights under the policy measured by English law. At any rate, when the case comes into an English court, I think it is out of the power of the parties to fetter the judge in the discharge of the duty imposed upon him by the statute to take stamp objections. And I do not think any distinction can be drawn in this respect between what may be called a mere stamp objection and an objection going to the validity of the document itself. The section of the Stamp Act which this policy fails to satisfy annuls the document itself, and it follows that no suit can be maintained on it in this country. I entirely agree with the judgment of Bigham, J., and I think the appeal must be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Chan. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) — July 2.

In re WOOD.
WOOD *v.* WOOD. (*a.*)

Will — Construction — Illegitimate children — Gift to children by name—Gift to next-of-kin of children.

A testator, after bequeathing legacies to each of his seven children by name, gave the residue of his estate to his said seven children in equal shares, the shares of each daughter to be settled as therein mentioned, with an ultimate trust in the event of a daughter dying without issue "for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates." Three of the children named in the will were born before marriage. One of these, a daughter, died without issue.

Held, that the testator having by his will shown an intention that all his children should be treated as legitimate and akin to one another, the persons who were to take under the statute were to be ascertained also on that footing. Consequently the deceased daughter's share devolved upon those persons who at the time of her death would have been her next-of-kin according to the statute if she and all the other children named in the will had been legitimate.

Decision of Kekewich, J. (ante, *p.* 102, [1901] 2 *Ch.* 578), *reversed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal from a decision of Kekewich, J. (reported *ante*, p. 102, [1901] 2 Ch. 578).

The testator by his will, after bequeathing legacies to each of his seven children by name, devised and bequeathed his residuary estate to trustees upon trusts for conversion and investment, and for the payment of the income to his widow during her life, and directed that after her death the trustees should stand possessed of his residuary estate in trust in equal shares for such of the said seven children as should then be living, and should have attained or might attain the age of twenty-one years, and for all or any of the issue—who being a male or males should attain the age of twenty-one years, or being a female or females should attain that age or marry—of any of his said children who should die in the lifetime of his widow leaving issue living at her death, and so that such issue should take through all degrees according to their stocks and in equal shares the share or shares which their parent would have taken if living at the time aforesaid, and so that no issue should take whose parents should be living at the time aforesaid and capable of taking. He also directed his trustees to retain the legacy or other bequest, and also the share of his residuary trust estate which any daughter of his might take under those provisions and to hold the same upon trust to pay the income of each such daughter's legacy and share to her during her life for her separate use during any coverture and after her death in case she should leave a husband surviving her, upon trust to pay the income to the husband for life or any less period if she should so direct or appoint, and subject thereto upon trusts for the benefit of her children; and if there should be no such child then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes.

After the death of the testator it was discovered that three of his children were born before his marriage.

The widow of the testator died in December, 1900, and six of the seven children survived her.

One of the testator's illegitimate children, a daughter, died in January, 1901, without having had any issue or exercised the power of appointment given to her by the will in favour of her husband (who survived her).

A summons was taken out by the plaintiff, one of the legitimate children, raising the question whether the legacy and share of residue of the deceased daughter upon her death without issue (1) devolved upon the persons who would have been her next-of-kin at the time of her death in case she and the other persons described in the will as the testator's children had all been legitimate, or (2) passed to her legal personal representative as if it had been absolutely bequeathed to her, or (3) became divisible amongst the persons entitled in right of the testator's widow and legitimate children as if he had died intestate in relation thereto.

Kekewich, J., held that the illegitimate children could not be treated as legitimate for the purpose of benefiting those who would have been their next-of-kin had they been legitimate. He held that there was an absolute gift to the deceased daughter and that her legal personal representative took her legacy and share of residue.

The plaintiff appealed.

Warrington, K.C., and *Chubb*, for the appellant.—The testator's meaning is that the share of a daughter is to be held upon trust for those persons who would be her next-of-kin, as if she had died unmarried. The testator has said already in his will that all his children are to be treated as legitimate. He intends, therefore, that the daughter's share is to go to the persons who would have been her next-of-kin if she had died unmarried and been legitimate, and the reference to the Statute of Distributions ought not to be allowed to defeat this intention.

They cited *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265; *In re Deakin*, 43 W. R. 70, [1894] 3 Ch. 565; *In re Standley's Estates*, L. R. 5 Eq. 303, 16 W. R. Ch. Dig. 151; *In re Jodrell, Jodrell* v. *Seale*, 38 W. R. 721, 44 Ch. D. 590; and *Wilkinson* v. *Adam*, 1 Ves. & B. 422.

Renshaw, K.C., and *F. Thompson*, for the persons entitled on an intestacy.—Next-of-kin according to the statute must mean the persons who can allege that they are actually entitled under the statute, not persons who in certain contingencies would be so entitled.

They referred to *Mortimore* v. *Slater*, 26 W. R. 134, 7 Ch. D. 322; *sub. nom. Mortimore* v. *Mortimore*, 27 W. R. 601, 4 App. Cas. 448; and *Bullock* v. *Downes*, 9 H. L. Cas 1, 9 W. R. H. L. Dig. 18.

P. O. Lawrence, K.C., and *Peterson*, for the legal personal representative of the deceased daughter.

Warrington, K.C., replied.

VAUGHAN WILLIAMS, L.J.—In this case Romer and Stirling, L.JJ., take the view that the decision of Kekewich, J., cannot be supported. I confess that although I am not prepared to differ from that conclusion, I shall concur in it with great hesitation. I agree with Kekewich, J., that if we adopt the construction of this will which we are invited by the appellant to adopt we are making a distinct step in advance of any that has been heretofore taken. I start here with the proposition which is clearly laid down by Lord Halsbury in *In re Jodrell*, that, inasmuch as it is lawful if you choose to use apt words to give legacies to illegitimate children and also to the next-of-kin (so called) of illegitimate children, you must always have regard to the intention of the testator though he may not have used apt words—that is, though he may have used words which would be apt only in the case of legitimate children or the next-of-kin of legitimate children—if once you are satisfied upon the terms of the will and within its four corners that it was the testator's intention to include illegitimate children. Here, starting with that proposition, I want to see whether in the present will the testator has used such words as to make it, I do not say absolutely certain, but reasonably clear that he intended by the words which he has used to give this property after the deaths of his illegitimate children respectively without issue to the persons who would have been the next-of-kin of those children if they had been legitimate. It is said that that is so in this case because this is one of the cases in which a testator has created a dictionary for himself and you must read his will in the light of that dictionary. It is said that if you look at the earlier part of the will the testator speaks of his children illegitimate as well as legitimate under the general term "children," and that you must read the will with the term "children" having this meaning. I agree. But then it is said that a wider connotation must be put upon the word, that it not only includes illegitimate as well as legitimate, but that it means that those persons whom the testator describes as children shall for all purposes be treated as legitimate. Therefore when he speaks of "the persons who at the death of such daughter would have become entitled to such share under the

statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married," you must read that definition as not merely referring you to the statute, but as if the words had run on "and in case she had been legitimate." I think this is a very material step in advance. We are invited because of the condition in fact of the testator's family, to give to his will a meaning altogether different from and inconsistent with the real words of the will. The real words of the will refer you to the statute as the index to those persons who are to receive these shares in the distribution of the testator's estate. If you do refer to the statute these persons whom the appellant represents who are not next-of-kin and are not within the statute at all would take no share. But instead of referring to the statute, what you are to do, according to the construction urged on us, is to give this property to persons who, if the children referred to had not been illegitimate but legitimate, would have been entitled. It does seem to me that that is going a step further than any case has yet gone. But it is said you must do that because if you do not you defeat what is the obvious and the only possible intention of the testator. I do not know how far that doctrine is to be carried. Speaking for myself, I cannot help thinking that you might have words defining a class with such accuracy and particularity that it would be impossible to override them, on the ground that if you construe those words strictly there would never have been any class who could take, and that the testator if he was versed in the law must have known that that was so. It seems to me always possible that the mistake has arisen from the testator's ignorance of the law, that he never had any intention of using the words in any other than their natural meaning, because he never knew that there was any necessity for doing so. In such a case it seems to me that it would be impossible to say that the testator intended to create a dictionary for himself, and in the present case it does seem to me a strange thing to say that because the testator intended to create a dictionary for himself in respect of the words "child" or "children," he also intended to create a dictionary for himself in respect of the word "next-of-kin." However, in spite of these considerations, though I think the case is difficult one, I have persuaded myself to concur in the judgment of my learned brethren. In will cases one is so often compelled to do violence to that which one believes to be the intention of the testator that it is pleasant to give effect to what I have no doubt was the intention of this testator—viz., that his children one and all should stand on the same footing.

ROMER, L.J.—This is a curious case, but I think the appeal ought to succeed. The testator by his will with regard to each share of his illegitimate children has declared that the share shall be held by the trustees upon certain trusts. In the case of a daughter the trusts are, after her death without issue, "for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes." To my mind it is clear upon this will that the testator intended that some persons should be capable of taking under that gift over in the event of the daughter's dying without issue. The question is, What persons are to take? It is clear that the testator could not have intended to provide by means of that gift for persons who could have been ascertained under the statute, treating the daughter as illegitimate, because on that footing he could have attached no meaning at all to the gift. I decline to say that the testator had no meaning in making that gift. I think he had a meaning. Then what does he mean? If he intended to treat the daughters as legitimate, has he shown what he intended by this gift? Can I have any doubt as to what he meant? In my opinion, no one can have any doubt as to what the testator meant here. I am able to give effect to his intention, and I resolve to do so. The testator has throughout his will shown his intention that all his children shall be treated as legitimate, and you are to ascertain the persons who are to take under the statute by treating all the children as legitimate. On that footing alone can you give effect to what the testator has shown to be his intention. On that footing the difficulty disappears, and the will becomes clear. I think, therefore, that the appeal ought to succeed.

STIRLING, L.J.—I am of the same opinion. [His lordship read the will, and continued:] One of the testator's illegitimate daughters has died without issue and the question arises as to the effect to be given to that ultimate gift. The testator refers to these seven persons as his children: it follows from that that they have kin—they are akin to one another and akin to the testator himself. We have now to inquire who are the persons who on the death of a daughter would become entitled to her share under the Statute of Distributions. [His lordship read the statute, and continued:] Those are the persons whom the testator points out as the objects of his bounty in case one of his daughters dies without leaving issue. In ascertaining the next-of-kin thus referred to who are meant by the testator, are we, because the testator has adopted this reference to the statute as a means of expressing his own intention, to treat the illegitimate daughters as having no next-of-kin? It seems to me plain that the intention of the testator was that on the death of a daughter persons would be found who should succeed to her share. The testator treats all his children as akin to one another, and the persons he means to take are the persons who are next-of-kin in the view, not that these illegitimate children are akin to nobody, but that they are akin to their brothers and sisters. Though this decision goes further than any case yet decided, I think it falls, nevertheless, within the authority of the cases cited to us on behalf of the appellants. For these reasons I think this appeal should be allowed.

Solicitors, *Indermaur, Clark, & Palmer; Field, Roscoe, & Co.*

High Court of Justice.

Chan. Div. Swinfen Eady, J. — April 29, 30; May 1, 2, 14.

RANDALL (LIMITED) v. THE BRITISH AND AMERICAN SHOE CO. (a.)

Company—Name painted or affixed on shop—Breach of Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 41, 42 *—Right to protection—Injunction.*

In an action for an injunction to restrain defendants from using a certain trade-name, similar to one used by plaintiff company, although not their corporate name, the defendants pleaded that plaintiffs having contravened

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

sections 41 *and* 42 *of the Companies Act*, 1862, *were precluded from any right to the protection of their trade-name.*

Held, applying the principle of Wright *v.* Horton, 36 *W. R.* 17, 12 *App. Cas.* 371, *that plaintiffs had established a right to the protection of their trade-name.*

Pearks, Gunston, & Tee (Limited) *v.* Thompson, Talmey, & Co., 18 *Rep. Pat. Cas.* 185, *followed.*

The plaintiffs were H. E. Randall (Limited), who owned and carried on a number of shops for the sale of boots and shoes. The articles sold in these shops were of British manufacture.

In 1897 the plaintiffs determined to open a shop for the sale of American goods, and in March of the same year a shop was opened in Regent-street under the name of "The American Shoe Co." This name was used to distinguish the shop from the other shops carried on by plaintiffs exclusively for the sale of British goods.

It appeared that the plaintiffs had not, as far as their Regent-street shop was concerned, at first complied with the requirements of the Companies Act, 1862, ss. 41 and 42, which provides (*inter alia*) for the painting and affixing of the name of the company on the outside of every place of business, and on the official publications, invoices, and receipts of the company. Their attention being called to this, they had immediately painted their corporate name under their trade-name of "The American Shoe Co." There had also been other omissions to comply with the above sections, which had been remedied.

The defendants were the British and American Shoe Co., previously known as "The London American Shoe Co.," who carried on a business at Putney.

This was an action for an injunction to restrain the defendants from using the name "British and American Shoe Co." or any other name so nearly resembling the name of "The American Shoe Co." as to lead to the belief that it was the name of a business connected with that of the plaintiffs.

Vernon Smith, K.C., and *Gatey*, for the plaintiffs.

Micklem, K.C., and *Wright Taylor*, for the defendants, said that the omission of the plaintiffs to comply with sections 41 and 42 of the Companies Act, 1862, precluded them from any right to the protection of the name "The American Shoe Co." Plaintiffs had not acquired the name by lawful user, and the court would not protect it: *Leather Cloth Co.* v. *American Leather Cloth Co.*, 12 W. R. 289, 4 De. G. J. & S. 137, 142, 13 W. R. 873, 11 H. L. Cas. 523.

SWINFEN EADY, J., held that, subject to the question of law raised, the plaintiffs, had established their right to an injunction. It remained to be decided whether the plaintiffs were precluded from obtaining relief by any breaches of sections 41 and 42 of the Companies Act, 1862. His lordship was satisfied that such breaches had been made inadvertently. Did they preclude the right of the plaintiffs to an injunction? It was said that the present case was to be distinguished from the case where a company, having purchased an old business, continued to carry it on under the old name without adding their own. Here the plaintiffs by their own exertions had created and made famous the name and reputation of "The American Shoe Co." He could see no reason for drawing a destinction between the two cases. The Companies Act, 1862, ss. 41 and 42, imposed certain penalties on a company for non-compliance with its provisions, but these penalties did not include the forfeiture of its goodwill to any dishonest person who chose to steal it. In his opinion the present case was governed in principle by *Wright* v. *Horton*, 36 W. R. 17, 12 App. Cas. 371, and in that respect he followed the decision of Farwell, J., in *Pearks, Gunston, & Tee (Limited)* v. *Thompson, Talmey, & Co.*, 18 Rep. Pat. Cas. 185.

Solicitors for plaintiffs, *Ellis, Munday, & Clarke.*

Solicitor for defendants, *Alfred Syrett.*

K. B. Div. (Channell, J.) April 11; May 14.

EAST STONEHOUSE DISTRICT LOCAL BOARD v. WILLOUGHBY. (a.)

Limitation statutes—Leaseholds—User of adjoining land—Accretion to holding—Statute of Limitations (3 & 4 *Will.* 4, c. 27), s. 7.

A. was the tenant of two plots of land from the same landlord. He executed in his lifetime a deed directing that after his death the two plots should be held by the trustees on different trusts. He died in 1848. *The* cestui qui trustent *of the one plot used and occupied the other plot without acknowledgment or payment of rent for over forty years.*

Held, that their occupation was not that of trespasser or tenant at will, but was under the trusts of the will, and that consequently the Statute of Limitations did not run as against the landlord.

Action without a jury.

The facts of the case and the arguments of counsel appear sufficiently from the judgment.

Upjohn, K.C., Clavell Salter, and *Hawke*, for the plaintiffs.

Foote, K.C., and *Bodilly*, for the defendant.

The following cases in addition to those mentioned in the judgment were cited in the course of the argument: *Tichborne* v. *Weir*, 8 Times Law Reports, 713, 41 W. R. Dig. 120; *Andrews* v. *Hailes*, 1 W. R. 366, 2 E. & B. 349; *Tabor* v. *Godfrey*, 64 L. J. Q. B. 245, 43 W. R. Dig. 91; *Board* v. *Board*, 22 W. R. 206, 43 L. R. Q. B. 4; *Burroughs* v. *M'Creight*, 1 Jo. & Lat. 290.

May 14.—CHANNELL, J., read the following judgment: This is an action of ejectment which came on for trial before me at the last assizes at Exeter, and the points of law arising in it have since been argued on further consideration before me in London. Stated shortly, the question is, what is the effect of the parties beneficially interested in the leases of a plot of land at East Stonehouse having for many years without payment of rent or acknowledgment used and occupied two pieces of land outside their proper boundary and included in the parcels demised by leases of an adjoining plot. The leases were under the same landlord, and each lease had been renewed several times without any notice being taken of the fact that the occupation did not correspond with the parcels described as demised. The case is further complicated by the fact that for a considerable part of the time the terms created by the leases were legally vested in the same persons as trustees. It is necessary to state the facts precisely.

In the year 1819 Lord Mount Edgcumbe granted to James Moir a lease for ninety-nine years, provided three named persons lived so long, of a plot of land at East Stonehouse described by its dimensions and by reference to a plan. The lease was at a small rent, and was renewable at a fixed fine if the

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

lessee applied for the renewal within a limited time after the first life dropped. This lease has been renewed on similar terms in 1835, 1856, and in 1890, and the plot of land demised has always been described as of the same dimensions, and the plans on the leases have been identical, except as regards the names of the occupiers of the lands adjoining. It is a quadrangular plot, bounded by four straight lines, and the dimensions being given in the plans it is quite easy to identify. On the plot of land so demised James Moir built a foundry, and in the argument before me this plot was called the foundry plot, and the leases of it the foundry leases, and it will be convenient to use the same terms in my judgment.

In 1831 Lord Mount Edgcumbe granted to the same James Moir a similar lease for ninety-nine years, subject to three lives, of land adjoining the foundry plot. This same plot was called in the argument before me the stable plot, as at one time there was a stable on it, and the leases of the plot were called the stable leases. The original stable lease was renewed in 1856 and 1894 and 1898, and the description of the plot demised and the plans on the lease were always the same. The stable plot abutted on the foundry plot on the north and west sides of the foundry plot. On the west side of the foundry plot, and extending all along that west side there was a small strip included in the stable plot. On the north side of the foundry plot was the larger portion of the stable plot; on the east side of both plots was a street called Phœnix-street, and on the south side of the foundry plot, and along the south end of the strip, was a road called Buckingham-place.

Prior to the year 1843 (to which date the memory of one of the witnesses called before me went back) James Moir was using the strip of the stable property, which was on the west side of the foundry property, as a yard in which he stored articles from the foundry. There was then a wall at the northern end of the strip dividing it from the rest of the stable property, then used as a garden, in which wall there had at one time been a door into the garden, but in 1843 the door had been bricked up, and it has remained so ever since. That strip has from that time always been occupied with the foundry as a storage yard, and there has been no access from it to the other part of the stable property except through the foundry, and it is one of the two pieces sought to be recovered in this action.

James Moir also had erected, prior to 1843, on the stable property on the Phœnix-street side some workshops or sheds, which he used in connection with the foundry. The other land and buildings the subject of this present action are at this spot. They now consist of a smith's shop, which adjoins the foundry plot, and a loft and room used as a pattern shop, which is over a stable. The stable is in the possession of the plaintiffs, who are the present lessees of the stable plot, but the smith's shop and loft or pattern shop are in the possession of the defendants, the present lessees of the foundry plot. According to the recollection of the older witnesses there have been some slight alterations in these buildings since they first recollect them in James Moir's possession, but this, I think, is immaterial.

In 1842 James Moir, being then the lessee both of the foundry plot and of the stable plot, and also of two other leaseholds, made a settlement bearing date the 12th of January, 1842, whereby he assigned all the four leaseholds and also the stock-in-trade and chattels used in the foundry to William Lane to hold on such trusts as he should thereafter by deed appoint, and until appointment for himself. By deed dated the 18th of November, 1846, he executed this power of appointment. This deed requires careful consideration. It was assumed in the argument by counsel on both sides that by this deed the beneficial interest in the foundry lease was given on one set of trusts, and the beneficial interest in the stable lease on another set of trusts, and after carefully considering the deed I have come to the conclusion that this assumption of counsel is correct, but I think it is material to notice, as accounting possibly for what has occurred, that it might quite well be contended that the deed gave all of the premises, whether in the one lease or the other, upon which the foundry business was then being actually carried on upon the one set of trusts, and the residue of the property only upon the other set of trusts. This deed of 1846 does not recite the leases, but only the previous deed of settlement of the 12th of January, 1842, and other apparently similar settlements of other property of the same date.

The settlor first appoints all the properties to himself for his life, and makes appointment of premises other than those to which this action relates, and then appoints "all that piece or parcel of land situate in Phœnix-street wherein the said J. Moir, party thereto, carried on his business of an iron founder together with all buildings and erections thereon upon trust to pay the rents and profits thereof to John Moir, son of him the said James Moir, or permit him to occupy the same during his life or until he should assign or charge his interest," and on the determination of John Moir's interest upon trust to assign the same to the children of John Moir on their attaining twenty-one. He then directed a sale of the stock-in-trade, &c., of the iron foundry business, but gave John Moir the right to purchase it at a valuation. No doubt, therefore, he contemplated that John Moir should carry on the business of the foundry, and the words which he used in appointing the property are capable of passing all the land and buildings on which the business of the foundry was actually carried on without reference to the title being under one lease or the other. He made no express appointment of the stable property, but he appointed the residue of the properties in the settlement upon trust to divide the rents and profits between a grandson and two married daughters for their lives and afterwards for their children. The deed then went on as follows: "And the said James Moir, party hereto, doth hereby further appoint that the smith's shop and stable erected on the garden situate in Phœnix-street shall be rented by the said John Moir so long as the said John Moir shall see fit at the yearly rent of £20, the said John Moir paying all rates and taxes in respect of the same."

As the smith's shop (which is the same smith's shop as is now in dispute) was clearly then used with the foundry business, and was by this clause as to renting clearly assumed not to have been appointed to John Moir, I think the true construction of the deed must be to give only so much of the foundry property as was included in the foundry lease to John Moir. Further, there is no provision for apportioning the rent or the sums payable on renewal under the stable lease as there should have been if that property was to be divided. Probably it was intended that John Moir should rent all of the property used with the foundry, but included in the parcels demised by the stable lease. But the settlor seems to have omitted the strip to the west of the foundry, and it looks as if he had been under the impression that the only part of the stable property used with the foundry was the smith's shop and stable. There is no evidence of any rent having been paid by James Moir for the smith's shop, nor is there any evidence of

the stable having ever been occupied by John Moir. He did, however, occupy, and so did his children, both the smith's shop now in question which is what he was to be allowed to rent with the stable, and also the pattern shop over the stable, and the strip towards Buckingham-place which is not mentioned in the deed of 1846 at all.

James Moir died in 1848, and John Moir the son carried on the foundry business and died in 1853. His widow then carried it on, and subsequently one of his daughters, Mrs. Triscott. The widow took nothing herself under the settlement, and no doubt she was acting as trustee and manager for her children, some of whom were certainly under age.

On the 12th of March, 1856, the foundry lease was renewed and on the 27th of August, 1856, the stable lease was renewed, each new lease being granted to the settlement trustees, and it seems important, therefore, to see what was the character of the possession which John Moir's widow had in 1856 of the two pieces of land in dispute. Mr. Foote, for the defendant, contended that as to both pieces she was either a trespasser or at most a tenant at will. Even if John Moir had been tenant of the smith's shop the right to occupy that as tenant seems to be given only to him personally "so long as he shall think fit," and therefore a tenancy under the strict terms of the appointment would end at his death. How John Moir and subsequently his widow came to be allowed to retain possession of the two pieces of land in dispute without payment of any rent to the trustees cannot now be ascertained for certain. I, however, draw the inference from such evidence as I had before me that it was by mistake and that the plans on the leases were never examined. As regards the smith's shop, no doubt the terms of the clause as to renting that and the stables ought to have drawn attention to the fact that it was included in the demise of the stable property, but this was possibly overlooked. It is of course possible that at first rent was paid and that the payment was discontinued, but there is no evidence of it, and as the stable was not occupied the £20 would not be payable. I am therefore not justified in assuming rent to have been paid or that any actual tenancy was created. At the same time the occupation of those pieces cannot be said to have been a trespass. It must have been by the permission in fact of the trustees, though that permission was probably given in the mistaken belief that the occupation was in accordance with the trust though in fact it was not. I shall have to consider presently what the condition of things must be taken to be at the time of these renewals in 1856, but will continue the history of the case first.

The leases granted by way of renewal, both in 1856 and at other times, appear always to have been in the same form. They referred to the former lease and stated that the new lease was granted in consideration of the term granted by the previous lease being "merged by the re-grant of the same tenement to the lessees in whom the whole legal interest in the residue of the said term is now vested as is hereby covenanted and warranted by the said lessees." Subsequently to 1856 Mrs. Triscott, a witness called at the trial, a daughter of James Moir, and granddaughter of James Moir, the settlor, bought or succeeded to the beneficial interests of her brothers and sisters in the foundry property, and she carried on the foundry business, herself occupying and using the disputed premises. There was no evidence (unless the recital which I am about to mention can be considered evidence) that she ever got an assignment from the trustees of the legal estate in the foundry term, but by deed dated the 24th of July, 1890, Lord Mount Edgcumbe granted to her a new lease of the foundry plot by the old description and plan. There was, it is true, an inaccurate statement in the plan as to the land immediately adjoining the west and north boundary being occupied by certain persons, when in fact the disputed pieces which were in Mrs. Triscott's own occupation, intervened, but this, I think, is quite immaterial. This deed contains the same statement as to Mrs. Triscott being entitled to the whole legal interest which I have quoted above. This is the only kind of evidence that she ever had the legal estate. It was stated by Mr. Clavell Salter in opening the case, and I understand it to be admitted, though I have no note of an express admission, that all three lives in the lease of the 12th of March, 1856, had dropped before the 24th of July, 1890, so that Lord Mount Edgcumbe was not bound to grant a renewal unless he pleased; and under these circumstances he would not very strictly investigate Mrs. Triscott's title. The date when the last of the three lives in the lease of March, 1856, dropped was not stated; but I assume it to have been in the year 1890, shortly before the new lease was granted. Since the case was argued I have endeavoured to get further information on this point and on some other points which appeared left in doubt, but I am informed that there are reasons why I cannot have any further information now. Down to this time (July, 1890) the legal interest in the two terms created in 1856 was in the trustees of the settlement unless they had at some previous time executed to Mrs. Triscott the assignment to which she was entitled, which I think they never did. About the time of renewing the lease in 1890 Mrs. Triscott let the foundry to the present defendants, and subsequently sold it to them. In 1893 an action was commenced for the partition of the settled property, and in the judgment in that action it was, amongst other things, directed that the lease of the stable property of August, 1856, should be sold. Before the sale (probably by direction of the court) the then trustee, one Taylor, took a renewed lease from Lord Mount Edgcumbe, dated the 7th of December, 1894, in the usual form, and with the old description and plan. This new lease was sold by auction to one Saltern, and the assignment to him is dated the 25th of June, 1896. At or about the time of this sale by auction the fact of the occupation by Mrs. Triscott or the defendants of the premises in dispute in this action appears to have been first discovered, and in the assignment dated the 25th of June, 1896, it is recited that the plan on the lease of 1894 was inaccurate, and the assignment is made "of so much of the land demised by the lease of December, 1894, as is in the occupation of Messrs. Goad" (which would not include the disputed portions) "or is now subject to the said lease." It is obvious that the trustee was unwilling to assert his title to the disputed pieces, but nevertheless he assigned such title to them as he had by the lease of 1894. Saltern renewed the lease of 1894 by taking a new lease from Lord Mount Edgcumbe dated the 7th of July, 1898. This was done by the old description and plan and no doubts or inaccuracy of the plan were recited. Then on the 14th of March, 1901, Saltern assigned to the present plaintiffs, who bought for the purpose of widening Phœnix-street; and they shortly afterwards, on the 18th of July, 1901, commenced this action.

Thus, the defendants and their predecessors in title to the beneficial interest in the foundry have had actual possession without acknowledgment of the disputed premises from 1848, when James Moir died. In 1896 the error was discovered, but even then no claim seems to have been made on the defendants; it appears to have been assumed that the error lay in

the plans on the leases. Thus the period of undisputed possession seems to have been upwards of fifty years. During all that time the now disputed premises were as between the persons beneficially entitled to the foundry property and those beneficially entitled to the stable property treated as included in the former property and not in the stable property, but all the time Lord Mount Edgcumbe was receiving the rents to which he was entitled, and in every renewal was treating the disputed premises as part of the stable property.

Under these circumstances I should be glad to be able to decide the case by the doctrine commonly referred to as a lost grant—that is, the rule which says that on long continued user or possession being proved anything requisite to give that user and possession a legal origin ought to be presumed by the court. This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly. It is, in my opinion, a most useful doctrine, and enables the court to avoid interfering with user and possession in cases not covered by the Statutes of Prescription and Limitation, though within the mischief which these statutes were intended to remedy. In particular it can be applied between termors when there is a difficulty in applying the statutes owing to the freeholder not being bound. In the present case there is no plea founded on this doctrine, but there is a plea that the defendants are in possession, which would be sufficient to raise any legal right to retain possession though not an equitable one. In this case it would be necessary in order to justify the present possession of the defendants to infer from the possession of their predecessors during the currency of leases now expired some binding engagement to give the benefit of the renewed lease, which at the most would create a trust, so the point would not be open on the present pleadings without amendment. Further, there might be a difficulty owing to the fact that the stable property was until 1896 in trust, and probably the *cestuis que trustent* were incapable of making a grant. I am by no means sure that these difficulties would be insuperable. There is a very wide arbitration clause in the settlement, and I am by no means sure that it would not be legitimate to infer an award settling the doubts arising on the construction of the settlement, and justifying the occupation which has taken place. But I feel that I ought not to decide the case on the ground of any such presumption, even if on a full consideration I thought it could be so decided, because the point has not been raised (probably for very good reason) by counsel for the defendants, and consequently I have not heard any arguments against it from the counsel for the plaintiffs, and moreover, it is not open on the pleadings as they stand.

The defendants relied entirely on the Statute of Limitations for their defence, and the first point which has to be considered is when, if at all, the statute began to run against Lord Mount Edgcumbe, and in order to succeed the defendants must make out that it began to run at or before the making of the lease of the 27th of August, 1856, for that lease subsisted until 1894, that is, until twelve years before the action was commenced. This question seems to me to depend mainly on the character of the possession at that time of the disputed premises by the widow of John Moir, representing, as she did, Mrs. Triscott and her other children. I am unable to come to the conclusion that there was any tenancy in fact existing to the trustees, and therefore the case of *Corpus Christi College, Oxford* v. *Rogers*, 49 L. J. Q. B. 4, 28 W. R. Dig. 133, as explained in *Ecclesiastical Commissioners of England and Wales* v. *Rowe*, 29 W. R. 159, 5 App. Cas. 736 (see per Lord Selborne, at p. 743), does not apply. But I am equally unable to come to the conclusion that Mrs. Triscott and her brothers and sisters (in whose right Mrs. Moir was carrying on the business) were trespassers. In *Ecclesiastical Commissioners of England and Wales* v. *Rowe*, at the time of the surrender and regrant of the lease the allotment in question was in the possession of a mere "trespasser and disseisor," as Lord Selborne said at p. 742, and that possession could not possibly be considered to be the possession of the lessees who surrendered. Consequently, during the interval of time which the Lord Chancellor held must exist between the surrender and regrant, the allotment was being held against the lessor by the trespasser, and the right of action against him accrued to the lessor. In the case before me Mrs. Moir and her children were in possession of the foundry under the trusts of the settlement, and though in fact those trusts in their favour did not extend to the disputed parcels, yet Mrs. Moir clearly got the possession which she had of them by reason of her possession of the trust property. Under these circumstances the disputed parcels would, in my opinion, be held under the trust they would devolve according to the trusts, and they would be an accretion to the trust property on the same grounds as they would be an accretion to the demised property if it were a case of tenancy. I think under these circumstances the proviso at the end of section 7 of the Statute of Limitations (3 & 4 Will. 4. c. 27) applies, and that Mrs. Triscott cannot be considered a tenant at will to the trustees within the meaning of that section. Mr. Foote contended that the proviso only applied as regards land of which the trustee was in fact trustee for the *cestui que trust*, and said by way of illustration that it could not apply if a man encroached in Middlesex on some land of a person who happened to be trustee for him of land in the county of Devon. That would be so, but in this case, where the possession is obtained by reason of the trust, I think it would be otherwise. It seems to me that, when the trustee surrendered the stable lease in August, 1856, and took a new lease, he had the possession in law and effectually surrendered it to the lessor to enable him to make the regrant, as Lord Selborne says (see top of p. 742), out of his estate in possession just as much as he did when he surrendered in March, 1856, the lease of the foundry of which Mrs. Triscott or her mother was then in the actual physical possession. Even if there were a tenancy at will, I am not sure that it would not be determined by her surrender, though created again after the regrant. It would be so determined, in my opinion, if the supposed tenant at will had notice of the surrender. I think, therefore, on these grounds that the statute did not begin to run against Lord Mount Edgcumbe in 1856.

This point is nearly she same as the second point raised by Mr. Upjohn, that the existence of the trust in itself prevented the statute running. This point he based on the cases of *Lester* v. *Pickford*, 13 W. R. 827, 34 Beav. 576, and *Knight* v. *Bowyer*, 6 W. R. 565, 2 De G. & J. 421. I agree with Mr. Foote that it is possible to distinguish each of those cases. In *Lister* v. *Pickford* the trustees were themselves in actual receipt of the rents and profits but they accounted for these rents to the wrong person. It was held that the persons for whom the trustees really were trustees were not barred by the erroneous payment, because a trustee could not by any act of his own make his rightful possession adverse to the real *cestui que trust*. Here the trustees were not in possession, so that case is not directly in point, though it is rather near to the present. Again,

Knight v. *Bowyer* proceeded on section 25 of the statute, as to express trusts. That section says that when land is vested in a trustee as an express trust, the right of the *cestui que trust* or any person claiming through him to bring an action against the trustee or any person claiming through him shall be deemed to have accrued only when the land shall have been conveyed to a purchaser for valuable consideration, and then only as against such purchaser and anyone claiming through him. Now, here there was an express trust of all the stable property, and the disputed parts were included in that trust. But the section only prevents the statute running in favour of persons claiming through the trustee otherwise than by purchase for value. Mrs. Triscott was certainly not a purchaser for value from the trustee, but it is not clear that she was a person claiming through the trustee. If she had been a mere stranger to the trust encroaching on the trust property and claiming adversely both to the trustee and the *cestui que trust*, the fact of the trust existing would not prevent the statute running in her favour. The question whether she was a person claiming through the trustee is nearly, if not quite, the same question as that which I have already discussed as to whether her possession could be considered the possession of the trustee for the purpose of the surrender, and if I am right in the view I have taken on that question I think she must also be considered as a person claiming through the trustee within the meaning of section 25. In fact, all these questions turn on whether Mrs. John Moir can be considered to have been for a year prior to August, 1856, a tenant at will of the disputed premises to her trustee within the meaning of section 7.

Assuming, however, that the statute did begin to run in 1856 against Lord Mount Edgcumbe, so that he would be barred when his tenant of the stable property was barred, still the statute ran in favour of another tenant (or the *cestui que trust* of another tenant, which I think is the same thing) of the other property, and all the authorities show that a presumption would arise that the encroachment was an accretion to the holding. The result therefore would, in my opinion, be that if Lord Mount Edgcumbe had a right of entry in August, 1856, on these two disputed parcels, these parcels would, when the statute ran out, be presumed to be held with the foundry property, and when that lease determined or was surrendered he could resume possession. That lease did not determine until the 24th of July, 1890, or shortly before, when the third life is said to have dropped. He would then have acquired a new right of possession and it would be within twelve years of this action unless the third life dropped before the 18th of July, 1889. Mr. Foote answers this point as to accretion to the tenancy by referring to the observations of all the Lords Justices in *Attorney-General* v. *Tomline*, 28 W. R. 870, 15 Ch. D. 150, to the effect that this presumption of accretion to the holding is a question of fact, and if on the facts proved in any particular case the landlord and tenant are shown to have "so conducted themselves as to show that the landlord treated the encroachment as not enuring for his benefit" then the presumption would be rebutted. I quote from the judgment of Thesiger, L.J., at end of p. 161; but the language of the other Lord Justices is quite to the same effect. In that case it was said that even if the presumption applied to copyholds the surrender of the original holding and the regrant of it without the encroachment would be sufficient to rebut the presumption. That was in many respects a very different case to the present; but adopting Thesiger, L.J.'s, words I am quite unable to come to the conclusion that Lord Mount Edgcumbe ever recognized this encroachment as not enuring for his benefit. I am convinced that neither he nor his advisers (who probably alone knew anything at all of the matter) ever for one moment recognized any independent title in Mrs. Triscott to these portions of the property. In all probability they assumed without inquiry that she was surrendering to Lord Mount Edgcumbe all she held, and although Lord Mount Edgcumbe cannot be in a better position owing to his ignorance than he otherwise would be, yet he cannot be assumed to have voluntarily given up any of his rights, presumptive or otherwise. Assuming, however, as probably I ought to assume, that he knew the facts as to Mrs. Triscott's occupation, and knew that in consequence he was in a position to claim that she had during the term which was being surrendered held the portions now in dispute as an addition to her proper holding, I do not think he was in a position to regrant them to her, and therefore his not including them in the renewed lease raises no presumption that he did not intend to treat them as having been added to her former holding while it continued. On his acquiring from Mrs. Triscott on the surrender of her term the right to the possession of these portions, the holder of the stable lease would, as it seems to me, become again entitled to them as against Lord Mount Edgcumbe; and in fact he so dealt with the matter, for in 1894 he regranted the whole of the original stable property including these pieces to Taylor.

I do not think the fact that during the currency of the lease of 1856 the owners of the stable lease had lost the right to recover these pieces from Mrs. Triscott and had thereby enabled her to add them to the holding as between herself and Lord Mount Edgcumbe would have at all prevented their claiming the possession of them again from Lord Mount Edgcumbe when he acquired them from Mrs. Triscott at the expiration of the lease of March, 1856. In fact Lord Mount Edgcumbe's right to the disputed pieces on the determination of the foundry lease would automatically vest in the owner of the stable lease. That being so, it does not seem to me that anything happened at the expiration or surrender of that term which rebuts the presumption that during the term these pieces were held under it. I think, therefore, that at this time Lord Mount Edgcumbe acquired the right to the possession, and his leases of 1894 and 1898 were good leases.

That being so, I hold first, that no right of entry accrued to Lord Mount Edgcumbe in 1856, and that on that view his right first accrued on the surrender of the stable lease in December, 1894; secondly, if I am wrong in that, and he did acquire a right of entry in 1856, so that the statute then began to run against him, the effect of its so running was to add the disputed pieces to the foundry lease so that as against Mrs. Triscott he acquired a new right on the determination of that lease in July, 1890, or shortly before that date when the third life dropped, and whichever of those views is correct the Statute of Limitations does not bar this action of the plaintiffs unless that third life dropped before the 18th of July, 1889.

It is not very satisfactory that I should have to give judgment in this case, which will probably go to the Court of Appeal and possibly to the House of Lords, without the date of the determination of the lease of March, 1856, having been proved, but I understand from counsel that although the fact is known there is some difficulty in putting before me an admission as to it on which I can act. Under the circumstances I can only deal with the case upon the footing that the statements in the lease of July, 1890, are correct, and that the former lease subsisted until immediately before the grant of the new lease.

I therefore give judgment for the plaintiffs for possession. Tehre is no claim for mesne profits. Of course costs will follow.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Crowders, Vizard, & Oldham*, for *R. Robinson Rodd*, East Stonehouse.

Solicitors for the defendants, *Ravenscroft, Woodward, & Co.*, for *Rooker, Matthews, Harrison, & Co.*, Plymouth.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 16.

EGHAM RURAL DISTRICT COUNCIL *v.* GORDON. (*a.*)

Highway—Repairs—Excessive weight—Extraordinary traffic—"Person by whose order"—"By or in consequence of whose order"—Highway and Locomotives (Amendment) Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12.

The defendant, being about to build a house in the plaintiffs' district, entered into a contract with a brick company for the delivery of a large number of bricks on the land where he intended building, but he gave no order as to the manner or time in which such bricks were to be delivered. The brick company, in the defendant's absence abroad, and without his knowledge, caused the bricks to be delivered by means of traction engines and trucks, the excessive weight of which caused damage to certain of the plaintiffs' roads, and they in consequence brought an action in the county court against the defendant to recover the amount of the expenses to which they had been put in repairing the roads The county court judge, under the circumstances, came to the conclusion that the defendant was not a person "by or in consequence of whose order" such excessive weight had been conducted over the plaintiffs' roads within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12, *sub-section* 1 (c), *of the Locomotives Act*, 1898, *and that he was therefore not liable.*

Held, that, under the circumstances of the case, and in view of the facts, the county court judge was not wrong in arriving at the conclusion he had come to.

This was an appeal by the plaintiffs from the decision of the county court judge of Surrey, sitting at Chertsey.

The plaintiffs' action was for damages in respect of extraordinary expenses incurred by them in repairing damage to certain roads caused by excessive weight passing along them or extraordinary traffic thereon.

It appeared that the defendant was building a house in the plaintiffs' district and that he gave an order to the Bracknell Brick and Tile Co. for 250,000 bricks to be delivered where the house was being built, but he did not give any instructions as to how they were to be sent.

The company ordered a contractor to deliver the bricks by means of a traction engine and trucks.

The defendant then went abroad, and during his absence, and without his knowledge, the bricks were sent as aforesaid, and in consequence the roads were damaged.

It was admitted at the trial that the damage was caused by the use of the trucks and traction engines, and that the damage would not have been done if the bricks had been delivered in carts in the usual way.

The county court judge found that the weight of the traffic was excessive, and that the damage was caused thereby, but that it did not take place in consequence of the defendant's orders, and he accordingly gave judgment for the defendant.

The plaintiffs now appealed.

The Highways and Locomotives (Amendment) Act, 1878, provides as follows:—

Section 23. "Where . . . it appears to the authority which is liable . . . to repair any highway . . . that . . . extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by reason of excessive weight passing along the same or extraordinary traffic thereon, such authority may recover . . . from any person by whose order such weight or traffic has been conducted the amount of such expenses . . ."

The Locomotives Act, 1898, provides as follows:—

Section 12, sub-section 1. "Section 23 of the Highways and Locomotives (Amendment) Act, 1878 . . . shall be amended as follows . . . (c) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

Macmorran, K.C. (*C. F. Pritchard* and *McCalmont Hill* with him), for the appellants.

The county court judge was wrong. The Act of 1898 was intended to meet the decision in *Kent County Council* v. *Lord Gerard*, 46 W. R. 111, [1897] A. C. 633, which was such a case as this, and to enable the local authority to sue the person for whose benefit whatever had taken place had been done. Although the defendant gave no directions as to the manner in which the bricks were to be conveyed to him, nevertheless he is liable if the bricks are brought in a lawful way and that lawful way causes damage to the roadway. It makes no difference whether the damage is caused by excessive weight or extraordinary traffic.

He referred to the following cases: *Epsom Urban District Council* v. *London County Council*. 49 W. R. 302. [1900] 2 Q. B. 751; and, *Hill* v. *Thomas*, 42 W. R. 85, [1893] 2 Q. B. 303.

Danckwerts, K.C. (*Cunningham Glen* with him), for the respondent.

The learned judge found that the damage was not caused in consequence of any order given by the defendant. That was a question of fact; and even if not so, the damage done was not the natural consequence of the defendant's order. The person for whose benefit the traction engine and trucks were used was the man who contracted to supply the bricks and not the defendant.

Macmorran, K.C., replied.

Lord ALVERSTONE, L.C.J.—This case is by no means free from difficulty. There is considerable weight in the argument on behalf of the plaintiffs that it was intended by the Act of 1898 to make the person responsible for whom the goods were being carried in the ultimate result. I think it is difficult to say, however, that the county court judge went wrong in law or applied a wrong principle of law. He held that these unusually large loads of bricks being brought over the roads by unusually heavy engines was not in consequence of the defendant's orders. That must amount to a finding that the mode in which the bricks were conveyed was in no way affected by any orders given by the defendant, and that it was not necessary that they should be brought in that way because of any direction he had given. That being so, it seems to me that the learned judge has negatived the allegation that the defendant was a pe

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

"by or in consequence of whose order" the traffic in question was conducted within the meaning of section 12, sub-section 1 (c) of the Act of 1898. If that is the true view, I do not think that the county court judge has misdirected himself on any question of law.

Upon the facts, I come to the conclusion that the learned judge was not wrong in holding that the damage to the road caused by this heavy traffic was not in consequence of any order given by the defendant, but was in consequence of the vendors choosing this particular method of fulfilling their contract with the defendant. I think, therefore, that the appeal must be dismissed.

DARLING, J.—I am of the same opinion. It seems to me that to accept the argument, with its logical consequence, put forward by the counsel for the plaintiffs would be to hold that whoever gives an order for goods is liable for any damage caused to the roads in the course of their delivery. I think that the words "in consequence of whose order" mean no more than "as a necessary consequence of whose order." Here the county court judge has found that the damage was not caused in consequence of the order given by the defendant, and I do not think we can say that in law he was not entitled to come to that conclusion.

CHANNELL, J.—I am also of the same opinion. The county court judge must be taken to have found that the damage was caused by the mode in which the vendors sent the bricks, and that this was not the necessary consequence of the defendant's order. It is really a question of fact, and the evidence in the case of a larger quantity of bricks having been delivered in the same road without any damage having resulted clearly justified the county court judge in arriving at the conclusion he did. I will only add that I do not think that the decision of Bigham, J., in *Epsom Urban District Council* v. *London County Council*, 49 W. R. 302, quite covers this case, though no doubt it goes a long way towards doing so.

Appeal dismissed.

Solicitors for the appellants, *Wood, Bigg, & Nash*, for *A. Dallas Brett*, Egham.

Solicitor for the respondent, *A. M. Bradley*.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) April 9.

KNIVETON *v.* NORTHERN EMPLOYERS' INDEMNITY. (*a.*)

Practice—Appeal—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c* 57), *s.* 5—*Appeal to High Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

An appeal from an order of a county court judge under section 5 of the Workmen's Compensation Act, 1897, *lies to the Divisional Court.*

Appeal from the county court judge at Bolton ordering the defendant company to pay the sum of 14s. 9d. and arrears, the amount which the respondent had been awarded against the Darcy Lever Co., now in liquidation.

The accident took place on the 13th of December, 1900, and on the 8th of May, 1901, the order was made against the Darcy Lever Co. under the provisions of the Workmen's Compensation Act.

The appellant thereupon commenced this action under section 5 of the Workmen's Compensation Act, which provides that "where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of any accident, then, in the event of the employer becoming bankrupt . . . or if the employer is a company of the company having commenced to be wound up such workman shall shall have a first charge upon the sum aforesaid for the sum so due. . . ."

The plaintiff contended that under the rules of the defendant association it was liable to the Darcy Lever Co. for the award in his favour.

The county court judge gave judgment for the plaintiff for the amount claimed.

The association appealed.

The respondents took the preliminary point that no appeal lay.

Chester Jones, for the respondents.—No appeal lies to this court, and the Act is a complete code of procedure, and the only appeal under the Act is an appeal to the Court of Appeal under Schedule II. (4). The decision of the county court judge is therefore final.

Haldane, K.C. (*F. E. Smith* with him), for the appellant.—An appeal lies to this court under section 120 of the County Courts Act. This is a distinct proceeding from the arbitration proceedings under Schedule II. (4), and the right of appeal given there has no application.

Lord ALVERSTONE, L.C.J.—The case in the Court of Appeal (*Leech* v. *Life and Health Assurance Association*, 49 W. R. 482, [1901] 1 K. B. 707) shows that there is no appeal to the Court of Appeal under section 5 of the Workmen's Compensation Act. Under section 5 there is a statutory subrogation of the workman to the rights of the employer, and it seems to me that, the matter being within the purview of the county court judge, the ordinary right of appeal under section 120 of the County Courts Act, 1888, applies.

DARLING and CHANNELL, JJ., concurred.

Appeal allowed.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Pearce & Ellis*, Wigan.

Solicitors for the respondent, *Chester & Co.*, for *Fielding & Fernihaugh*, Bolton.

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1901, TO THE 12TH OF AUGUST, 1902.

VOL. L.

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1902.

A DIGEST

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CASES DECIDED IN ENGLAND,

FROM

THE 24TH OF OCTOBER, 1901, TO THE 12TH OF AUGUST, 1902,

AS REPORTED IN

VOL. L. OF THE WEEKLY REPORTER, 1901-1902;

AND IN

CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; K.B.D., the King's Bench Division; Q.B.D., the Queen's Bench Division; BKCY., the King's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1902, *as well in this Volume* (50) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

ACTION :—

Cause of action—Contract, Inducing breach of—Justification — **Bona fides. — The plaintiff was apprenticed by an indenture to W. & W. as a stonemason, and they employed him as a labourer. By one of the rules of the trade union of which the plaintiff and the defendants were members, and which rules W. & W. were parties to, it was provided "That boys entering the trade shall not** work more than three months without being legally bound apprentice, and in no case to be more than sixteen years of age, except masons' sons and stepsons. Employers to have one apprentice to every four masons on an average." The plaintiff was twenty-five years of age when employed by W. & W. The defendants threatened to withdraw the men employed by W. & W., those men being members of the trade union, if the plaintiff was taught the art of a stonemason, and **in consequence there was a breach of the contract entered into between the plaintiff and W. & W. The plaintiff brought an action against the defendants for procuring such breach.**

Held, on appeal from the county court judge, who gave judgment for the defendants, that the plaintiff would have a cause of action against the defendants unless they showed they were justified in interfering with his contractual rights; such justification for interference with the plaintiff's rights must be an equal or superior right in themselves, and it would not be sufficient for them to show that they had acted on a wrong understanding of their rights or without malice, or *bonâ fide*, or in the best interests of themselves.—READ v. FRIENDLY SOCIETY OF OPERATIVE STONEMASONS, K. B. D., 619; [1902] 2 K. B. 88; 71 L. J. K. B., Q. B. D., 86 L. T. 593.

See also Bankruptcy, 4; Negligence, 1, 2, 3.

ADMINISTRATION:—

1. *Costs—Apportionment—Real and personal estate—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2 (3).—The rule, that the general costs of an administration action are borne by the personal estate, and that the costs are borne by the real estate only so far as they have been increased by the administration of the real estate, remains unaltered by the Land Transfer Act, 1897.—JONES, RE. ELGOOD *v.* JONES, *Ch.D. Buckley, J.*, 215; [1902] 1 Ch. 92; 71 L. J. Ch. 6; 85 L. T. 608.

2. *Grant to manager of bank—Debt due to bank—Retainer.*—Where the manager of a bank had been granted administration of the estate of an intestate who was a debtor to the bank,

Held, that after an order for the administation of the estate had been made, the manager could not, as administrator, retain the debt due to the bank.—RICHARDS, RE, LAWSON *v.* HARVEY, *Ch.D. Cozens-Hardy, J.*, 57; [1902] 1 Ch. 76; 71 L J. Ch. 66; 85 L. T. 452.

3. *Inoperative will—Intestacy—Advance to children—Hotchpot—Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10), *s.* 5—1 *Will.* 4, *c.* 10.—Where a will has become inoperative by reason of the sole executor and universal devisee and legatee dying in the lifetime of the testator, there is an intestacy within section 5 of the Statute of Distributions, and the provisions of that statute, as to children sharing in the residue bringing their advances into hotchpot, apply.—FORD, RE, FORD *v.* FORD, *Ch.D. Buckley, J.*, 91; [1902] 1 Ch. 218; 71 L. J. Ch. 24; 85 L. T. 609.

4. *Insolvent estate—Secured creditor—Withdrawal of claim—Certificate—Disallowance of claim—Realization of security—Leave to prove—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*R. S. C., ord.* 55, *rr.* 57, 70, 71.—By section 10 of the Judicature Act, 1875, the rules in bankruptcy are made applicable to the administration of insolvent estates in Chancery, so that a creditor is entitled to avail himself of any rights he may have under the rules in the absence of an established practice in Chancery to the contrary.

A secured creditor in an action in Chancery for the administration of an insolvent estate who, in reliance on his security, withdraws his claim, is not debarred from subsequently coming in and proving for the balance of his debt in accordance with the practice in bankruptcy by the mere fact that a certificate has been made in which his claim is stated to have been disallowed.

In re Hopkins, Williams v. *Hopkins*, 29 W. R. 767, 18 Ch. D. 370, distinguished.—MCMURDO, RE, PENFIELD *v.* MCMURDO, *C.A.*, 644; 86 L T. 814.

5. *Order of administration of assets—Insufficiency of personalty—Will—Secret trust of portion of residue—Specific gift debars the will.*—A testatrix by her will gave her residuary estate to A., and by a memorandum not admissible to probate and subsequent to the date of will, but which was acknowledged by A., to constitute a trust binding on her, gave a specific portion of the residue in trust for certain other persons therein specified. The residue, after deducting therefrom the portion bound by the memorandum, proved insufficient to pay the debts and testamentary expenses of the testatrix.

Held, that the beneficiaries under the memorandum, though their title was *dehors* the will, were entitled to have the residuary personal estate not comprised in the memorandum exhausted to pay the debts and expenses before the property bound by the memorandum was resorted to, as such property had been specifically bequeathed

Decision of Kekewich, J. (*ante*, p. 54, [1901] 2 Ch. 372), reversed.—MADDOCK, RE, LLEWELYN *v.* WARRINGTON, *C.A.*, 598; [1902] 2 Ch. 220; 71 L. J. Ch. 567; 86 L. T. 644

6. *Power of appointment—Appointed fund—Valid receipt—Administrator with will annexed.*—Where a married woman having a general power of appointment over a fund of personalty makes an appointment of the fund by will and appoints executors, and the said executors die without having proved the will,

Held, that the administratrix with the will annexed of the testatrix could give a valid receipt and discharge for all the settled funds.—PEACOCK, RE, KELCEY *v.* HARRISON, *Ch D. Eady, J.*, 473; [1902] 1 Ch. 552; 71 L. J. Ch. 325; 86 L. T. 414.

7. *Practice—Costs—Power of appointment—Successive appointments of specific sums—Appointment of residue—Costs of administering trust fund—Estate duty.*—A husband and wife, in exercise of a joint power of appointment over a trust fund (subject to their respective life estates therein) amongst the children of the marriage, appointed three sums of £10,000 in trust for their three elder daughters, and appointed the residue, after satisfying the three previous appointments, in trust for their fourth daughter, but so that the appointment should not exceed £10,000. The fund was not sufficient to provide for the appointment of the full sum of £10,000 to the fourth daughter. Upon the distribution of the fund,

Held, applying the rule laid down by Chitty, L.J., in *In re Saunders*, [1898] 1 Ch. 17, 23, that the general costs of administering the trust fund, including the costs of raising the estate duty payable on the respective deaths of the husband and wife and the costs of raising the appointed sums, ought to be borne rateably by the four appointed sums.—CHISHOLM, RE, GODDARD *v.* BRODIE, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 457; 71 L. J. Ch. 289; 86 L. T. 183.

8. *Settled land—Sale of timber—Conversion.*—By an order of the court timber growing on land settled upon A. for life, with remainder in fee to B., was sold, and the proceeds invested in Consols in court.

Held, that as between the heir-at-law of B. and the personal representative of B. the proceeds of the sale were personalty, and an order was made (after the deaths of A. and B.) directing the transfer of the sum to the legal personal representative of B.—HARTLEY *v.* PENDARVES, *Ch.D. Cozens-Hardy, J.*, 56; [1901] 2 Ch. 498; 70 L. J. Ch. 745; 85 L. T. 64.

9. *Will—Beneficial and onerous property devised together—Aggregate gift—Onerous leaseholds settled to same uses as freeholds—Incidence of burden—Right to disclaim.*—A testator devised freehold estate to his brother for life, with remainders over in strict settlement, and bequeathed his leaseholds to trustees to be settled to the same uses; his personal estate was insufficient to pay his legacies. Before his death he had contracted to purchase a freehold estate which proved to be worth less than the purchase-money remaining unpaid after his death. Among his leaseholds was a house which was sold after his death for a sum less than the sum charged on it by mortgage. On a summons to determine whether the excess of the purchase-money over the value of the one estate and the mortgage debt upon the other were chargeable upon the residue of the real estate or upon the personalty,

Held, that all the real estate and the leaseholds must be taken to be comprised in one gift, and the devisees could not reject the onerous part and accept the beneficial, and that both charges must therefore be paid out of the real estate.

Frewen v. *Law Life Assurance Society* 44 W. R. 682, [1896] 2 Ch. 511, followed.—KENSINGTON (BARON), RE, LONGFORD (EARL) *v.* KENSINGTON, *Ch.D. Farwell, J.*, 201; [1902] 1 Ch. 203; 71 L. J. Ch. 170; 85 L. T. 577.

See also Probate, 1, 2, 5; Will, 1, 7.

ADMIRALTY.—See Ship.

ADULTERATION:—

1. *Butter—Article not of the nature, substance, and quality demanded—Adding milk to—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—A provision merchant who sells to a purchaser, who demands butter, a compound consisting of butter made by the ordinary process, in which a large proportion of the water in the cream or milk is eliminated, to which was added milk from which no water was eliminated, in consequence of which the compound contains an excess of water, is guilty, under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality demanded by the purchaser.—PEARKS v. KNIGHT; PEARKS v. VAN TROMP, *K.B.D.*, 104; [1901] 2 K B. 825; 70 L. J. K. B. 1002; 85 L. T. 379.

2. *Butter—Process of blending milk with butter—Increased percentage of water—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—A purchaser, acting on behalf of an inspector under the Sale of Food and Drugs Act, asked for and purchased from the appellants, grocers, half a pound of one shilling butter, which on analysis was proved to contain 7·8 per cent. more water than the limit of 16 per cent. natural to butter. This excess of water was caused by a process adopted by the appellants of blending milk with butter. On the wall behind the butter counter in the appellants' shop there was a notice in large letters that the butter sold by them was "choicest butter blended with pure English full cream milk by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture." This notice was visible to anyone going into the shop, though the purchaser in this case did not observe it, nor was his attention called to it.

Held, that, as an ordinary purchaser entering the shop would see, and must be taken to have seen, the notice, the sale took place upon the notice, and was a sale of blended butter and not ordinary butter, and that, therefore, the sale could not be considered a sale to the prejudice of the purchaser within the meaning of section 6 of the Sale of Food and Drugs Act, 1875, and that, therefore, no offence had been committed under that section.—PEARKS v. HOUGHTON, *K.B.D.*, 605; [1902] 1 K. B. 889; 71 L. J. K. B. 385; 86 L. T. 325.

3. *Company, sale by—"Person"—Liability—"To the prejudice of the purchaser"—Knowledge of purchaser—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 2, *sub-section* 1.—The Sale of Food and Drugs Act, 1875, s. 6, enacts that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20.

Held, that a joint stock company incorporated under the Companies Acts can be convicted of an offence under section 6:

Held, also, that a sale may be to the prejudice of the purchaser within section 6, although the purchaser had special knowledge, not derived from information given by the seller, that the article sold was not of the nature, substance, and quality demanded by him. The test is whether the sale would have been to the prejudice of a purchaser who had not that special knowledge.—PEARKS, GUNSTON, & TEE (LIMITED) *v.* WARD; HENNEN *v.* SOUTHERN COUNTIES DAIRIES CO. (LIMITED), *K.B.D.*; [1902] 2 K. B. 1; 71 L. J. K. B. 656.

4. *Food—Giving of false warranty—Limit of time for laying information—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 20—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *ss.* 19, 20, *sub-section* 6—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.—An information under the Sale of Food and Drugs Acts in respect of a false warranty must be laid within six months of the date on which the warranty was given.—WHITAKER *v.* POMFRET BROTHERS, *K.B.D.*, 393; [1902] 1 K. B. 661; 71 L. J. K. B. 353; 86 L. T. 420.

5. *Food—Margarine—Excess of water—Sale not of nature, substance, and quality demanded—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—Margarine having been purchased and analyzed, evidence was given that it contained 21 per cent. of water, which was at least 5 per cent. in excess of water that margarine should contain.

Held, that the vendor was rightly convicted of selling to the prejudice of the purchaser margarine not of the nature, substance, and quality demanded, contrary to the Sale of Food and Drugs Act, 1875, s. 6.—BURTON *v.* MATTINSON, *K.B.D.*; 86 L. T. 770.

6. *Food—Sale "to prejudice of purchaser"—No evidence of inferiority of article sold—Addition of glucose to marmalade.*—To a person who asked for a pot of marmalade a grocer sold a pot of marmalade which was found to contain 13 per cent. of starch glucose. The glucose consisted of sugar, a gummy substance which had no sweetening property, and water. There was no legal standard for the making of marmalade, and manufacturers used various recipes, and for many years glucose had been used by many, though not by all, manufacturers in the making of it. The glucose to the extent used was not injurious to health, and it prevented the marmalade from crystallizing and had a tendency to prevent mildewing and fermenting.

Held, that there was no evidence that the article supplied was inferior to the article demanded or was adulterated, and no evidence, therefore, that the sale was a sale to the prejudice of the purchaser within the meaning of section 6 of the Sale of Food and Drugs Act, 1875.—SMITH *v.* WISDEN, *K.B.D.*; 85 L. T. 760.

7. *Food—Justices—Service of summons—Defendant a limited company—Sale of Food and Drugs Act—Companies Act*, 1862 (25 & 26 *Vict. c.* 57), *s.* 62.—A service of a summons under the Food and Drugs Acts on a limited company is only valid if served in the manner prescribed under section 62 of the Companies Act.—*Pearks* v. *Richardson*, *K.B.D.*, 286; [1902] 1 K. B. 91; 71 L. J. K. B. 18; 85 L. T. 616.

8. *Milk—Defence—Written warranty—Application of warranty to future deliveries of milk—Evidence—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.—In a prosecution under the Sale of Food and Drugs Act, 1875, for adulterating milk, where the defendant relies on section 25 as a defence, it is sufficient if, in order to prove that he bought the

milk in question with a written warranty, he prove that he had contracted with dairymen to supply him with milk daily; that they gave him a written warranty with respect to all milk which they should so supply, and that the milk in question was sold and supplied to him under that contract and warranty. He need not prove a specific written warranty with respect to each delivery; nor need there be evidence in writing to connect the milk in question with the warranty on which he relies.

Laidlaw v. *Wilson*, [1894] 1 Q. B. 74, followed.

Harris v *May*, (1883) 12 Q. B. D. 97, and *Robertson* v. *Harris*, [1900] 2 Q. B. 117, not followed.—ELLIOT *v.* PILCHER, *K.B.D.*; [1901] 2 K. B. 817; 70 L. J. K. B. 795; 85 L. T. 50.

9. *Milk—Sale of article not of nature, substance, and quality of article demanded—Milk as taken from cow deficient in fat—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—A purchaser demanded to be supplied with new milk, and was given an article which came direct from the cow and which had not been tampered with or adulterated in any way, but which, on analysis, was found to be deficient in milk fat. This deficiency was caused by the abnormal method employed in milking the cows—viz., an interval of sixteen hours between the evening milking and the morning milking, at which the milk in question was drawn.

Held, by Lord Alverstone, L.C.J., and Channell, J. (Darling, J., dissenting), that there was sufficient evidence on which the justices might find that the seller had committed the offence under section 6 of the Sale of Food and Drugs Act, 1875, of selling to the prejudice of the purchaser an article not of the nature, substance, and quality of the article demanded.—SMITHIES *v.* BRIDGE, *K.B D.*, 686; [1902] 2 K. B. 13; 71 L. J. K. B 555.

10. *Milk—Successive warranties—Jurisdiction of magistrates—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 25, 27—*Sale of Food and Drugs Act*, 1899, *s.* 20, *sub-section* 5, 6.—The magistrates, in cases where the sale and delivery has taken place outside the jurisdiction of the court, have no jurisdiction to deal with a case of giving a false warranty, unless the warranty was given to the person from whom it was purchased for analysis.—MANNERS *v.* TYLER, *K.B.D.*, 604; [1902] 1 K. B. 901; 71 L. J. K. B. 585; 86 L. J. 716.

ADVOWSON:—

Sale of glebe—Private Act (6 & 7 *Vict. c. xvi.*)—*Patron—Infant—Consent to sale—Trustees of settlement—Guardian.*—By a private Act glebe land was vested in trustees, with power to sell with the consent of the patron, "who shall be seised of the advowson thereof in possession, whether for an estate of inheritance or any less estate, and by the guardians of any such patron or patrons, being an infant or infants."

The patron was an infant whose estates had been settled by an indenture which provided (*inter alia*) that, during the minority of the patron, the trustees should have power to present to any vacant benefice.

Held, that the trustees were not entitled to the advowson "for any estate of inheritance or any less estate" within the meaning of the Act; and that the guardian of the infant was the proper person to give the consent to the sale.—LEIGH *v.* LEIGH, *Ch.D. Eady, J.*, 380; [1902] 1 Ch. 400; 71 L. J. Ch. 195; 86 L. T. 219.

ANIMAL:—

Horse—Working in an unfit state—Guilty knowledge—Prevention of Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.—The appellant, who was charged with causing two horses to be worked in an unfit state, carried on business in London, and the two horses in question were under the charge of one L. at a farm at C., where the appellant resided. He was practically always away, and did not see the horses above once a fortnight, they being under the entire management of L. There was some evidence that the appellant knew that the horses had been out of condition at some time, but no evidence was given as to the date when that was, or how long it was before the alleged improper working. There was no evidence that the appellant had interfered with L., had given any order for the horses to be worked, or knew of their condition on the day in question. On the 2nd of May, 1901, the horses were being worked in an unfit state. The justices convicted the appellant.

Held (allowing the appeal), that there was a failure on the part of the prosecution to give any evidence of guilty knowledge with regard to the offence in question.—GREENWOOD *v.* BACKHOUSE, *K.B.D.*; 86 L. T. 566.

ANNUITY.—See Will, 2; Inland Revenue, 3.

APPOINTMENT.—See Administration, 6, 7; Power, 1-4.

ARBITRATION:—

1. *Building contract—Submission of disputes to architect—Litigation between builder and architect—Action of fraud—Application to revoke submission.*—Where, by the terms of a building contract, all questions are submitted to the arbitration of an architect appointed by the building owners, the mere fact that the builders, or those claiming through them, bring an action against the architect charging him with fraud in relation to the contract does not entitle them to revoke the submission.—BELCHER *v.* ROEDEAN SCHOOL SITE AND BUILDINGS (LIMITED), *C.A.*; 85 L. T. 468.

2. *Stay of proceedings—Agreement to refer—Legal proceedings in respect of matter agreed to be referred—Application for stay—Step in proceedings—Summons for directions—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*R. S. C., ord.* 30, *rr.* 1, 2.—An action was brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties. The defendant attended at chambers on the hearing of a summons for directions taken out by the plaintiffs, on which an order was made that the plaintiffs and defendant should respectively make discovery of documents. The defendant subsequently applied under section 4 of the Arbitration Act, 1889, for a stay of proceedings,

Held, that the defendant had taken a step in the proceedings, and was, therefore, not entitled to a stay.—COUNTY THEATRES AND HOTELS (LIMITED) *v.* KNOWLES, *C.A.*; [1902] 1 K. B. 480; 71 L. J. K. B. 351; 86 L. T. 132.

See also Insurance, 4; Master and Servant, 2; Solicitor, 5.

ASSIGNMENT:—

1. *Debt—Same debt assigned to different persons—Priority—Notice to debtor—Debt due to firm—Assignment by one partner by deed—Validity.*—A debt due to a firm was assigned by one partner to the defendants by writing, and was subsequently assigned by the other partner to the plaintiff by deed. The plaintiff gave notice to the debtor before the defendants did so.

Held, that there was a valid equitable assignment of the debt to the plaintiff, and that, having first

given notice to the debtor, he was entitled to the debt in priority to the defendants.—MARCHANT *v.* MORTON, DOWN, & Co., *K.B.D.*; [1901] 2 K. B. 829; 70 L. J. K. B. 820; 85 L. T. 169.

2. *Equitable assignment—Order given by debtor to his solicitors to collect his debt and pay third party—Subsequent deed of assignment for creditors.*—F., being the debtor of C., B. & Co., and the creditor of W. & Sons, instructed his solicitors, who were suing W. & Sons, to hold the proceeds at the disposal of C., B. & Co. Subsequently F. called his creditors together, and a deed of assignment was executed by C., B. & Co. with the other creditors. The solicitors received part of the money due from W. & Sons before the execution of the deed by C., B. & Co., and the remainder afterwards. The deed contained a clause that it was not to prejudice the rights of creditors in respect of securities held against any person but the debtor.

Held, that this was a good equitable assignment of the whole of the proceeds of the debt of W. & Sons, and that C., B. & Co. were entitled as against the trustee of the deed.—PALMER *v.* CULVERWELL, *K.B.D.*; 85 L. T. 758.

3. *Assignment of debt—Absolute assignment—Security for moneys due or to become due on a banking account—Right of assignor to sue—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—The plaintiff, a builder, entered into a contract with the defendants to execute certain building work at their hotel. Subsequently the plaintiff, by an instrument in writing, assigned to his bankers, by way of continuing security for all moneys due or to become due to them from him, all moneys due or to become due to him from the defendants under the contract. Notice of this assignment was given to the defendants, and at the same time a letter was written to them by the plaintiff authorizing and requesting them to pay the moneys to the bankers, whose receipt should be their sufficient discharge. In an action by the plaintiff to recover the moneys due under the contract,

Held, that this was an absolute assignment not purporting to be by way of charge only, within the meaning of section 25, sub-section 6, of the Judicature Act, 1873, and that the plaintiff was not entitled to sue.—HUGHES *v.* PUMP HOUSE HOTEL Co., *C.A.*. 660; [1902] 2 K. B. 190; 71 L. J. K. B. 630; 86 L. T. 794.

See also Bankruptcy, 17; Contract, 1, 2; Practice, 8, 9.

ATTACHMENT:—

1. *Foreign order—Enrolment—Disobedience—Service in England—Jurisdiction.*—Motion for leave to issue a writ of attachment. An order was made by one of the Land Judges of the Chancery Division of the High Court of Ireland upon the respondent A. H. S to lodge in the court on oath all document in his custody, power, or procurement relating to certain property in Ireland ordered to be sold (or account for the same on oath) within ten days after service of the said order upon him. By an order made on the 26th of March 1901, the Irish order was ordered to be enrolled in the Chancery Division of the High Court of Justice in England. On the 11th of April, 1901, a copy of the order of the 26th of March, 1901 was personally served on A. H. S. in London.

Held, that as the order to lodge the deeds in court had not been served on A. H. S. in Ireland, and no leave had been obtained to serve that order on A. H. S. out of the jurisdiction, there had been no disobedience, and the motion for leave to issue a writ attachment must be refused.—SYNGE, RE, *C.A.*; 85 L. T. 736.

2. *Non-payment of rates—Committal—Bankruptcy of debtor—Legal process—Jurisdiction—Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 10 (2).—Committal for non-payment of rates is punitive, and is not "a legal process against the property or person of the debtor" within section 10 (2) of the Bankruptcy Act, 1883. The court has, therefore, no jurisdiction to order the release of the debtor under that sub-section upon proof of the presentation of a bankruptcy petition.—EDGCOMBE, RE, *C.A.*, 678.

3. *Passing off—Action for—Default of pleading—Injunction—Alleged breach—Estoppel.*—The plaintiff brought an action against the defendants for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of the plaintiff's manufacture. The defendants made default in pleading, and the injunction was granted in due course. Later it appeared that a similar article to that complained of was being put upon the market by N., for whom the defendants were acting as agents for sale. On a motion for attachment of the defendants for breach of the injunction no direct evidence was forthcoming, and the case was rested on admissions by the defendants (which the court held to be insufficient) and on the fact that the defendants, having allowed judgment to go against them by default, were estopped from saying that the goods complained of were not an imitation of those of the plaintiff's manufacture.

Held, that in these circumstances an attachment could not issue.—RIPLEY *v.* ARTHUR, *Ch.D. Farwell, J.*; 86 L. T. 495, 735.

4. *Release from custody—Judicial separation—Order to pay or secure wife's costs—Wife's costs of proceedings for attachment*—Where a husband who has been attached and imprisoned for contempt of court in failing to obey an order of the court to pay or secure a sum of money for his wife's costs in a suit brought by her for judicial separation, has afterwards obeyed the order, he is entitled to be released from custody. The court will order him to pay all his wife's costs incurred with respect to the motions for attachment and release, but will not make the payment of such costs a condition precedent to his release.

Jackson v. *Mawby*, 45 L. J. Ch. 53, 1 Ch. D. 86, followed.—AYRES *v.* AYRES, *P.D. & Ad.D.*; 71 L. J. P. 18; 85 L. T. 648.

BAILMENT:—

Loss of chattel owing to negligence of stranger—Action by bailee—Bailee not liable to bailor.—The bailee of a chattel, who is under no liability in respect thereof to the bailor, can maintain an action against a stranger by whose negligence the chattel has been lost or injured, and he is entitled to recover the full value of the chattel in the one case, or the whole amount of the damage in the other.

The bailee, having recovered the full amount of the damages, must account to the bailor for his proportion thereof; and the wrongdoer, having paid those damages to the bailee, has an answer to any action by the bailor.

Claridge v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 40 W. R. Dig. 11, overruled.—"WINKFIELD," THE, *C.A.*, 246; [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668.

BANKER:

1. *Bill of exchange—Cheque—Crossed cheque—Receipt of payment for customer—Agent for collection—Crediting customer in account—Crossing of cheque by banker—Draft by branch bank on head office—Cheque*

drawn on other branch of collecting bank—Conversion—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), *ss.* 60, 82.—In an action for conversion it appeared that the plaintiff's clerk stole a number of drafts payable to the plaintiff's order, and, after putting on them forged endorsements of the plaintiff's signature, paid them into a branch bank of the defendants, where he had no account. The majority of the drafts were cheques drawn on other banks, and were crossed before they were received by the defendants. Some of them were cheques drawn on other banks, but were not crossed when received by the defendants. Others were drafts signed by the manager of another branch of the defendants' bank and addressed to the defendants' head office. Others were cheques drawn on other branches of the defendants' bank. The defendants crossed all the drafts, whether they were crossed before or not, and placed the amounts at once to the clerk's credit. In nearly every case the clerk added his own endorsement.

Held, that the defendants were liable in respect of all the cheques drawn on other banks, not being protected by section 82 of the Bills of Exchange Act, 1882; for, by giving credit to the clerk at once, they acted not as agents for collection for a customer, but as holders of the cheques for value.

Held, also, that the defendants could not, by crossing the cheques which were uncrossed when they received them, acquire for them the protection of section 82.

Held, also, that the defendants were liable in respect of the drafts addressed by the branch manager to the head office; for such drafts were not cheques at all, and on that ground the defendants were not protected by section 82.

Held, also, that the defendants were not liable in respect of cheques drawn on other branches, being protected by section 60.—GORDON *v.* LONDON CITY AND MIDLAND BANK, *C.A.*, 276; [1902] 1 K. B. 242; 71 L. J. K B. 215; 86 L. T. 98.

2. *Bill of Exchange — Crossed cheque — "Not negotiable"—Receipt of payment for customer—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss* 81 *and* 82.—A rate collector who is well known and accustomed to get cheques cashed at a bank, but having no account of his own there, is not a "customer" within the meaning of the Bills of Exchange Act, 1882, s. 82. Should a bank cash for such a person a cheque drawn upon another bank in favour of such a person as payee, but marked "not negotiable," and afterwards receive payment of the amount from the bank on which the cheque is drawn; if the cheque had been obtained by such payee by false pretences, the the first-mentioned bank is not protected from liability to the drawer by the above section.

Decision of the Court of Appeal (48 W. R. 662, [1900] 2 Q. B. 464) reversed.—GREAT WESTERN RAILWAY CO. *v.* LONDON AND COUNTY BANKING CO., *H.L.*, 50; [1901] A. C. 414; 70 L. J. K. B. 915; 85 L. J. 152.

BANKRUPTCY:

1. *Act of bankruptcy—Deed of assignment—Assent of petitioning creditor—Delay in presenting petition.*—A creditor who, knowing that the debtor has executed a deed of assignment, unduly delays the presentation of a petition will be taken to have assented to the deed.

The mere sending of a representative to a meeting of creditors who takes no part in the proceedings, does not bind the creditor who sends him to any course that may be agreed upon at such meeting.—CARR, RE, JACOBS, EX PARTE, *Bkcy.*, 336; 85 L. T 552.

2. *Act of bankruptcy—Deed of assignment for the benefit of creditors—Notice—Delay in presentation of petition—Bankruptcy Act*, 1883 (46 & 47 *Vict* c. 52), s. 4 (1) (*a*)—Where a creditor, who is aware that the debtor has executed a deed of assignment for the benefit of creditors, does not assent to the deed, and expressly reserves his right to take bankruptcy proceedings, he is entitled to succeed on a petition founded on the deed, even though there be some delay in presenting the petition.

In re Carr. Ex parte Jacobs (*ante* p. 336, 85 L. T. Rep. 552), distinguished.—DAY, RE, HAMMOND, EX PARTE, *Bkcy.*, 448; 86 L. T. 238.

3. *Act of bankruptcy—Sale of business effects to company for worthless second debentures — Hire-purchase agreement—Bill of sale—Bankruptcy Act*, 1883 (46 & 47 *Vict. c* 52), *s.* 4. *sub-section* (1) (b)—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 6—*Bills of Sale Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.—W., who carried on an extensive business, had been financed by D. In April, 1900, he asked D. for a loan of £1,000, and it was eventually arranged that D. should purchase part of the plant of his business for £1,000, and W. should re-purchase it under a hire-purchase agreement. In the following July a similar transaction took place under which W. received £2,000. The hire-purchase agreements contained a licence to seize and sell. On the 6th of February, 1901, W. assigned to the defendant company all his trade assets, including the chattels comprised in the two hire-purchase agreements, but retained book debts of the nominal value of £1,760, which realized £700. The consideration for the assignment was £3,700 in second debentures and £100 in cash. D. took first debentures of the nominal value of £3,000. At the date of the assignment to the company W. owed £4,000, excluding his debt to D. The company went into liquidation, and its assets were insufficient to satisfy the first debentures.

Held, (1) that the assignment to the company was void as an act of bankruptcy; (2) that the transactions resulting in the hire-purchase agreements were in reality loans, and were void under the Bills of Sale Acts owing to the power to seize and sell, and that the chattels comprised therein had not passed to D. by a title antecedent to the sale to the company.—WHEATLEY'S TRUSTEE *v.* WHEATLEY, *Bkcy.*; 85 L. T. 491.

4. *Action for trespass—Claim for personal damage—Bankruptcy of plaintiff—Cause of action remaining in plaintiff.*—An action was brought for trespass and conversion of goods, and damages were claimed for the personal inconvenience thereby occasioned to the plaintiff. The plaintiff subsequently became bankrupt.

Held, that, the damage to the goods being admitted to be nominal, the essential cause of action was the personal injury to the plaintiff, and that this cause of action did not pass to the trustee in bankruptcy, but remained in the plaintiff, who was, therefore, entitled to prosecute his action.

As to where one and the same cause of action results in substantial damage to the property of the bankrupt, as well as injury to his person, *Quære.*—ROSE *v.* BUCKETT, *C.A.*, 8; [1901] 2 K. B. 449; 70 L. J. K. B. 736; 84 L. T. 670.

5. *Assignment for benefit of creditors—Lease—Action against assignee for rent—Adjudication of bankruptcy after commencement of action, but before trial—Relation back—Disclaimer—Bankruptcy Act,*

1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44.—The plaintiffs granted a lease to B. B. made an assignment of all her property, including the lease, to the defendant for the benefit of her creditors. A petition in bankruptcy was presented against B., alleging the assignment as the act of bankruptcy. The plaintiffs brought an action against the defendant for rent which accrued due after the assignment. After the commencement of the action, and before the trial, B. was adjudicated bankrupt and the trustee in bankruptcy disclaimed the lease.

Held, that the plaintiffs were entitled to recover the rent from the defendant.—STEIN *v.* POPE, *C.A.*, 374; [1902] 1 K. B. 595; 71 L. J. K. B. 322; 86 L. T. 283.

6. *Bankruptcy notice—Judgment creditor—Seizure by sheriff under* fi. fa.—*Withdrawal without return to writ—Right to issue notice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (g).—A judgment creditor issued a writ of *fi. fa.* against the judgment debtor's goods, but on learning that all the goods at the debtor's residence were claimed by third parties, directed the sheriff to withdraw, which the sheriff did without making any return to the writ. The judgment creditor then issued a bankruptcy notice for the amount of the debt against the judgment debtor

Held, on the evidence, that the sheriff was never in possession of any goods of the judgment debtor, and that the judgment creditor accordingly had a right to issue the bankruptcy notice, since there was no stay, express or implied, nor had the sheriff realized anything by the seizure or sale of the goods of the debtor for which he was bound to account or make a deduction from the judgment debt.—DEBTOR, A, RE, JUDGMENT CREDITOR, EX PARTE, *C.A.*, 609; [1902] 2 Q. B. 260.

7. *Bill of sale—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8—*Hiring and purchase agreement.*—Mellor, a publican, being in want of money to complete the purchase of a hotel, applied to the defendants for a loan of £2,000. They refused to lend on a fourth mortgage of the hotel, and Mellor refused to give them a bill of sale. It was therefore arranged that the defendants should buy the furniture in the hotel from the vendor for £2 000 instead of Mellor and should let the furniture to Mellor under a hiring and purchase agreement. Mellor subsequently became bankrupt, and the furniture was claimed by the trustee in the bankruptcy.

Held, that the defendants had purchased the furniture as trustees for Mellor, who was the real owner, and that they had no title to the goods except under the hiring and purchase agreement, which was void for want of registration as a bill of sale.

Beckett v. *Tower Assets Co.*, 39 W. R. 438, [1891] 1 Q. B. 538, followed.—MELLOR'S TRUSTEE *v.* MAAS *Bkcy.*, 111; [1902] 1 K. B. 137; 71 L. J. K. B. 26; 85 L. T. 490.

8. *Fraudulent conveyance—Transfer of whole of debtor's property for a past debt—Protected transaction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (1) (b), 49.—A transfer of the whole of a debtor's property for a past debt is not protected by section 49 of the Bankruptcy Act, 1883, though a similar transfer for a present consideration may be protected by that section.

Shears v. *Goddard*, 44 W. R. 402, [1896] 1 Q. B. 406, distinguished.—JUKES, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 560; [1902] 2 K B. 58; 86 L. T. 456.

9. *Interpleader—Property divisible among creditors—Property held on trust—Assignee for benefit of creditors—Right of indemnity over assets—Lien passing to trustee in bankruptcy—Execution creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—The assignee of a business under a deed of assignment for the benefit of creditors who incurs debts in carrying on the business has a right of indemnity or lien over the assets of the business which on his bankruptcy passes to his trustee.

The assignee of a business under such a deed incurred a debt in carrying it on for which judgment was signed against him, and the judgment creditor seized some of the assets of the business in execution. The assignee then became bankrupt.

Held, that, although the assets of the business were properly held by the assignee on trust, and so, by virtue of section 44 of the Bankruptcy Act, 1883, were not divisible among his creditors, yet the trustee in bankruptcy had such an interest in them as to entitle him to succeed in an interpleader issue against the execution creditor.

Decision of the Divisional Court (49 W. R. 495, [1901] 1 Q. B. 108) affirmed.—JENNINGS *v.* MATHER, *C.A.*, 52; [1902] 1 K. B. 1; 70 L. J. K. B. 1032; 85 L. T. 396.

10. *Order for summary bankruptcy—Claim for over £200 not arising out of the bankruptcy—Jurisdiction.*—An order for summary administration having been made under section 121 of the Bankruptcy Act, 1883, the official receiver applied to the county court judge for an order against a third party to pay him £343. This claim did not arise out of the bankruptcy.

Held, that the county court had no jurisdiction. The jurisdiction is the same in summary as in ordinary bankruptcies.—BILLING, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*; 86 L. T. 689.

11. *Petition—Attestation—Amendment.*—A bankruptcy petition not properly attested under rule 146 ought, if possible, to be amended at the hearing.—DEBTOR, A, RE, PETITIONING CREDITORS, EX PARTE, *Bkcy.*; 86 L. T. 688.

12. *Petition—Production of debtor's books—Calling debtor to prove acts of bankruptcy—Practice.*—Upon the hearing of a bankruptcy petition, the petitioning creditor is entitled to call for the production of the debtor's books.

Semble, the petitioning creditor is also entitled to call the debtor for the purpose of proving the acts of bankruptcy alleged against him.—DEBTOR, A, RE, HAES, EX PARTE, *C.A.*, 182; [1902] 1 K. B. 98; 71 L. J. K. B. 102; 85 L. T. 564.

13. *Pledge—Property of bankrupt—Relation back of trustee's title—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—A pledgee of goods is bound to return the goods to the pledgor when paid the amount advanced upon them, even though he has notice that the pledgor has committed an act of bankruptcy within three months prior to the date of such return of the goods. — LAWFORD & LAWRENCE, RE, THE TRUSTEE, EX PARTE, *Bkcy.*, 592; 86 L. T. 693.

14. *Private examination of witness in foreign country—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 27, 105, 118.—The court has no power under section 27 of the Bankruptcy Act, 1883, to make an order for the private examination of witnesses in a foreign country.—DRUCKER, RE, (No. 2), *Bkcy.*, 592; [1902] 2 K B. 210; 71 L. J. K. B. 688; 86 L. T. 692.

15. *Proof of debts—Breach of contract—Damages in tort—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52),

s. 37.—S. stored goods with H. under a verbal contract, in breach of which H. sold the goods. S. brought an action against H., and in the statement of claim set out the contract and its breach, but made no claim for damages for breach of contract, but only for detinue and conversion. Before judgment a receiving order was made against H., of which S. had notice.

Held, by Wright, J., that S., having elected to sue in tort rather than contract, must abide by the result, and that the trustee in H.'s bankruptcy had rightly rejected S.'s proof founded on that judgment debt and costs.

Held, by Court of Appeal, that on S. undertaking to abandon the judgment, and stay all further proceedings under it, she should be permitted to carry in a proof in the bankruptcy for damages for breach of contract.—HOPKINS, RE, DE STEDINGK, EX PARTE, *C.A.*, 86 L. T. 676.

16. *Proof of debts—Legacy—Direction giving legatee power to retain debt due to testator in or towards satisfaction of legacy—Specific legacy—Abatement.*—The testator bequeathed to his son £10,000, and directed that as regards any money due to him at his decease from that legatee the same should (but not to an amount exceeding £10,000) be set off and retained in or towards satisfaction of the legacy. The legatee was indebted to the testator's estate, and the executors obtained judgment against him for £26,398 12s. 6d., after giving credit for the amount of the legacy. The legatee became bankrupt, and the testator's estate proved insufficient to pay the legacies in full. The executors proved in the bankruptcy for £5,356 1s. 2d., the difference between the amount of the legacy of £10,000, with which the bankrupt had been credited, and £4,643 18s. 10d., the proportion due on abatement.

Held, that the legacy was not specific, and was subject to abatement, and that the proof must be admitted.—RICHARDSON, IN RE, THOMPSON, EX PARTE, *Bkcy.*; 86 L. T. 25.

17. *Property of bankrupt—Assignment of* chose in action—*Notice of assignment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—Prior to the bankruptcy the bankrupt had borrowed money from his wife, and deposited a life policy with her as security for the loan.

The trustee gave notice of the bankruptcy to the insurance company before the wife gave notice of her claim.

Held, that the fact of the trustee having been the first to give notice to the insurance company did not affect her title as an incumbrancer for value prior to the bankruptcy.—WALLIS, RE, TRUSTEE, THE, EX PARTE, *Bkcy.*, 430; [1902] 1 K. B. 719; 71 L. J. K. B. 465; 86 L. T. 237.

18. *Property of bankrupt—Money paid to settle bankruptcy petition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—The debtor gave his solicitors a charge to secure *inter alia* a sum to be paid by them in settlement of a bankruptcy petition presented by the respondents. The solicitors paid that sum to the respondents, who withdrew their petition. The debtor was subsequently made bankrupt upon a petition presented within three months of the act of bankruptcy, of which the respondents had notice.

Held, that the trustee in the bankruptcy was not entitled to recover from the respondents the sum paid to them in settlement of their petition, as it never was the debtor's money.

In re Snyder, Ex parte Pixley, 8 Morr. 127, distinguished.—DRUCKER, RE, THE TRUSTEE, EX PARTE, *Bkcy.*, 543; [1902] 2 K. B. 55, 237.

19. *Property of bankrupt—Relation back of trustee's title—Money paid for bets—Protected transaction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49—Money paid away by a debtor after an act of bankruptcy committed within three months before the presentation of a bankruptcy petition against him, upon which he is adjudicated bankrupt, can be recovered by his trustee in bankruptcy in like manner as goods transferred by him or their proceeds can be recovered.

A debtor, after he had committed an act of bankruptcy, paid to the defendant a sum of money in respect of a bet which he had lost to the defendant, and he also deposited with the defendant a sum of money as security for bets which he had made with him. The defendant won the bets and retained the money. Subsequently a receiving order was made against the debtor, founded on the act of bankruptcy, and he was adjudicated bankrupt.

Held, that the transactions were not protected by section 49 (*c*) (*d*) of the Bankruptcy Act, 1883, as the money was paid without valuable consideration, and that the trustee was entitled to recover the money.—WARD *v.* FRY, *C.A.*, 72; 85 L. T. 394.

20. *Property of bankrupt—Reputed ownership—Building agreement—Mortgage—Power of mortgagee to seize if builder "become bankrupt"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—A builder entered into a building agreement which provided that all the materials and plant brought upon the ground should "be deemed to be annexed to the freehold," and mortgaged all his interest under the agreement by a deed providing (*inter alia*) that if the builder should "become bankrupt" the mortgagee might take possession and complete the buildings. The mortgagee took possession on the day a receiving order was made against the builder on which he was subsequently adjudicated bankrupt.

Held, that the mortgagee was not entitled to seize because "become bankrupt" meant "be adjudicated a bankrupt."

Held, also, that the plant and materials on the land at the date of the commencement of the bankruptcy were in the order and disposition of the bankrupt, with the consent of the freeholder, who was the true owner, and passed to the trustee in the bankruptcy.

In re Ginger, 46 W. R. 144, [1897] 2 Q. B. 461, followed.—WEIBKING, RE, WARD, EX PARTE, *Bkcy.*, 460; [1902] 1 K. B. 713; 71 L. J. K. B. 389; 86 L. T. 455.

21. *Property of bankrupt—Reputed ownership—Order and disposition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s* 44.—A clause in a building contract whereby it is provided that "all plant, work, or materials brought to and left upon the ground by the contractor shall be considered the property" of the building owners, does not constitute them the true owners thereof for the purpose of consent to reputation of ownership by the contractor.—KEEN & KEEN, RE, BRISTOL SCHOOL BOARD, EX PARTE, *Bkcy.*, 334; [1902] 1 K. B. 555; 71 L. J. K. B. 487; 86 L. T. 235.

22. *Property of bankrupt—Verbal contract with solicitor to act in the bankruptcy—Payment of lump sum—Repayment.*—A solicitor received from a client a lump sum under a verbal contract to act for him in his bankruptcy proceedings.

Held, that the amount so paid must be repaid to the trustee, less costs incurred to the date of the receiving order.—MANDER, RE, THE OFFICIAL RECEIVER, EX PARTE, *Bkcy.*; 86 L. T. 234.

23. *Report of official receiver—Offence under Debtors Act—Consideration by the court—Order to prosecute—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 16 —*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52) *s.* 164.—Where an official receiver reports that a bankrupt has been guilty of offences under the Debtors Act, it is the duty of the court to consider the report and to decide whether the bankrupt should be prosecuted; but there is no duty imposed on the court to decide at any particular time as to a prosecution.—DUNN, RE, OFFICIAL RECEIVER, EX PARTE, *C.A.*, 183; [1902] 1 K. B. 107; 71 L. J. K. B. 83: 85 L. T. 567.

24. *Scheme of arrangement — Debts released by deeds delivered as escrows pending approval of scheme by court—Right of releasing creditors to vote.*—In the absence of fraud the security required by the Bankruptcy Act, 1890, s. 3 (9) need not extend to debts, releases for which have been executed and delivered as escrows to take effect on the approval of the scheme by the court; but the creditors who have executed such releases have no interest entitling them to vote upon the scheme.—BAINES, RE, BOARD OF TRADE, EX PARTE, *Bkcy.*; 86 L. T. 691.

25. *Scheme of arrangement—Declaration of trust—Withdrawal of proofs—Debts provable—Conduct of debtor—Bankruptcy Act*, 1890 (53 & 54 *Vict c.* 71), *s.* 3, *sub-section* 9.—"Debts provable" under the Bankruptcy Act, 1890, s. 3 (9), means debts provable at the time when the scheme of arrangement comes before the court for approval, and not when the receiving order is made.

Rash and hazardous speculation on the part of the debtor is not of itself necessarily a ground for refusing to sanction a scheme of arrangement.

Misconduct of a debtor does not make it against public policy to sanction a scheme unless the misconduct is of a gross character.—E. A. B., RE, *C.A.*, 229; [1902] 1 K. B. 457; 71 L. J. K. B. 356; 85 L. T. 773.

26. *Stay of proceedings—Power of county court to stay proceedings in High Court.*—The power given to the Bankruptcy Court under the Bankruptcy Act, 1883, s. 10 (2) to stay proceedings against a debtor ought not to be exercised by the county court where the High Court has, with knowledge of bankruptcy proceedings, allowed the matter to proceed.—RICHARDSON & COOK, RE, GRIME, EX PARTE, *Bkcy.*; 86 L. T. 690.

See also Criminal Law 1, 8.

BICYCLE.—See Local Government, 19.

BIGAMY:—

Second marriage performed abroad — Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.—By the Offences against the Person Act, 1861, section 57, "Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony."

Held, that the section extends to a case where the second marriage is celebrated beyond the King's dominions.—TRIAL OF EARL RUSSELL, *H.L.*; [1901] A. C. 446; 70 L. J. K. B. 998; 85 L. T. 253.

BILL OF EXCHANGE:—

1. *Agreement for agent to provide drawer for particular purpose—Insertion of name for another purpose—Liability of third person who takes in good faith.* — In pursuance of an agreement made between the plaintiffs and J. R. for accommodation in relation to acceptances, the plaintiffs handed J. R. certain bills which they had accepted, in which the dates and drawers' names were left blank, which under the agreement were to be provided by J. R. The bills were to be used by J. R. to recoup himself for advances to the plaintiffs, and for the purpose of raising money for the plaintiffs. J. R. used the bills for his own purposes, and having filled in the dates, handed them to the defendant L. who, acting in good faith, inserted drawers' names. In an action against L. for conversion,

Held, that although L. took the bills in good faith, he was liable, as he took bills with only an acceptor's name but no drawer's name, and so ran the risk that J. R. had no authority, or only a limited authority, to allow a drawer's name to be put in the instrument; that here J. R. had no authority to insert a drawer's name under the circumstances, as the only authority he had to insert a name was that of a drawer who would take the bill for the plaintiff's benefit; and that the insertion of the words in the agreement, "drawers to be provided by the said J. R.," did not extend the limited authority actually given.—WATKINS *v.* LAMB, *K.B.D.*; 85 L. T. 483.

2. *Promissory note—Fraud of third party—Holder in due course—"Negotiated"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 20, 29.—The defendant applied to A for a loan of £15. At A.'s request the defendant, on promise of the loan, signed a blank paper bearing a 9d. stamp, and gave A. authority to fill it up as a promissory note for £15 payable to A. Subsequently A. applied to the plaintiff for a loan of £25, and offered in exchange to give the plaintiff the defendant's promissory note for £30. This was agreed to, and A. filled up the signed and stamped paper as a promissory note for £30 payable to the plaintiff, who received it in ignorance of the true facts, giving in exchange his cheque for £25 payable to the order of the defendant. A. having forged the defendant's signature to the plaintiff's cheque obtained payment for the same.

Held, that, although a payee might be a "holder in due course" within section 29 of the Bills of Exchange Act, 1882, yet the delivery here to the plaintiff did not "negotiate" the note within the proviso to section 20 of that Act, and therefore, as the note was not filled up by A. strictly in accordance with the authority given him by the defendant, the plaintiff could not recover on the note.

Lewis v. *Clay*, 46 W. R. 319, 77 L. T. Rep. 653, considered.—HERDMAN *v.* WHEELER, *K.B.D.*, 300; [1902] 1 K. B. 361; 71 L. J. K. B. 270; 86 L. T. 48.

3. *Solicitor—Lien for costs—Solicitor instructed to recover bill—Bill handed to solicitor—Defect in title of client—Overdue accommodation bill—Right of solicitor to sue on the bill for unpaid costs.*—The acceptors of a bill drawn for their accommodation, and payable to the order of the drawer handed the bill to the drawer to get it discounted, and the drawer having indorsed it in blank handed it to one L. to get it discounted. L. did not get it discounted, and refused to return it. The drawer then instructed solicitors to bring an action against L. for the recovery of the bill, which they did. They succeeded in the action, and L. in court handed over the bill to the solicitors as solicitors for the then plaintiff (the drawer). The solicitors then told the drawer (their client) and the acceptors that they would hold the bill by way of lien until their costs in the action were paid, and the drawer and acceptors did not dissent, but in fact assented. At the time the bill was handed to the solicitors in

court it was to their knowledge an overdue accommodation bill, but at the time they brought the action for its recovery it was not due, and they did not know it was an accommodation bill. In an action by the solicitors on the bill against the drawer and the acceptors, in respect of the balance of their costs—there being no question as to the liability of the drawer on his retainer,

Held, that the solicitors, when their claim to hold the bill by way of lien for their costs was assented to by the parties to the bill, became "holders" of the bill within the meaning of section 27, sub-section 3, of the Bills of Exchange Act, 1882, and that, being holders having a lien on the bill, they were "holders for value to the extent of the sum for which they had a lien"—namely, to the extent of their unpaid costs, and were entitled to recover the balance of their costs against the acceptors, although when the bill was handed to them they knew that it was overdue and was an accommodation bill.—REDFERN *v.* ROSENTHAL, *K.B.D.*; 85 L. T. 313.

See also Banker, 1, 2; Company, 25.

BILL OF SALE:—

Statutory forms—Two grantors—Chattels belonging to each grantor in severalty—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Schedule.*—A bill of sale given by two grantors of goods of which they are not joint owners, but some of which belong to one of them and the rest to the other, is void under section 9 of the Bills of Sale Act, 1882, as not being in accordance with the form in the schedule.

Judgment of the Divisional Court (49 W. R. 127, [1901] 1 K. B. 70) affirmed.—SAUNDERS *v.* WHITE, *K.B.D.*, 325; [1902] 1 K. B. 472; 71 L. J. K. B, 318; 86 L. T. 173.

See also Bankruptcy, 3, 7.

BOND:—

Bearer bonds—Negotiability by custom—Holders for value—Liability of Stockbroker for conversion.—Certain "bearer bonds," consisting partly of bonds of foreign corporations and partly of bonds of an English company, were stolen from the plaintiff by his clerk, who employed M., a provincial stockbroker, to sell them. M. instructed the defendants, who were London stockbrokers, to sell the bonds on the London Stock Exchange. The defendants, *bonâ fide* and without notice of any defect in the vendor's title, effected the sale and remitted the proceeds to M. The plaintiff sued the defendants for conversion of the bonds. Evidence was given of a custom to treat the bonds in question as negotiable in the same way as the bonds of foreign governments.

Held, that the bonds were negotiable instruments, that the defendants were holders of them for value, and therefore that the action was not maintainable.

The Bechuanaland Exploration Co. v. *London Trading Bank* (*Limited*), [1898] 2 Q. B. 658, 47 W. R. Dig. 29, followed.—EDELSTEIN *v.* SCHULER & Co., *K.B.D*, 493; [1902] 2 K. B. 144; 71 L. J. K. B. 572.

BREAD:—

Sale of bread—Sale otherwise than by weight—London Bread Act (3 *Geo.* 4, *c. cvi.*), *s.* 4.—In the sale of bread it is necessary that the weight of every parcel of bread should at least be purported to be ascertained in order to comply with section 4 of the London Bread Act (3 Geo. 4, c. cvi.).—COX *v.* BLAINES, *K.B.D.*, 392; [1902] 1 K. B. 670; 71 L. J. K. B. 437; 86 L. T. 563.

BUILDING SOCIETY:—

Cancellation of registry—Winding up—Building Societies Act, 1894 (57 & 56 *Vict. c.* 47), *s.* 6, *sub-sections* 1, 5; *s.* 8.—Where the registration of a building society has been cancelled, and it has ceased to carry on business, a creditor's remedy is to petition for a winding-up order.

In such a case the court may direct that no proceedings be taken under the order without leave beyond the transfer of assets to the official receiver.—GROSVENOR HOUSE, &c., BUILDING SOCIETY, RE, *Ch.D. Buckley, J.*, 630.

See also Infant, 1.

BYE-LAW.—See Canada, Law of, 2; Local Government, 1-4.

CANADA, LAW of:—

1. *Local legislature—Province—Licensing law—Conflict of laws.*—A provincial legislature in Canada has jurisdiction to restrict the sale of intoxicating liquors within the province so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada and in force within the province.

Attorney-General for Ontario v. *Attorney-General for the Dominion*, [1896] A. C. 348, 44 W. R. Dig. 24, followed.—ATTORNEY-GENERAL FOR MANITOBA *v.* MANITOBA LICENCE-HOLDERS' ASSOCIATION, *P.C.*, 431; [1902] A. C. 73; 71 L. J. P. C. 78; 85 L. T. 591.

2. *Powers of provincial legislature—Quebec Act* 58 *Vict. c.* 69—*Bye-law of corporation granting exclusive rights—Construction.*—Under a bye-law of the Hull City Council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 Vict. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a licence previously granted by the city to the respondents for a similar purpose.

Held, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the provincial legislature, and none the less so because it excluded for a limited time the competition of rival traders:

Held, also, that by the true construction of the bye-law the city did not themselves revoke the licence to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected.—HULL ELECTRIC CO. *v.* OTTAWA ELECTRIC CO., *P.C.*; [1902] A. C. 237; 71 L. J. P. C. 58; 86 L. T. 208.

CAPE OF GOOD HOPE, LAW of:—

Construction—Title—Terms of grant—Diagram.—In a grant of land with certain specified boundaries, "as will further appear by the diagram framed by the surveyor,"

Held, that as a matter of construction where the diagram is repugnant to the terms of the grant the latter will prevail, although, by articles 8 and 13 of the Proclamation of the 6th of August, 1813, there must be a diagram before a title be granted, yet the right of the grantee must be expressed in his title, and when so expressed will not be limited by the diagram.—HORNE *v.* STRUBEN, *P.C.*; [1902] A. C. 454.

CERTIORARI:—

1. *Appeal—Jurisdiction—Appeal to House of Lords from order of Court of Appeal in Ireland.*—No appeal lies to the House of Lords from an order of

the Court of Appeal in Ireland with respect to the issue of a writ of *certiorari*.—REG. *v.* BARTON, *H.L.*; [1902] A. C. 268.

2. *Writ of* certiorari—*Removal of action from inferior court—Common law right—Liverpool Court of Passage—5 Vict. c. lii., ss.* 2, 3—56 & 57 *Vict. c* 37, *s.* 5.—At common law a writ of *certiorari* issues as of right to remove an action from an inferior court to the High Court. The Act 5 Vict. c. lii., s. 2, and the Liverpool Court of Passage Act, 1893, s. 5, do not take away this right, but the former Act merely imposes on its exercise the condition that recognizances shall be given unless the judge dispenses with them. The application for the writ is in time, within section 3 of the former Act, if it be made within one month of the delivery of the statement of claim.—EDWARDS *v.* LIVERPOOL CORPORATION, *K.B.D.*; 86 L. T. 627.

CEYLON, LAW of:—

Practice—Appeal—Point not raised in court below—Validity of will.—The respondents, the next-of-kin of the testator, presented a petition for the revocation of the probate of his will on the ground that he was not of sound mind, and that the will was obtained by undue influence. The court of first instance decided in their favour. The executrix appealed, and the Court of Appeal held the will good so far as regarded the personal estate of the testator, but invalid so far as regarded his real estate, which was considerable. No such point had been raised at the trial, at which the will was attacked and defended as a whole. The executrix appealed, but there was no cross-appeal by the next-of-kin.

Held, that the course taken by the Court of Appeal was not correct according to the rule laid down by the House of Lords in *The Tasmania* (63 L. T. R. 1, 15 App. Cas. 223), that a Court of Appeal ought only to decide in favour of an appellant on a ground put forward for the first time on the hearing of the appeal if it be satisfied that it has before it beyond all doubt all the facts bearing upon the new contention as completely as if it had been raised at the trial; but, in the absence of a cross-appeal by the next-of-kin, the decision must be affirmed, but without costs.—KARUNARATNE *v.* FERDINANDUS, *P.C.*; [1902] A. C. 405; 86 L. T. 329.

CHARITY:—

1. *Gift of proceeds of sale of real estate—Retention of land unsold—Leave of court—Mortmain and Charitable Uses Act,* 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5, 6, *and* 8.—Where land is devised to trustees upon trust to sell the same and hand the proceeds of sale over to a charity, the subject-matter of the gift being "personal estate arising from or connected with land," which is excepted from the definition of land contained in the Mortmain and Charitable Uses Act, 1891, sections 5 and 6 of that Act do not apply, and it is competent to the trustees to retain the land unsold for more than a year after the death of the testator without obtaining the leave of the court therefor under section 5 of the Act, though it would probably be expedient for them to obtain such leave under the general jurisdiction of the court to administer trusts. In such a case section 8 of the Mortmain and Charitable Uses Act, 1891, has no application to the land devised by the will, unless the charity has money to purchase land under the provisions of some other will. — SIDEBOTTOM, RE, BEELEY *v.* WATERHOUSE, *C.A.*, 641; 72 L. J. Ch. 662.

2. *Inn of Chancery—School of learning—Study of the law—Failure of object—Disposition of property—Charitable purpose.*—The Society of Clifford's Inn was one of the Inns of Chancery which were established to provide for the legal education of students of the law. In the year 1618 by an indenture of feoffment the messuages and premises occupied by the society were assured to certain members thereof as trustees, in consideration of the payment of a sum of money, and the reservation of certain rents. The indenture declared that the intention of the grantors was that the messuage commonly called Clifford's Inn, which was stated to have been for many years used and employed as an Inn of Chancery for the study and practice of the common laws of the realm, and to have been governed to the good of the Commonwealth and the honour of the grantors and their ancestors, "shall and may hereafter continue to be employed as an Inn of Chancery for the furtherance of the practisers and students of the common law of the realm as aforesaid," and that the society should from thenceforth be assured of a certain estate therein, and the operative part of the deed declared that the true intent and meaning thereof, and of the parties thereto was that "Clifford's Inn shall for ever hereafter be continued and employed as an inn of Chancery for the good of the gentlemen of the society and for the benefit of the Commonwealth as aforesaid and not otherwise." The property had long been dealt with by the society as its own, and for its own purposes, and the surviving members contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, to be divided and disposed of as they might think fit.

Held, that the property vested in the present trustees was held by them upon trust for charitable purposes.

Judgment of Cozens-Hardy, J., [1900] 2 Ch. 511, affirmed.—SMITH *v.* KERR, *C.A.*; [1902] 1 Ch. 774; 71 L. J. Ch. 369; 86 L. T. 477.

3. *Land on trust for sale, devise of—"Personal estate arising from land"—Right of trustees to retain land unsold—Gift to charity—Mortmain and Charitable Uses Act,* 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.—Land was devised to trustees on trust to sell and to hold the proceeds, after making certain payments thereout, upon trust for a charity. The will contained a power to the trustees to postpone sale.

Held, that the subject-matter of the gift, being "personal estate arising from land," was within the exception from the definition of "land" contained in section 3 of the Mortmain and Charitable Uses Act, 1891, and that therefore section 5 of the Act was not applicable, and it was competent for the trustees, without obtaining the leave of the court, to retain the land unsold after the expiration of one year from the death of the testator.—WILKINSON, RE, ESAM *v.* ATTORNEY-GENERAL, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 841; 71 L. J. Ch. 663.

4. *Mortmain—Will—Construction—Bequest of money to be laid out in purchase of land and erection thereon of model dwellings to be let to poor at low rents—Validity—"Charitable uses."*—A testator, who died in 1900, devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert and to stand possessed of the proceeds upon trust from time to time to purchase land in populous places and to erect upon the land so purchased model dwellings, and to let the same to the poor at low rents.

Held, that the testator had manifested a general charitable intention to provide model dwellings for

the poor, and therefore that the effect of striking out the direction to purchase land in accordance with section 7 of the Mortmain and Charitable Uses Act, 1891, was not to put an end to the whole charitable trust.

Held, therefore, that the residuary gift was valid.

The words "charitable uses" in section 7 of the Act of 1891 have the same meaning as the words "the purposes of the charity" in section 8 of the Act.

Semble, the Working Classes Dwellings Act, 1890, is not an Act dealing with charity matters.—SUTTON, RE, LEWIS *v.* SUTTON, *Ch.D. Buckley, J.*; [1901] 2 Ch. 640; 70 L. J. Ch. 747; 85 L. T. 411.

5. *Tithes—Annual payment of corn to poor of parish—Charge on great tithes—Inclosure Act—Lands allotted in lieu of tithes—Sale of lands—Lands subject to charge—Mortgagee—Notice of charge—Inclosure Act*, 1830 (11 *Geo.* 4, *c.* 4), *ss.* 37, 66—*Charitable Trusts (Recovery) Act*, 1891 (54 & 55 *Vict. c.* 17)—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-section* 1 (ii.).—In 1881 the defendant purchased from the Ecclesiastical Commissioners certain lands which, in 1834, had been allotted to their predecessors in title under the Inclosure Act, 11 Geo. 4, c. 4, in lieu of the great tithes of the parish of H. There was evidence that from time immemorial an annual payment of a certain quantity of corn had been made out of the tithes for the benefit of the poor of the parish, and from 1834 to 1881 the same payment had been made by the owners or occupiers of the lands in question. The conveyance to the defendant was expressed to be made "free from incumbrances," but was also expressly subject to the unredeemed land tax, tithe commutation rent-charge, both rectorial and vicarial, and to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the lands conveyed.

Held, that the payment of corn constituted a valid charge to which the lands allotted in lieu of the tithes became subject by virtue of section 66 of the Inclosure Act, and that the defendant by the terms of his conveyance took the lands subject to the charge.

The defendant had mortgaged the lands by a deed which expressly stated in terms similar to those used in the conveyance that the mortgage was subject to all payments and outgoings, ecclesiastical or civil, charged upon or payable out of the mortgaged property. The mortgagee had made no inquiry as to the existence of any charges upon the property.

Held, that, having regard to section 3, sub-section 1 (ii.), of the Conveyancing Act, 1882, the mortgagee must be taken to have had notice of the charge in question, and that the mortgaged property was subject thereto.—THE ALMS CORN CHARITY, RE, CHARITY COMMISSIONERS *v.* BODE, *Ch D. Stirling, J.*; [1901] 2 Ch. 750; 71 L. J. Ch. 76; 85 L. T. 533.

See also Wills, 4, 5, 36.

CLUB.—See Licensing Law, 1; Inland Revenue, 2.

COMMON:—

Compulsory purchase—Extinction of commonable rights—Compensation—Apportionment—Jurisdiction—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 102, 103, 104—*Inclosure of Land Act*, 1854 (17 & 18 *Vict. c.* 97), *ss.* 15, 16, 17.—Where common lands have been taken compulsorily for public purposes, and a committee of commoners has been duly appointed under section 102 of the Lands Clauses Consolidation Act, 1845, and has received the compensation money, the court has no jurisdiction to interfere in determining who are the persons interested in such money, as machinery for determining them has been provided by the various Acts of Parliament relating to the subject.—RICHARDS *v.* DE WINTON; RICHARDS *v.* EVANS, *Ch.D. Kekewich, J.*, 87; [1901] 2 Ch. 566; 70 L. J. Ch. 719; 84 L. T. 831.

COMPANY:—

1. *Articles of association—Capital—Minimum subscription—Mistake—Rectification by court—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 50—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 6.—Under its ordinary jurisdiction to rectify written instruments the court has no power to rectify a mistake in the articles of association of a company which have been executed by the seven signatories to the memorandum, although no one else has come in under the articles and no shares have been allotted.

The proper mode of rectifying a mistake is by section 50 of the Companies Act, 1862, which has only a statutory effect.—EVANS *v.* CHAPMAN, *Ch.D. Joyce, J.*; 86 L. T. 381.

2. *Articles of association—Construction—Preference shares—"Net profits"—Reserve fund—Discretion of directors—"Interest"—Depreciation fund.*—In an action by preference shareholders in a company claiming that they were entitled by contract to be paid a preferential dividend out of the balance to the credit of the profit and loss account in each year before the appropriation of any part of such balance to a reserve fund or any carrying over,

Held, that such a question, as well as that of a depreciation fund, is to be answered according to to the circumstances of each particular case, the nature of the company and the evidence of competent witnesses.

In the present case, special resolutions creating the preference shares were to be read as subject to the provisions of the original articles of association, and a provision for the payment of "net profits" towards arrears of dividend due on such preference shares was not sufficient to rescind the articles relating to declaration of dividends and formation of reserve fund.

Per Farwell, J.: "Interest is compensation for delay in payment, and is not accurately applied to the share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of such profits."

"There is no hard and fast rule by which the court can determine what is capital and what is profits."

The court is unlikely to compel directors of a company to pay dividends when they have expressed their opinion that the state of the accounts does not admit of any such payment.—BOND *v.* BARROW HÆMATITE STEEL CO, *Ch.D. Farwell, J.*, 295; [1902] 1 Ch. 353; 71 L. J. Ch. 246; 86 L. T. 10.

3. *Borrowing powers—Surplus lands*—Ultra vires.—It is not *ultra vires* for a company incorporated by statute, with express powers of borrowing upon mortgage limited to mortgages on its undertaking, to offer its surplus lands as additional security in arranging for the transference of an existing debt where the creditor would be entitled to levy execution against such lands.—STAGG *v.* MEDWAY NAVIGATION CO., *Ch.D. Eady, J.*, 446.

4. *Capital—Reduction of capital—Available assets—Reserve fund—Unappropriated profits—Preference shares.*—The court will not confirm a reduction of

capital where it would work unjustly or inequitably. The court therefore refused to confirm a reduction which would benefit the ordinary shareholders at the expense of the preference shareholders.

In ascertaining the available assets of a company for the purpose of a reduction of capital, the amounts of reserve and unappropriated profit, and the value of the goodwill, are to be taken into account.

Decision of Cozens-Hardy, J., [1900] 2 Ch. 846, affirmed (49 W. R. Dig. 24).—BARROW HÆMATITE STEEL CO., RE, *C.A.*, 71; [1901] 2 Ch. 746; 71 L. J. Ch. 15; 85 L. T. 493.

5. *Capital—Reduction of capital—Deferred shares—Scheme—No actual reduction—Illegality.*—A company entered into an agreement with the holders of its deferred shares of £1 each (to which special rights were attached) that in consideration of the cancellation of the deferred shares the holders thereof should receive ordinary shares in exchange for each deferred share. The company now petitioned the court for an order confirming the reduction of capital.

Held, that, having regard to all the circumstances of the case, the capital of the company was not being reduced, but increased; that the scheme was illegal and *ultra vires*, and the reduction could not be confirmed.—DEVELOPMENT CO. OF CENTRAL AND WEST AFRICA, RE, *Ch.D. Eady, J.*, 456; [1902] 1 Ch. 547; 71 L. J. Ch. 310; 86 L. T. 323.

6. *Contract with third person for intended company—Privity—Adoption—Inferred contract—Right of action.*—The plaintiff company entered into an agreement with A. B. to grant to him or a company to be formed by him an exclusive licence to use certain patents. A. B. then entered into an agreement with C. D. to sell the licence to him on behalf of the intended company, and this agreement was adopted by the intended company, the defendants, by another agreement to which A. B., C. D., and the defendant company were parties.

Held, that, there being no privity of contract between the plaintiffs and defendants, and no contract which could be inferred or considered as having been adopted by the conduct of the defendants, the plaintiffs had no right of action against them.

Decision of Kekewich, J. (49 W. R. 265, [1901] 1 Ch. 196), affirmed.—BAGOT PNEUMATIC TYRE CO. *v.* CLIPPER PNEUMATIC TYRE CO., *C.A.*, 177; [1902] 1 Ch. 146; 71 L. J. Ch. 158; 85 L. T. 652.

7. *Debentures—Conditions—"Compromise or adjustment of any claim"—"Release of property charged"—Extension of period for redemption—Increase of debenture stock—Power of majority to bind dissentient minority.*—By one of the conditions as to the issue of the debenture stock of a company it was provided that a meeting of the holders might, by a resolution of three-fourths, agree to any "compromise or adjustment of any claim" by the holders against the company, or for the settlement of any question in dispute, or the "giving of time to the company for the payment of any principal or interest or the release of the property or any portion thereof charged to secure the stock"; and that such resolution should bind all the holders. Debenture stock to the extent of £75,000 had been issued by the company, which was redeemable on the 1st of October, 1901. The directors had endeavoured to raise funds to redeem the stock, but the negotiations were unsuccessful. The company, therefore, was not in a position to redeem on the 1st of October, 1901, and the redemption could not be carried out without prejudicing the stockholders themselves. In these circumstances the company convened a meeting of the stockholders under the above conditions, at which two resolutions were passed by a majority present—one extending the period for redemption of the stock until the 1st of July, 1904, and the other authorizing the increase of the stock up to £100,000 by the issue of £25,000 further stock to rank *pari passu* with the existing stock.

Held, that the condition was not limited to cases where disputes had arisen within the strict meaning of that term, but was applicable to a case where difficulties had to be met; and that, therefore, under the circumstances the majority of the debenture stockholders acting honestly and *bonâ fide*, and with a view to the preservation and improvement of their security, had power to bind the minority under the language of the condition when passing the resolutions.—WALKER *v.* ELMORE'S GERMAN METAL CO., *C.A.*; 85 L. T. 767.

8. *Debentures—Costs—Taxation—Trustees' costs—Same solicitor appearing for trustees and company—Disallowance of company's costs—Right of trustees to full set of costs—Retainer—Joint or separate—Debenture-holders' action.*—Where debentures are secured by a trust deed, the trustees are properly added as defendants to a debenture-holders' action, and where the trustees and the company appear by the same solicitor, although the company are not entitled to costs, all the costs of the defendants, except any separate costs of the company, ought to be paid out of the assets before distribution amongst the debenture-holders, upon the ground that, subject to that exception, those costs must be treated as incurred by the trustees; and for this puspose the order directing taxation should contain a direction that in taxing the costs of the trustees the taxing-master should allow them a full set of costs, except as regards any separate costs of the company, notwithstanding that the trustees and the company have appeared by the same solicitor.—MORTGAGE INSURANCE CORPORATION (LIMITED) *v.* CANADIAN AGRICULTURAL, COAL AND COLONIZATION CO., *Ch.D. Kekewich, J.*; [1901] 2 Ch. 377; 70 L. J. Ch. 684; 84 L. T. 861.

9. *Debentures—Extension of time for registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 15—*Application subsequent to resolution for voluntary winding up—Form of order.*—An application for an order under section 15 of the Companies Act, 1900, extending the time for registration of debentures was not made until after the passing of a special resolution for the voluntary winding up of the company and the appointment of a liquidator.

Held, that the principle of *Crew* v. *Cummings*, 36 W. R. 908, 21 Q. B. D. 420, and *In re Parsons, Ex parte Furber*, 41 W. R. 468, [1893] 2 Q. B. 122, extended to cases in which the rights of third parties had actually accrued and might be prejudicially affected if registration were allowed without protecting those rights. The order was consequently made "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."—SPIRAL GLOBE CO., RE, *Ch.D. Swinfen Eady, J.*, 187; [1902] 1 Ch. 396; 71 L. J. Ch. 128; 85 L. T. 778.

10. *Debentures—Non-registration—Debentures "created" before but issued after the Act.*—Debentures "created" (that is, sealed by the company) before the Companies Act, 1900, came into operation, but not actually issued until after that date, do not require to be registered under

section 14 of the Act.—SPIRAL GLOBE (LIMITED), RE, WATSON *v.* SPIRAL GLOBE (LIMITED), *Ch.D. Joyce, J.*; [1902] 2 Ch. 209; 71 L. J. Ch. 538; 86 L. T. 499.

11. *Debentures—Registration—Extension of time—Form of order—Saving of prior rights—Companies Act*, 1890 (63 & 64 *Vict. c.* 48), *s.* 15.—Direction given by the judge for the insertion, in orders for the extension of time for registration of debentures of a company, of words saving the rights of parties acquired prior to registration.—JOPLIN'S BREWERY CO., RE, *Ch.D. Buckley, J.*, 75; [1902] 1 Ch. 79; 71 L. J. Ch. 21; 85 L. T. 411.

12. *Debentures—Registration—Extension of time—Form of order—Saving of prior rights—Rights of debenture-holders inter se—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.—The rights of equality *inter se* attached to debentures of a series ought not to be interfered with by an accidental omission to register some of them within the time required under section 14 of the Companies Act, 1900, and the proviso inserted in orders for the extension of time for registration, saving the rights of parties acquired prior to registration, ought to be framed so as not to make any difference to the rights of debenture-holders *inter se*.

Form of order considered.—JOHNSON & CO. (LIMITED), RE, *C.A.*, 482; [1902] 2 Ch. 101; 71 L. J. Ch. 576; 86 L T. 791.

13. *Debentures—Registration—Extension of time—Winding up—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.—An order under section 15 of the Companies Act, 1900, extending the time for the registration of debentures should be made without prejudice to rights acquired prior to the actual time of registration.

In re Joplin Brewery Co. (*Limited*), *ante*, p 75, [1902] 1 Ch. 79, and *In re Spiral Globe* (*Limited*), *ante*, p. 187, followed.

Semble, the order will, except under very exceptional circumstances, always be made in this form.—ABRAHAMS & SONS, RE, *Ch.D. Buckley, J.*, 284; [1902] 1 Ch. 695; 71 L. J. Ch. 307; 86 L. T. 290.

14 *Debenture—Goodwill—"Property"—Debenture-holder's action—Jurisdiction to appoint manager.*—The goodwill of a hotel business is the property of the company to which the hotel belongs, so that if all the "property" of the company is charged by its debentures the goodwill of the hotel business is included therein, and a manager of the business can be appointed in a debenture-holder's action.

Jennings v. *Jennings*, 46 W. R 344, [1898] 1 Ch. 378, and *In re David and Matthews*, 47 W. R. 313, [1899] 1 Ch. 378, applied.—LEAS HOTEL CO., RE, SALTER *v.* LEAS HOTEL CO., *Ch.D. Kekewich, J.*, 409; [1902] 1 Ch. 332; 71 L. J. Ch. 294; 86 L. T. 182.

15. *Director—Dividends—Loss of capital—Misfeasance—Reliance of director on officers of company—Director's responsibilities—Statements honestly made—Damage—Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—A director of a company, in the absence of reasonable ground for suspicion, is entitled to rely upon the judgment, information, and advice of the officials of a large company. Where the necessary course of business necessitates delegation to others, and there is no moral fraud on his part, the management of the affairs of the company in a reasonable manner is a sufficient discharge of his duties.

What constitutes reasonable care must be dealt with in each particular case.

Remarks as to payment of dividends out of capital (floating and fixed), and some observations of the Court of Appeal thereon, not approved of.

Decision of the Court of Appeal (*sub. nom. In re National Bank of Wales*, 48 W. R. 99, [1899] 2 Ch. 629), affirmed.—DOVEY *v.* CORY, *H L.*, 65; [1901] A. C. 477; 70 L J. Ch. 753; 85 L. T. 257.

16. *Director—Qualification—Articles of association—Construction—Shares held "in his own right"—Bankruptcy of shareholder.*—A registered holder of shares in a limited company holds the shares "in his own right" so as to qualify him for being a director under the articles of association, when he holds them in such a way that the company can safely deal with him as the owner of the shares; and where the shareholder is an undischarged bankrupt and his trustee in bankruptcy claims the shares, but has not decided whether he shall be registered or not, the company cannot safely deal with the bankrupt shareholder as owner in respect of those shares, and consequently he does not hold them in his own right for the purpose of qualifying as a director under the articles.

Dictum of Lindley, L.J., in *Bainbridge* v. *Smith*, 37 W. R. 594, 41 Ch. D. 462, followed.—SUTTON *v.* ENGLISH AND COLONIAL PRODUCE CO., *Ch D. Buckley, J.*, 571.

17. *Director—Remuneration—Condition precedent—Apportionment—Articles of association.*—The articles of association of a company provided that the directors should be allowed to receive as remuneration for their services a certain sum per annum "to be paid at such times as they may determine."

Held, that the words "to be paid at such times as they may determine" did not merely enable the directors to apportion the remuneration for periods less than a year, but constituted a condition to the right of a director to receive any remuneration.—CARIDAD COPPER MINING CO. *v.* SWALLOW, *C.A.*, 565; [1902] 2 K. B. 44; 71 L. J. K. B. 601; 86 L. T. 699.

18. *Director—Resale by director to company—Distribution of profits—Investment of funds—"Staff."*—There is no obligation on a joint stock company to distribute, whilst it continues as a going concern, the whole of its profits amongst its shareholders. What sum shall be retained, what carried to the credit of a reserve fund, or appropriated to any other use of the company, are matters of internal management which the shareholders must decide for themselves, subject to the regulations of their articles of association or bye-laws. The investment of the reserve fund may be made in such securities as the directors, subject to the powers of a general meeting, may think fit, provided they do not by speculation or otherwise abuse the authority for this purpose intrusted to them.

Should a director purchase property solely on his own behalf and afterwards sell the same to the company at an increased price, he will not be liable in damages where it is not shown that he did not make a full disclosure, or that the price was an unfair one.—BURLAND *v.* EARLE, *P.C.*, 241; [1902] A. C. 83; 71 L. J., P. C. 1; 85 L T. 553.

19. *Estoppel—Certification—Transfer—Secretary—Director.*—A company is not estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. Those who deal with a company must be cognizant of the company's memorandum and articles of association; and a managing or other director of a company cannot

bind the company, by estoppel or otherwise, in contravention of the regulations in the memorandum or articles of association.

Where the secretary of a company falsely certified that certificates of shares had been deposited, and this was done for the purpose of enabling a fraud to be carried out,

Held, in an action for damages for refusing to place the name of the respondent on the register of a company, that the company were not estopped by the action of their secretary from setting up the true state of facts, and, as his conduct was unauthorized and outside the scope of his employment, the company were justified in not registering the respondent as transferee.

Grant v. *Norway*, 10 C. B. 665, followed.

Decision of the Court of Appeal reversed.—WHITECHURCH *v.* CAVANAGH, *H.L.*, 218; [1902] A C 117; 71 L. J. K. B. 400; 85 L T. 349.

20. *Illegality—Unregistered association of more than twenty members—Right to maintain action—Companies Act*, 1862, *s.* 4—*Friendly Societies Act*, 1896.—The trustees of an unregistered association of more than twenty persons formed for mutual insurance against death and accident sued the late treasurer for moneys of the society which he had converted to his own use.

Held, that the society was not rendered illegal by the Companies Act, 1862, for want of registration, and that the plaintiffs were not precluded from maintaining the action by reason of non-registration under that Act or the Friendly Societies Act, 1896.—MARRS *v.* THOMPSON, *K.B.D.*; 86 L. T. 759.

21. *Interim dividend—Declaration of, by directors—Withdrawal—Indefeasible right of shareholders to payment—Articles of association.*—It was provided by the articles of association of a company that "the directors might from time to time pay to the members on account of the next forthcoming dividend such interim dividends as, in their judgment, the position of the company justified."

On the 16th of March, 1897, at a meeting of the directors, it was resolved that an interim dividend be declared for the current year at the rate of 4 per cent. per annum, payable on the 20th of April, 1897. On the 12th of April, 1897, the directors resolved that, having regard to certain litigation then pending, the payment of the proposed interim dividend should be postponed; and on the 13th of April, 1897, the company requested their bankers to set aside out of money in their hands belonging to the company, under a special account intituled "Interim Dividend Account," a sum of £36,000 to cover the dividend, pending the company's instructions. The company now claimed a declaration that neither they nor their bankers were bound to apply the said sum of £36,000 or any part thereof in payment of that dividend.

Held, that the company were entitled to such a declaration.—LAGUNAS NITRATE CO. *v.* SCHROEDER, *Ch.D. Joyce, J.*; 85 L. T. 22.

22. *Memorandum of association—Main object—Subsidiary objects*—Ultra vires—*Injunction.*—The objects clause of a memorandum of association of a gold mining company consisted of a large number of paragraphs which embraced objects apparently remote from gold mining. One paragraph stated that these objects should in no wise be limited or restricted by reference to or reference from the terms of any other paragraph or the name of the company.

Held, that the paragraphs in the clause were to be construed as giving the company full and ample powers to do a number of things, but in a manner subsidiary and subordinate to the main business, and an injunction was granted restraining the company from carrying out a scheme which clearly did not come within the main business of the company.—STEPHENS *v.* MYSORE REEFS (KANGUNDY) MINING CO. (LIMITED), *Ch.D. Swinfen Eady, J.*, 509; [1902] 1 Ch. 745; 71 L. J. Ch. 295; 86 L. T. 221.

23. *Memorandum upon register of members—Lien of company—Trustee in bankruptcy of shareholder—Form of certificate—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Table A, article* 13.—The trustee in bankruptcy of a shareholder in a company applied to be registered as owner of shares standing in the bankrupt's name. The company had, under their articles, a lien upon shares for debts due to them from their members. The company alleged that there were debts due to them from the bankrupt, and they registered the trustee as owner of the shares, but they put upon the register a memorandum of their claim to the lien, and claimed to put a note to the same effect upon the certificate of the shares.

Held, that the company were not entitled to put such a memorandum upon the register, and it must be removed therefrom.

Semble, that the certificate of the shares must be granted in accordance with the register, and the company were not entitled to place any such note or memorandum upon it.—KEY & SON, RE. *Ch D. Byrne, J.*, 234; [1902] 1 Ch. 467; 71 L. J. Ch. 254; 86 L. T. 374.

24. *Name painted or affixed on shop—Breach of Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 41, 42—*Right to protection—Injunction.*—In an action for an injunction to restrain defendants from using a certain trade-name, similar to one used by plaintiffs, defendants pleaded that plaintiffs, having contravened sections 41 and 42 of the Companies Act, 1862, were precluded from any right to the protection of their trade-name.

Held, applying the principle of *Wright* v. *Horton*, 36 W. R. 17, 12 App. Cas. 371, that plaintiffs had established a right to the protection of their trade-name.

Pearks, Gunston, & Tee (Limited) v. *Thompson, Talmey, & Co*, 18 Rep. Pat. Cas. 185, followed.—RANDALL *v.* BRITISH AND AMERICAN SHOE CO., *Ch.D. Swinfen Eady, J.*, 697; [1902] 2 Ch. 354.

25. *Notice—Person acting as secretary of two companies—Knowledge in one character—Presumption of notice in other character—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 48, 49, 50, *sub-section* 2 (b).—Where a man acts as secretary of two companies, it is not true as a general proposition that a fact which comes to his knowledge as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship. In order to make it notice it must be shown that it was his duty to the first company to communicate his knowledge to the second company.—FENWICK, STOBART, & CO. (LIMITED); DEEP SEA FISHERY CO.'S (LIMITED) CLAIM, *Ch.D. Buckley, J.*; [1902] 1 Ch. 507; 71 L. J. Ch. 321; 86 L. T. 193.

26. *Practice—Originating summons—Construction of "written instrument"—Company—Articles of association—Questions affecting class of shareholders—Preference shares—R. S. C.*, 1883, *ord.* 16, *r.* 32 (b); *ord.* 54 (a), *rr.* 1, 2.—A company proposing to issue new preference shares ranking *pari passu* with its existing preference shares served on one of its preference shareholders (sued on behalf of him-

self and the other preference shareholders) an originating summons for the determination of certain questions, with reference to the proposed issue, arising on the construction of the articles of association.

Buckley, J., refused to appoint the defendant to represent the class, and said that he would not decide the questions so as to bind the class of preference shareholders unless a meeting of them was first called and nominated a person to represent them, in which case he would appoint him to represent the class. He, however, decided the question as between the company and the defendant.—MORGAN'S BREWERY CO. *v.* CROSSKILL, *Ch.D. Buckley, J.*; [1902] 1 Ch. 898; 71 L. J. Ch. 585.

27. *Prospectus — Contract by company—Omission from prospectus—Rights to be "honourably met"—Cancelled contract—Cancelling contract—Untrue statement—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.—By an agreement of the 9th of May, 1898, a promoter agreed to float a company for a sum equal to one per cent. on its nominal capital. Subsequently it was resolved to purchase the business of another company as a going concern, and the company, by a letter of the 21st of September, a resolution of the 1st of October, and a letter of the 1st of October, entered into a contract with the promoter by which the promoter agreed to advance the sum of £14,250, which was required as a deposit in respect of the purchase, and the company agreed to repay him that amount together with a commission of £7,500. The agreement of purchase was signed on the 26th of September. The directors of the vendor company, some of whom were to join the board of the new company, objected to the payment of the £7,500. The promoter was accordingly assured that his right to receive proper remuneration for commission would be honourably met, and, with his consent, the contract contained in the letter of the 21st of September was cancelled by a resolution of the 10th of October and a letter of the 18th of October. Subsequently the directors issued a prospectus in which it was stated, on the advice of counsel, that the only contracts to which the company was a party were those of the 9th of May and the 26th of September.

Held, that the contract to pay the promoter the commission of £7,500 contained in the letter of the 21st of September, the resolution of the 1st of October, and the letter of the 1st of October was not wholly cancelled by the contract contained in the resolution of the 10th of October, and the letter of the 18th of October, and that in any event both contracts should have been disclosed in the prospectus under section 38 of the Companies Act, 1867, and that the statement in the prospectus that the only contracts to which the company was a party were those of the 9th of May and the 26th of September was a false statement within the Directors' Liability Act, 1890.

Held, also, that the fact that the contracts were omitted from the prospectus on the advice of counsel was no defence to an action under either statute.—BROOME *v.* SPEAK, *Ch.D. Buckley, J.*, 614.

28. *Prospectus—Director—Promoter—Underwriter—Contract by directors and promoters—Omission from prospectus—Materiality—Careful investor—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—In order that a shareholder may obtain relief under section 38 of the Companies Act, 1867, for non-disclosure in the prospectus of a material contract, he must show that he applied for his shares on the faith of that prospectus, and that such prospectus had been "knowingly issued" by the promoters and directors of the company before he acted upon it.

An underwriter who pays attention to nothing in the prospectus but the names of the directors will not be considered by the court as a careful investor in determining the materiality of a contract not disclosed in the prospectus.—BATY *v.* KESWICK, *Ch.D. Farwell, J.*, 14; 85 L. T. 18.

29. *Prospectus—Director—Promoter—Shareholder—Contract by directors and promoters—Omission from prospectus—"Fraudulent" prospectus—Waiver clause—Measure of damages—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—An arrangement under which the promoters and directors of a company about to be formed agreed with a firm that, in consideration of the latter's underwriting 10,000 shares in the company, the firm was to receive 12,000 vendor shares as commission therefor, but 10,000 shares were in fact for the use of the firm's name on the prospectus on their approving of the soundness of the undertaking; and, further, that the firm was to be appointed commercial agents of the company, whose registered office was to be located at its address, while a member of the firm was to go on the prospectus as chairman of the company, held to be a contract material to be disclosed in the prospectus within the meaning of the 38th section of the Companies Act, 1867.

The 38th section cannot be evaded by a "waiver clause" saying that "there may also be various trade contracts and business arrangements" in a case where such a contract as that mentioned above has not been disclosed in the prospectus.

In refusing to give effect, as against a shareholder, to such a waiver clause, and in holding that the prospectus by reason of the omission of a material contract is "fradulent" within the meaning of the 38th section, the court will measure the damages due to the shareholder by the difference between the amount paid by him for his shares and the actual value of the shares on the day after they were allotted to him.

Greenwood v. *Leather Shod Wheel Co.*, [1900] 1 *Ch.* 421, 48 W. R. Dig. 35, followed.—CACKETT *v.* KESWICK, *Ch.D. Farwell, J.*, 10; 85 L. T. 14 (affirmed 71 L. J. Ch. 641.)

30. *Reduction of capital—Unequal payments upon ordinary shares—Losses to be borne proportionately.*—The deferred shares in a company were paid up in full, the ordinary shares of £10 each were as to some paid up to £5 each, as to others up to £2. The articles of association of the company provided that in the case of a winding up the losses were to be borne by the members in proportion to the capital paid up. The company passed a special resolution that the ordinary shares be reduced from £10 to £8 10s., cancelling capital to the extent of £1 10s. on each ordinary share.

Held, that the same rule must be followed in the reduction of capital as would have been followed in a winding up, and that the losses must be borne by the members in proportion to the capital paid up on the shares.—CREDIT ASSURANCE AND GUARANTEE CORPORATION, RE, *Ch.D. Farwell, J.*, 629; [1902] 2 Ch. 178.

31. *Registration—Similarity of name—Deception—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.—The plaintiffs carried on business under the name of "Aerators (Limited)." The defendants sought to register a company under the name of "Automatic Aerator Patents (Limited)."

Held, that a name is not necessarily calculated to deceive because it is similar, and that on the facts there was not any probability of deception, and that the plaintiffs were not entitled to restrain the defendants from registering their company.—AERATORS (LIMITED) *v.* TOLLIT, *Ch.D. Farwell, J.*, 584; [1902] 2 Ch. 319; 86 L. T. 651.

32. *Shares—Agreement to vote in a particular way—Executors—Directors.*—Executors holding shares in a company agreed to sell part of them to G., who stipulated that as part of transaction he should nominate X. and W. as directors, and that the executors should, when either X. or W. should retire by rotation, vote for and not against his re-election. The agreement extended to shares, whether held by the executors in that capacity or in their own personal capacity. W. was about to retire by rotation, and some of the executors threatened to oppose his re-election.

Held, that the agreement was valid as regarded shares held by the executors, either as such or as directors, and that on W. undertaking to retire, if required by the court, at the ordinary meeting next after the trial, an injunction must be granted until the trial restraining such of the executors as threatened to do so from voting against the re-election of W. on his retirement by rotation.—GREENWELL *v.* PORTER, *Ch.D. Swinfen Eady, J.*; [1902] 1 Ch. 530; 71 L. J. Ch. 243; 86 L. T. 220.

33. *Shares—Call for whole amount remaining unpaid — Non-payment — Forfeiture — Sale — Condition that purchaser be discharged from prior calls—Subsequent call—Liability of purchaser.*—A limited company, having power to do so, forfeited shares for non-payment by the holders of a call for the full amount remaining unpaid thereon. The company then sold the shares to the defendants, the contract of sale providing that the shares were to be deemed to be discharged from all prior calls. Subsequently, the call being still unpaid, the company made in substitution therefor a further call.

Held, that the contract of sale did not protect the defendants from liability for the subsequent call.—RANDT GOLD MINING CO. *v.* NEW BALKIS EERSTELING, *K.B.D.*; 71 L. J. K. B. 346; 85 L. T. 780.

34. *Shares—Memorandum of association—Subscription obtained by misrepresentation—Winding up—Contributory—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18, 23.—A signatory to a company's memorandum cannot claim rescission of his contract to take shares on the ground that he became a signatory in consequence of misrepresentation made to him by a third party.

L. having subscribed the memorandum of a company on the faith of misrepresentations made to him by S., a promoter of the company, held liable on the shares for which he had subscribed the memorandum, because (1) a company cannot appoint an agent before it comes into existence itself; and (2) L. on registration became bound, not only as between himself and the company, but also as between himself and all future members.

Karberg's case, [1892] 3 Ch. 1, 40 W. R. Dig. 41, distinguished.—METAL CONSTITUENTS (LIMITED), RE, LORD LURGAN'S CASE, *Ch.D. Buckley, J.*, 492; [1902] 1 Ch. 707; 71 L. J. Ch. 323; 86 L. T. 291.

35. *Shares subscribed for in memorandum of association—Shares allotted as fully paid up under contract of sale—Application to register memorandum of contract—Liability of subscriber to memorandum of association—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.—Shares subscribed for in a memorandum of association of a limited company formed in 1893 cannot subsequently be contracted to be paid for in some way other than in cash, or be superseded and replaced by others issued under a contract subsequently executed and registered, even if the shares so subscribed for were intended to be paid for in this way, and those subsequently issued were intended to be the ones subscribed for. And where the shares in question do not exhaust the whole of the shares of the company, an application under section 1 of the Companies Act, 1898, to file a memorandum stating that the shares were issued as part of the consideration of the contract will be refused.

In re Jarvis & Co., 47 W. R. 186, [1899] 1 Ch. 193, and *In re Archibald D. Dawnay (Limited)*, 48 W. R. 600, [1900] W. N. 152, followed.

In re Whitehead & Brothers (Limited), 48 W. R. 58, [1900] 1 Ch. 804, distinguished.—TIMMINS, RE, *Ch.D. Buckley, J.*, 134; [1902] 1 Ch. 238; 71 L. J. Ch. 121.

36. *Shares—Surrender—Release of liability on shares—Invalidity of surrender—Rectification of register after lapse of time—Companies Act*, 1862, *s.* 35.—A surrender of shares not fully paid up in a limited company, with the intention that the surrenderer shall be released from liability for the amount unpaid, falls within the principle of *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409, and is *ultra vires* and void, and the surrenderer has a right to the rectification of the register by the entry of his name, notwithstanding that several years have elapsed and that his name was removed at his own instance.

Trevor v. *Whitworth*; *Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125; and *British and American, &c., Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, discussed.

Teasdale's case, 22 W. R. 286, L. R. 9 Ch. App. 54, and *Eichbaum* v. *City of Chicago Grain Elevators (Limited)*, 40 W. R. 153, [1891] 3 Ch. 459, commented on.

Decision of Kekewich, J. ([1901] 2 Ch. 265, 49 W. R. Dig. 31), affirmed as regards the invalidity of the surrender, but reversed on the question of the rectification of the register.—BELLERBY *v.* ROWLAND AND MARWOOD'S SHIPPING CO. (LIMITED), *C.A.*, 566; [1902] 2 Ch. 14; 71 L. J. Ch. 541; 86 L. T. 671.

37. *Special resolution—Voting—Show of hands—Proxies—Chairman's declaration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51; *Table A., art.* 42.—Although a chairman's declaration is, under section 51 of the Companies Act, 1862, conclusive evidence of the carrying of a special resolution, even if founded on an error or mistake of fact, it is not conclusive if on the face of it wrong in fact and founded on a mistaken view of the law.—CARATAL NEW MINES (LIMITED), RE, *Ch.D. Buckley, J.*, 572.

38. *Shares—Transfer of shares—Registration—Equitable title—Priority.*—The decisions in *Société Générale de Paris* v. *Walker*, 34 W. R. 662, 11 App. Cas. 20, and *Moore* v. *North-Western Bank*, 40 W. R. 93, [1891] 2 Ch. 599, establish that—where the articles of association of a company provide that the transferor shall be deemed to be the holder of such shares until the name of the transferee is entered in the register in respect thereof, and that every instrument of transfer shall be left at the office of the company for registration, accompanied by the certificate of the shares to be transferred

and such other evidence as the company may require to prove the title of the transferor or his right to transfer the shares—the mere leaving of such transfer and the certificate of shares at the office of the company before the company had notice of any prior equitable claim to the shares, is not sufficient to give the legal title to the transferee so as to oust the prior equitable owner, and is not of itself sufficient to give the transferee a "present absolute unconditional right" to the shares.—IRELAND *v.* HART, *Ch.D. Joyce, J.*, 315; [1902] 1 Ch. 522; 71 L. J. Ch. 276; 86 L. J. 385.

39. *Winding up—Assets—"Surplus assets"—Loss of capital—Profits earned before winding up—Dividend not declared—Rights of preference and ordinary shareholders* inter se.—The capital of a trading company consisted of £10 shares, preference and ordinary, all paid up in full, the former being entitled to a cumulative preferential dividend. The articles of association empowered the directors to set aside out of the profits such sums as they thought proper as a reserve fund. For some years the preferential dividend was paid, and then for three years the business was carried on at a loss, the result being a loss of capital to the amount of £4,346 In the next year there was a profit of £1,675 on the year's trading, but the directors did not declare a dividend or make any appropriation of that sum. The company went into voluntary liquidation, the debts were all paid, and the capital, to the extent of £7 per share, was returned to the shareholders. The sum of £1,675 remained in the hands of the liquidator.

Held, upon the construction of the articles, that the preference shareholders were not entitled to have this sum applied in paying them dividends for the four years in which they had received none, but that it must be divided as capital rateably among all the shareholders.

Decision of Wright, J. ([1902] 2 Ch. 184), affirmed.

In re Bridgwater Navigation Co., [1891] 1 Ch. 155, and *Bishop* v. *Smyrna and Cassaba Railway Co.*, [1895] 2 Ch. 265, considered and distinguished.—CRICHTON'S OIL CO., RE, *C.A.*; [1902] 2 Ch. 86; 71 L. J. Ch. 531; 86 L. T. 787.

40. *Winding up—Costs—Compulsory order—Petitioning creditor's debt under £50.*—Where a compulsory winding up order is made on the petition of a creditor whose debt is under £50, he may, if supported by creditors for a larger amount, be allowed his costs.—LEYTON AND WALTHAMSTOW CYCLE CO., RE, *Ch.D. Wright, J.*, 93.

41. *Winding up—Costs—Taxation—Costs of drawing bill of costs and of copy.*—The N. Bank was in voluntary liquidation. The M. Bank bought the assets of the N. Bank and agreed to pay the costs, &c., of the liquidators of the N. Bank in the winding up. The liquidators' solicitor prepared bills of costs which were duly paid by the M. Bank. On taxation of the bill of costs presented by the solicitor to the liquidators of the N. Bank, (*a*) the costs of preparing and copying the bill of costs for payment by the M. Bank, and (*b*) for preparing and copying the bill of costs taxed were disallowed.—NATIONAL BANK OF WALES, RE, *Ch.D. Buckley, J.*, 541.

43. *Winding up—"Proceeding against the company"—Companies Act*, 1867, *s.* 87.—Where a company is being wound up under the direction of the court, an appeal to the House of Lords in which the company is respondent, brought in an action in which the company was originally plaintiff, is not a "proceeding against the company" within section 87 of the Companies Act, 1862.—HUMBER & CO. *v.* GRIFFITHS CYCLE CO., *H.L.*; 85 L. T. 141.

43. *Winding up—Proof in winding up—Directors—Remuneration as receivers and managers—Remuneration as directors.*—Two directors of a company who had been appointed by the court receivers and managers for the debenture-holders were allowed to prove in a voluntary winding up for their remuneration as directors during the period for which they had acted and been paid as such receivers and managers. — SOUTH - WESTERN VENEZUELA RAILWAY CO., RE, *Ch.D. Buckley, J.*, 300; [1902] 1 Ch. 701; 71 L. J. Ch. 407; 86 L. T. 321.

44. *Winding up—Public examination—Discretion of registrar as to allowing question—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict.* c. 63), *s.* 8.—The discretionary power of allowing a question to be put at a public examination given to the court by section 8, sub-section 7, of the Companies (Winding-up) Act, 1890, is in no way limited by the other provisions of that section, but is a discretion that must be judicially and carefully exercised under all the circumstances of each particular case.—LONDON AND GLOBE FINANCE CO., RE, *Ch.D. Byrne, J.*, 253

45. *Winding up — Pending action — Privilege—Officer of company—Examination—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 115.—An officer of a company which has gone into liquidation is not justified in refusing, in the course of an examination under section 115 of the Companies Act, 1862, to answer questions as to documents belonging to the company which have come into his possession as an officer of the company, on the ground that such documents have passed into the possession of persons who are in litigation with the company, and have successfully claimed privilege in the litigation in respect of such documents.

Judgment of Wright, J. (*ante*, p. 167), affirmed.—LONDON AND NORTHERN BANK, RE, ARCHER'S CASE, *C.A.*, 262; 85 L. T. 698.

46. *Winding up—Solicitor—Terms on which a solicitor may appear for a witness—Private examination—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 115.—On the examination of a witness under section 115 of the Companies Act, 1862, the Registrar of Joint-Stock Companies is entitled to require from the witness's solicitor, as a condition of his being allowed to be present at the examination, an undertaking to use any knowledge he may acquire from the examination only for the purposes of re-examination, and not to communicate the same to any other person.

Decision of Byrne, J. (*ante*, p. 386), affirmed.—LONDON AND NORTHERN BANK, RE, HADDOCK'S CASE, *C.A.*, 536; [1902] 2 Ch. 73; 71 L J. Ch. 511; 86 L. T. 430.

47. *Winding up—Voluntary winding up—Compulsory order—Contributory—Fully-paid shareholder, petition by—Surplus assets—Directors—Presents of shares—Fraud—Breach of trust—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 145.—A contributory of a company, even though he is the holder of fully-paid shares, is not debarred from presenting a compulsory winding-up petition by the mere fact that there is a voluntary liquidation pending in which there is a surplus or probable surplus of assets for distribution. The jurisdiction to make a compulsory order is not limited to cases either where the voluntary liquidation is proved to be a sham or a fraud, or where the petition is

supported by creditors, but may be exercised wherever the court is satisfied that the voluntary liquidation is existing in circumstances which are likely to prejudice the shareholders, and that some benefit will result to the shareholders by the exercise of the jurisdiction.

During the pendency of the voluntary winding up of a company, having surplus assets, a petition for a compulsory winding-up order was presented by a fully-paid shareholder.

Held, that the case was not one in which the court would exercise its jurisdiction to make a compulsory order, the evidence not being sufficient to show that any benefit would thereby result to the shareholders. The petition was therefore dismissed, but, in the circumstances, without costs.—NATIONAL COMPANY FOR THE DISTRIBUTION OF ELECTRICITY, RE, *C.A.*; [1902] 2 Ch. 34.

See also Adulteration, 7.

COMPROMISE.—See Practice, 10; Settled Land, 5.

CONFLICT OF LAWS:

1. *Fund in court — French subject entitled — "Prodigal"—Status — Capacity to sue — "Conseil judiciaire"—Code Napoleon, section 513—Payment out.*—By the Code Napoleon a French subject of full age, who is of extravagant habits, when adjudged by a French court of competent jurisdiction to be a "prodigal," is restrained from dealing with, disposing of, alienating, receiving, or giving a receipt for his movable property without the consent of a *conseil judiciaire* (legal adviser). But, although this judgment modifies and affects the status of the "prodigal," it is a disqualification unknown to English law, and will be disregarded by English courts.

Where, therefore, a French subject of full age, who had been adjudged a "prodigal," and placed under the control of a *conseil judiciaire* by the judgment of a French court of competent jurisdiction, became entitled to a fund in court in England:

Held, that he was entitled to payment out of the fund to himself on his sole receipt, notwithstanding the opposition of his *conseil judiciaire.*

Worms v. *De Valdor*, [1880] 28 W. R. 346, 49 L. J. Ch. 261, discussed and followed.—SELOT'S TRUST, RE, *Ch.D. Farwell, J.*; [1902] 1 Ch. 488; 71 L. J. Ch. 192.

2. *Marriage—Deceased husband's brother—Italian subjects—Domicil—Lord Lyndhurst's Act (Marriage Act*, 1835, 5 & 6 *Will.* 4, *c.* 54), *s.* 2.—A marriage was legally contracted in Italy between a woman and the brother of her deceased husband, the wife and both husbands being Italian subjects and domiciled in Italy.

Held, that the marriage was valid in England.—BOZZELLI'S SETTLEMENT, RE, HUSEY HUNT *v.* BOZZELLI, *Ch.D. Eady, J.*, 447; [1902] 1 Ch. 751; 71 L. J. Ch. 505; 86 L. T. 445.

3. *Tort in foreign country—Right of action—Foreign government—Jurisdiction.*—To constitute an actionable wrong, where the injury is committed abroad, it must be actionable in the country where committed as well as in this country.

Where a British subject seized goods in Muscat waters, which act was authorized by the Sultan and therefore lawful in that country, no action lies in our courts for such seizure.—CARR *v.* FRACIS, *H.L.*, 257; [1902] A. C. 176; 71 L. J. K. B. 361; 85 L. T. 144.

4. *Will—Domiciled foreigner—Unattested will—Leaseholds—Administration with will annexed*—Lex rei sitæ—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 9.—The will of a foreigner domiciled abroad, though valid according to the *lex domicilii*, and though admitted to probate in England, will not pass the beneficial interest of leaseholds in England unless executed in accordance with the formalities required by the Wills Act.

Decision of Kekewich, J. (48 W. R. 671, [1900] 2 Ch. 504), affirmed.—PEPIN *v.* BRUYÈRE, *C.A.*, 34; [1902] 1 Ch. 34; 71 L. J. Ch. 39; 85 L. T. 461.

See also Canada, Law of, 1; Crown 2.

CONTRACT:—

1. *Assignability—Contract to supply goods—Increase of burden by assignment.*—T. contracted with the I. Co. to supply them for fifty years with at least 750 tons of chalk per week, and so much more as they might require for their manufacture of cement upon a certain piece of land, the chalk to be delivered in convenient daily quantities as required by the company by written notice given on the preceding day. The I. Co., which had a small capital and was doing a comparatively small business, went into voluntary liquidation and transferred all its business and property, and purported to assign this contract, to the A. Co., which was a very powerful company with a very large capital.

Held, that, as the result of the assignment would be to impose a greater liability and burden upon T., he was not bound to supply chalk to the A. Co.—TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) (LIMITED), *K.B.D.*; [1901] 2 K. B. 811; 70 L. J. K. B. 1036.

2. *Assignment of contract—Specific performance—Failure of consideration—Money had and received.*—On the 16th of July B. entered into an agreement to buy certain mining claims from A., the purchase to be completed on or before the 8th of November, subject to the payment by B. of instalments of £400 per month. On the 18th of July B. sold the same property to C., on condition that C. paid a deposit and a sum of £230 per month up to the 1st of November. On the 18th of July B. assigned the benefit of his contract with C. to D. The deposit and the monthly contributions were paid by C. to D. for four months. In an action brought by D. against B. and C. for specific performance, C. counter-claimed the return of the deposit and the four instalments.

Held, that, on total failure of consideration, C. could recover his payments from D.—FLEMING *v.* LOE, *Ch.D. Cozens-Hardy, J.*, 55; [1901] 2 Ch. 594; 70 L. J. Ch. 805; 85 L. T. 480.

3. *Building contract—Penalties—Building owner to make allowances for delay—Final decision—Default by building owner—Exclusive jurisdiction of building owner.*—By a building contract certain matters causing delay and "other causes beyond the contractor's control" were to be submitted to the board of directors of the owners of the building, who were to "adjudicate thereon and make due allowance therefor if necessary, and their decision shall be final."

Held, that the exclusive jurisdiction of the board did not extend to delay caused by interference by the building owners or their architect with the conduct of the works, by default in not giving the contractors possession of the premises, and in not providing plans and drawings in due time; and so, such interference and defaults being made out, the building owners could not recover penalties.—WELLS *v.* ARMY AND NAVY CO-OPERATIVE SOCIETY, *K.B.D.*; 86 L. T. 764.

4. *Building ship—Delay—Allowances—"Circum-*

stances beyond builders' control."—A contract for building a ship provided that due allowance should be made for delays through certain causes "or other circumstances beyond the builders' control."

It was within the contemplation of the parties that the ship should be commenced as soon as a suitable berth became vacant, and the first berth which became vacant was one in which another ship was being built, and delay was caused in the completion of this ship by the same kind of causes which were provided for in the contract relating to the ship in question.

Held, that allowances were properly made for delay in building the ship in the contract owing to the delay in completing the former vessel.—LOCKIE & CRAGGS, RE, *K.B.D.*; 86 L. T. 388.

5. *Parol evidence—Writing—Verbal warranty—Inadmissible to enlarge—Written warranty—Arbitration—Pleadings—Amendment.*—Where a written contract exists, parol evidence may be given to prove a verbal warranty respecting a matter on which the written contract is wholly silent. Such evidence is not admissible so far as to enlarge the scope of a warranty which is contained in the written contract. A written contract stated: " . . . We hereby offer you ninety thousand pounds for the entire rights, assets, and liabilities of the above company, including the liabilities attaching to existing contracts as at this date. . . ." It also stated: "We agree to take over the liabilities of the company as under," setting out certain specific items.

Held, that it was for the arbitrator to construe the whole of the contract and the meaning of the word "liabilities" in the earlier part; that parol evidence was not admissible to show the meaning attached to the word by the parties when entering into the contract; and that there was no necessity for limiting the word "liabilities" in the first part to the particular liabilities set out later. Disputes having arisen between the plaintiffs and the defendants, it was agreed between them "that all points in dispute in reference to the contract for the sale and purchase of S. F." should be referred to the arbitration of some practical man. Points of claim and defence and counter-claim with particulars were delivered, and re-delivered on being amended, between the parties.

Held, that these documents were in the nature of pleadings or particulars, and could be amended by the arbitrator in his discretion, and all points in dispute between the parties relating to the subject-matter could be so raised, although not in the first instance disclosed by such documents.—EDWARD LLOYD (LIMITED) *v.* STURGEON FALLS PULP CO., *K.B.D.*; 85 L. T. 162.

6. *Restraint of trade—"Interested in" similar trade—Servant at a salary.*—The manager of a jewellery business entered into a covenant with the proprietors of the business that he would not become interested in, either directly or indirectly, a similar trade or business to that carried on by the said proprietors. Subsequently he entered the employment of a firm in a similar business as an assistant at a fixed salary.

Held, that there was no breach of the covenant, as he had no "proprietary or pecuniary" interest in his new employment.—GOPHIR DIAMOND CO. *v.* WOOD, *Ch.D. Swinfen Eady, J.*, 603; [1902] 1 Ch. 950; 71 L. J. Ch. 550; 86 L. T. 801.

7. *Sale of business—Benefit of pending contracts—Assignment—Indemnity.*—An agreement for the purchase and sale of a newspaper business contained a term or condition that the vendors should sell and the purchasers should purchase "the full benefit of all pending contracts and engagements and of all other property to which the vendors are or may be entitled in connection with the said journal."

Held, that the purchasers took the burden of pending contracts, and did not merely acquire an option to take the benefit of such contracts.—BOWATER & SONS *v.* MIRROR OF LIFE CO., *K.B.D.*, 381.

8. *Setting aside—Contract of service—Dismissal—Undue pressure.*—In an action for salary due and damages for wrongful dismissal the defendants pleaded, *inter alia*, that by an agreement entered into by the plaintiff and the defendants, which agreement was embodied in a deed, the plaintiff had tendered his resignation, which had been accepted by the defendants, and that the plaintiff had accepted a certain sum of money in complete satisfaction and discharge of all his claims against the defendants. In his reply the plaintiff pleaded that he was induced to execute the deed by the defendants threatening unlawfully to imprison him unless he executed the same, and that he executed the deed in fear that the threat would be carried out, and that he had given no real or free consent to such execution. At the trial of the action two questions were left to the jury:

(1) Was the plaintiff induced to make the agreement by threats of the defendants of criminal proceedings or imprisonment? To which the jury returned the answer "No."

(2) Was the plaintiff induced to make the agreement by undue pressure exercised by the defendants to force the plaintiff to enter into the agreement? To which the jury returned the answer "Yes."

Held, on further consideration, that the answer of the jury to the second question was not sufficient to entitle the plaintiff to get rid of the deed and to fall back upon his original claims, and that judgment must be entered for the defendants.—BARNES *v.* RICHARDS, *K.B.D.*, 363; 71 L. J. K. B. 341; 86 L. T. 231.

9. *Statute of Frauds—Agreement for service—Time for commencement—Managing director.*—A memorandum in writing of an agreement by a company to employ a managing director for a term of five years is not sufficient within the Statute of Frauds unless it shows the date at which the service is to begin.

Semble, it should also contain some definition of the nature of the service.—ALEXANDER'S TIMBER CO., RE, *Ch.D. Wright, J.*; 70 L J. Ch. 767.

See also Action, 1; Company, 6, 27, 28, 29

CONVEYANCING ACTS.—See Charity, 5; Easement, 2; Infant, 2, 3; Landlord and Tenant, 1; Merger, 1; Mortgage, 1; Practice, 16; Receiver, 1; Trustee, 3; Vendor and Purchaser, 5, 12, 13.

COPYRIGHT:—

1. *Artistic production—Toys—Models of soldiers—Sculpture Copyright Act*, 1814 (54 *Geo.* 3, c. 56), s. 1—*Stamping proprietor's name on models—Date of publication.*—Metal models of mounted yeomen produced and sold as toys are, where there is evidence that they are anatomically and technically correct and display artistic skill and merit on the part of the producer, within the protection of the Sculpture Copyright Act, 1814.

The proviso in section 1 as to stamping such models with the proprietor's name is satisfied by the insertion of the name of one of the partners of the firm of proprietors, if he himself be the producer of the model.

The effect of the requirement in the same proviso as to the date of publication is that the date must not be misleading; and the insertion of a date upon the cast a few days earlier than the absolute date of putting forth and publication is no contravention of the proviso.—BRITAIN *v.* HANKS, *K.B.D.*; 86 L. T. 765.

2. *Common sources of information—Infringement—Injunction.*—An author may avail himself of common sources of information on a subject, but he is not entitled to save himself pains and labour by adopting a predecessor's work with but colourable variations, even though such predecessor's work is based on materials which are common property. Thus an author is not at liberty to avail himself of the taste and judgment of a predecessor in illustrating his work by quotations, nor can he justify taking such quotations on the ground that he has simply followed the references given by his predecessor and copied the quotations from the original works.

Decision of Kekewich, J. (49 W. R. 438), reversed.—MOFFATT & PAIGE *v.* GILL & SONS, *C.A.*, 528; 86 L. T. 465.

3. *Encyclopædia—Contributor and publisher—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 18.—The copyright in articles contributed to an encyclopædia and paid for by the publisher, where there is no special agreement as to the copyright between contributor and publisher, and no special circumstances in the nature of the work or in the terms of the employment, is in the author and not in the publisher.—AFLALO *v.* LAWRENCE, *Ch.D. Joyce, J.*, 24; [1902] 1 Ch. 264; 70 L. J. Ch. 797; 85 L. T. 342.

4. *Infringement—"Book"—Designs—Illustrations in catalogue—Sale of electrotypes—Personal licence—Right to assign.*—In September, 1898, the plaintiffs, who were wholesale manufacturers of furs, mantles, &c., published a catalogue of designs containing twelve illustrations. The firm of E. & W., retail drapers, having obtained one of these catalogues, requested the plaintiffs to supply them with some of the electro blocks of the illustrations, and this the plaintiffs did, the price being 4s. 6d. each. E. & W. handed over these blocks to the defendants, P. & Sons, a firm of "fashion printers," for production in E. & W.'s catalogue. P. & Sons at the same time purchased the blocks of E. & W., deducting the price from their charge for the catalogues supplied to E. & W. In November, 1898, P. & Sons printed for the defendants, B. & Co., another firm of retail drapers, a catalogue containing eight illustrations from the blocks in question, but with different names. Thereupon the plaintiffs registered, under the Copyright Act, 1842, their catalogue containing the twelve illustrations, and brought an action against B. & Co. and P. & Sons claiming an injunction to restrain the defendants from reproduction and sale of the illustrations, and consequential relief. The action as against B. & Co. was stayed on certain terms. The defendants, P. & Sons, stated that they had purchased the blocks of E. & W. without any conditions or restrictions, and contended, amongst other defences, that the plaintiffs had no copyright in the illustrations, as they had not been registered under the Fine Arts Copyright Act, 1862, and that registration of the catalogue under the Copyright Act, 1842, simply as a "book" was not sufficient to protect the illustrations separately.

Held, that engravings published as part of a book, and registered for the purposes of copyright as a "book," were protected by the copyright of the book itself; that in the present case the plaintiffs had a copyright in the illustrations in question as part of their book; and that, the illustrations being a substantial part of the book, there had been an infringement of the book itself.—MARSHALL *v.* BULL, *C.A.*; 85 L. T. 77.

5. *Infringement—Portions of one book printed by different printers—"Cause to be printed"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 15.—A person who has contracted to print a book for another, but subsequently allows such other person to get a portion printed elsewhere, does not "cause" such portion to be printed within the meaning of section 15 of the Copyright Act, 1842, even, though his name appears on the title-page of the work as the printer.

Decision of Byrne, J. (49 W. R. 313, [1901] 1 Ch. 374), affirmed.—KELLY'S DIRECTORIES *v.* GAVIN AND LLOYD'S, *C.A.*, 385; [1902] 1 Ch. 631; 71 L. J. Ch. 405; 86 L. T. 393.

CORPORATION:—

Statutory Power—Injury to individual—Remedy.—Where a public body, acting in the execution of their public duties for the public benefit, do an act which they are authorized by law to do, and the act, though done in a proper manner, causes special injury to a particular person, that person has no remedy unless one is given by statute. The appellant corporation, acting in pursuance of statutory powers, altered the gradient of a street in the town, and thereby seriously interfered with the access to the respondent's house. The Act under which the appellants acted made no provision for compensation in respect of consequential injury.

Held, that the respondent could not maintain an action against the corporation in respect of such injury. — EAST FREMANTLE (CORPORATION) *v.* ANNOIS, *P.C.*; [1902] A. C. 213; 71 L. J. P. C. 39; 85 L. T. 732.

COSTS.—See Administration, 1, 7; Attachment, 4; Company, 8, 40, 41; County Court, 1, 4, 5; Divorce, 1, 2, 3, 10, 13; Landlord and Tenant, 15; Libel, 1; Married Woman, 1; Mortgage, 2; Practice, 11-26; Probate, 10, 11; Solicitor, 4, 5, 6.

COUNTY COURT:—

1. *Appeal — Workmen's Compensation Act* (60 & 61 *Vict. c.* 57), *s.* 5—*Appeal to High Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.—An appeal from an order of a county court judge under section 5 of the Workmen's Compensation Act, 1897, lies to the Divisional Court.—KNIVETON *v.* NORTHERN EMPLOYERS' INDEMNITY, *K.B.D.*, 704; [1902] 1 K. B. 880; 71 L. J. K. B. 588; 86 L. T. 721.

2. *Costs—Remitted action—Payment by defendant to plaintiff after action brought—Sum "recovered in the action"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—Section 116 of the County Courts Act, 1888, provides, with respect to actions brought in the High Court which could have been commenced in the county court, that if in an action founded on contract the plaintiff shall recover a sum less than £20, he shall not be entitled to any costs of the action.

An action founded on contract having been brought in the High Court to recover £27, the defendants, after appearance, paid £8 to the defendants, no judgment or order of the court having been given or made in respect of that payment. The action was subsequently remitted to the county court. In their particulars of claim in the county court the plaintiffs credited the defendants with a payment of £8, and claimed the balance—£19; but

the particulars did not show that the payment had been made since action brought. The plaintiffs obtained judgment for £19 in the county court, the judgment in form being for £19, and not for that sum in addition to £8 credited in the particulars.

Held, that, although it should have appeared on the proceedings that the plaintiffs had recovered £19 in addition to £8 paid since action brought, they had in substance recovered in the action a sum not less than £20, and were, therefore, not disentitled to their costs by section 116.—PEARCE *v.* BOLTON, *K.B.D.*; [1902] 2 K. B. 111; 71 L. J. K. B. 558; 86 L. T. 530.

3. *Practice—Appeal to High Court—Misdirection—Refusal of new trial.*—Although a party who appeals directly to the High Court against the judgment of a county court judge on the ground of misdirection is not entitled to be heard unless he took the objection to the judge's direction at the time of the trial, it is otherwise if he first applies to the county court judge for a new trial on the ground of misdirection, and then upon being refused appeals to the High Court against such refusal. It is enough that the objection to the direction is taken for the first time upon the application for a new trial to the county court judge.—HANDLEY *v.* LONDON, EDINBURGH, AND GLASGOW ASSURANCE CO., *K.B.D.*; [1902] 1 K. B. 350; 71 L. J. K. B. 39.

4. *Practice—Costs—Action which could have been commenced in a county court—Tort—Recovery of less than £10—Judgment for injunction and nominal damages—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 116, *sub-section* 2.—An action brought in the Chancery Division for an injunction and damages for trespass to land was transferred to a county court. The county court judge gave judgment for the defendant. On appeal, the King's Bench Division gave judgment for the plaintiff for an injunction and nominal damages.

Held, that the plaintiff was entitled to his costs.

An action which results in a judgment for an injunction and nominal damages is not an action in which the plaintiff recovers a sum less than ten pounds within the meaning of section 116 (2) of the County Courts Act, 1888.

St. John's College, Cambridge v. *Pierrepont*, 61 L. J. Q. B. 19, 40 W. R. Dig. 181, overruled—KEATES v. WOODWARD, *C.A.*, 258: [1902] 1 K. B. 532; 71 L J. K B. 325; 86 L. T. 369.

5. *Practice — Costs — Power to make successful defendant pay plaintiff's costs—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 113.—A county court judge has no jurisdiction to order a successful defendant to pay the costs of the plaintiff.—ANDREW *v.* GROVE, *K.B.D.*, 524; [1902] 1 K. B. 625; 71 L. J. K. B. 439; 86 L. T. 720.

6. *Telephone company—Delegation of powers by Postmaster-General—Consent of local authority—Refusal of consent—Arbitration by county court judge—Jurisdiction—Prohibition.*—The Postmaster-General delegated certain powers to the N. T. Co. under the Telegraph Acts, and the company made an agreement with the corporation of T. W. to exercise those powers within the borough in respect of certain specified works. It was provided by the agreement that, except in the case of the specified works, the company should not exercise any of the powers conferred on the Postmaster-General by the Acts, in respect of which the consent of the corporation was necessary, without the further written consent of the corporation. The company applied for the consent of the corporation to further works, but the consent was refused. The company then applied to the county court judge to arbitrate, under section 4 of the Telegraph Act, 1878, which provides that any difference arising between the Postmaster-General and a local authority shall be referred to the county court judge as an arbitrator.

Held, that the county court judge had no jurisdiction to entertain the application of the company, inasmuch as the corporation had an absolute right to refuse their consent to the proposed work and had not consented thereto.—NATIONAL TELEPHONE CO. *v.* TUNBRIDGE WELLS CORPORATION, *C.A.*; 85 L. T. 368.

See also Bankruptcy, 10, 26; Master and Servant, 2, 30.

COVENANT—

Judgment—Merger—Mortgage—Rate of interest—Ancillary and independent covenants.—A mortgage deed contained a proviso for redemption if the mortgagors should pay the principal with interest after the rate thereinafter covenanted. The mortgagors covenanted to repay the principal on a day named with interest at 5 per cent., and if the principal was not then paid, to pay interest at that rate half-yearly on so much of the principal as should remain unpaid. The mortgagors having made default, the mortgagees recovered judgment against them for principal and interest upon the covenant.

An action having been brought by another mortgagee for an account of all moneys due to incumbrancers,

Held, that though the personal remedy on a covenant to pay a debt merges in a judgment and a judgment carries only 4 per cent. interest, yet upon the true construction of this mortgage deed the mortgagees were entitled to retain their security until they were paid the principal sum and interest at 5 per cent.

The decisions of the Master of the Rolls and the Court of Appeal in Ireland, *Usborne* v. *Limerick Market Trustees*, [1901] 1 I. R. 85, reversed on this point.—ECONOMIC LIFE ASSURANCE SOCIETY *v.* USBORNE, *H.L.*; [1902] A. C. 147; 71 L. J. P. C. 34; 85 L. T. 587.

See also Landlord and Tenant, 5-10; Married Woman, 2, 3.

CRIMINAL LAW :—

1. *Bankruptcy—Failure by debtor fully and truly to discover all his property to the trustee—Disclosure by debtor at private meeting of creditors—Intent to defraud—Admissibility of evidence negativing such intent—Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-sections* 1, 2, 4, *and* 6.—Upon an indictment under section 11, sub-sections 1, 2, 4, and 6, of the Debtors Act, 1869, charging a bankrupt with not fully and truly discovering to the trustee all his property, evidence that the bankrupt at a private meeting of his creditors, held after the presentation of the bankruptcy petition, had disclosed all his property, is admissible for the purpose of negativing any intent on his part to defraud his creditors.—REX *v* WISEMAN, *C.C.R.*, 333; 71 L. J. K. B. 128; 85 L. T. 791.

2. *Brothel—Permitting licensed premises to be used as brothel—Averment of commission of offence on different days—Continuing offence.*—An information charged B. that he within six months then passed—namely, on the 26th, 28th, 29th, and 31st of January, and the 1st, 4th, 5th, and 6th of February, 1901—permitted his licensed house to be used as a brothel, contrary to section 15 of the Licensing Act, 1872.

Held, that the information was not bad for duplicity as charging the commission of two or more offences on different and discontinuous days, and that B. might be rightly convicted on it of the offence of permitting his house to be used as a brothel since that offence was a continuing offence. —REX v. BURNBY, *K.B.D.*; 85 L. T. 168.

3. *Conspiracy—Joint indictment—Plea of guilty by one defendant—Acquittal of co-defendant—Withdrawal of plea of guilty—Practice—Stating case notwithstanding plea of guilty*—11 & 12 *Vict. c.* 78.—One person cannot be convicted of conspiracy by himself.

If on a joint indictment for conspiracy one defendant pleads "guilty," but his co-defendants plead "not guilty" and are acquitted, the defendant who pleaded guilty must be allowed to withdraw his plea and must also be acquitted.

The court has jurisdiction to consider a case stated where a defendant has pleaded guilty.—REX v. PLUMMER, *C.C.R.*; 86 L. T. 836.

4. *Conspiracy—Preventing due course of justice—Editor and Special "Crime Investigator"—Comments in newspaper about prisoners awaiting trial—Inference of intent.*—It is a criminal offence to publish writings which are calculated or tend to influence the minds of the magistrates or jurors against a person who is to be brought before them for trial.

An act which tends to prevent the course of justice is a contempt of court, but it is none the less an indictable offence.

A conspiracy to publish an article in a newspaper may be inferred if the article could not have appeared in the newspaper without the concurrence of the persons charged with conspiracy.

Held, on a special case stated for the consideration of the Court for Crown Cases Reserved, that the publication of information concerning the antecedents of two prisoners who were awaiting trial was of such a character as to interfere with and obstruct the ordinary course of justice, and that inasmuch as the articles could not have appeared without the co-operation of the editor and the reporter, there was evidence of conspiracy by them. —REX v. TIBBITS, *C.C.R.*, 125; [1902] 1 K. B. 77; 71 L. J. K. B. 4; 85 L. T. 521.

5. *Conviction set aside—No evidence of fraudulent appropriation — Liability of bank director.*—Conviction of fraudulently appropriating the moneys of a bank set aside, it appearing that there was no evidence of the convict director, who had overdrawn on a so-called trust account irregularly opened in his name, having misappropriated any one draft to his own use in fraud (within the meaning of the Act) of the bank's right to have the money. —NELSON v. REX, *P.C.*; [1902] A. C. 250; 71 L. J. P. C. 55; 86 L. T. 164.

6. *Evidence of previous convictions—Admissibility of at trial—Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 7.—Where the evidence of previous convictions is necessary in order to constitute a statutory offence, evidence of such convictions may be given at the trial of the prisoner.

Rex v. *Brown*, 65 J. P. 136, overruled.—REX v. PENFOLD, *C.C.R*, 671; [1902] 1 K. B. 547; 71 L. J. K. B. 306; 86 L. T. 204.

7. *Evidence—Prisoners jointly indicted—Cross-examination of one prisoner by another—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*iii.*).—Where two prisoners are tried together, and one of them gives evidence, under section 1 of the Criminal Evidence Act, 1898, on his own behalf, and in the course of it gives evidence incriminating the other prisoner, the former can be cross-examined by the latter as well as by the prosecution — REX v. HADWEN AND INGHAM, *C.C.R*, 589; [1902] 1 K. B. 882; 71 L. J. K.B. 581; 86 L. T. 601.

8. *Evidence—Statement of affairs*—24 & 25 *Vict. c.* 96, *ss.* 80, 85—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s* 27.—A statement of affairs made by a bankrupt in the course of bankruptcy is admissible as evidence against him on a charge of misappropriation, and does not come within the protection afforded by section 27 of the Bankruptcy Act of 1890.—REX v. PIKE, *C.C.R.*, 672; [1902] 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205.

9. *Indictment—Game—Night poaching—Previous convictions—Night Poaching Act*, 1828 (9 *Geo.* 4, *c.* 69), *ss.* 1, 9.—By section 1 of the Night Poaching Act, 1828, it is enacted that if any person shall by night unlawfully enter or be in any land with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, for the first and second offences, be liable, on summary conviction, to certain terms of imprisonment, "and in case such person shall so offend a third time he shall be guilty of a misdemeanour." By section 9 of the same Act it is enacted that if any persons, to the number of three or more, shall by night unlawfully enter or be in any land for the purpose of taking or destroying game, "any of such persons being armed with any gun, crossbow, fire-arms, bludgeon, or any other offensive weapon," such person shall be guilty of a misdemeanour.

Held, that a count of an indictment for a third offence against section 1 of entering by night upon land with a gun for the purpose of taking or destroying game, which shows that one of the two alleged previous convictions was a conviction of an offence against section 9, is bad, as it does not show that such person has "so" offended a third time within the meaning of section 1.—REX v. LINES, *C.C.R.*, 303; [1902] 1 K. B. 199; 71 L. J. K. B. 125; 85 L. T. 790.

10. *Larceny—Deer—Unlawful possession of—Deer "kept or being in" a forest—Deer killed outside forest—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *ss.* 12, 14.—A person who kills and carries away a deer when it has strayed outside the boundaries of a forest, chase, or purlieu, in which it is usually kept, on to the land of a third person has not "unlawfully" killed the deer within the meaning of section 12 of the Larceny Act, 1861, and cannot therefore be convicted under section 14 of being in unlawful possession thereof. — THRELKELD v. SMITH, *K.B.D.*, 158; [1901] 1 K. B. 531; 70 L. J. K. B. 921; 85 L. T. 275.

11. *Larceny—Fish taken at sea—Possession of owner of smack—Skipper of smack.*—Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny.

A., who was employed as skipper of a smack used for trawling outside territorial waters, during the course of a fishing voyage put into port, sold the fish he had taken, and appropriated the proceeds to his own use.

Held, that he was properly convicted of larceny. —REX v. MALLISON, *C.C.R.*; 86 L. T. 600.

12. *Larceny—Indictment—Husband and wife—Wife stealing goods of husband when about to leave or desert him—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.—By sections 12 and 16 of the Married Women's Property Act, 1882, it is provided that a husband may take criminal pro-

ceedings against his wife concerning property claimed by him, if such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband.

On the trial of a charge by a husband against his wife for feloniously stealing certain moneys, goods, and chattels belonging to him when she was about to leave or desert him, it is not necessary that the indictment should contain averments that she was the wife of the prosecutor, and that she had taken the articles when leaving or deserting, or about to leave or desert, her husband.—REX *v.* JAMES, *C.C.R.*, 286; [1902] 1 K. B. 540; 71 L. J. K. B. 211; 86 L. T. 202.

See also Bigamy, 1; Gaming, 1, 2, 4; Justices, 2, 3, 5, 6, 8, 9.

CROWN:—

1. *Commissioners of Works and Public Buildings—Contract by—Liability of commissioners—Principal and agent.*—The Commissioners of His Majesty's Works and Public Buildings, who were incorporated by 37 & 38 Vict. c. 84, may be sued in an action for breach of a contract entered into by them as such commissioners.—GRAHAM *v.* WORKS AND PUBLIC BUILDINGS COMMISSIONERS, *K.B.D.*, 122; [1901] 2 K. B. 781; 70 L. J. K. B. 860; 85 L. T. 96.

2. *Intestacy—Illegitimate foreigner—Personalty in England*—Bona vacantia—*Conflict of laws.*—The Crown is entitled to the personal property in England left by an illegitimate unmarried foreign intestate, who was domiciled and died abroad, for the Crown takes such property, not by right of succession, but as being *bona vacantia* in England, and the *lex domicilii* does not therefore apply.—BARNETT'S TRUSTS, RE, *Ch.D. Kekewich, J.*, 681; [1902] 1 Ch. 847; 71 L. J. Ch. 408; 86 L. T. 346.

See also Practice, 14.

CUSTOMS:—

Customs officer—Search of ship—Obstructing officer—Reasonableness of search—Right of magistrate to judge of.—Where a person is summoned for obstructing a customs officer in execution of his duty while on board a ship for the purpose of searching the same, the magistrate has no jurisdiction to inquire into the reasonableness or unreasonableness of the search, unless he finds that the search was a mere pretence. The duty of deciding what search there shall be is imposed on the customs officer and not on the magistrate.—ANDERSON *v.* REID, *K.B.D.*; 86 L. T. 713.

DAMAGES:—

Measure of—Sale of goods—Contract to supply invert sugar for brewing—Sugar contaminated with poisonous matter—Beer destroyed.—The measure of damages, apart from special circumstances, which the manufacturer of an article that has had to be destroyed by the fault of another is entitled to recover, is the price which he could have sold it for on the day that it had to be destroyed.

Held, therefore, that although the plaintiffs were brewers they were entitled to recover the full selling value of the beer in their cellars, which had by the fault of the defendants to be thrown away, and not merely such a sum as they themselves must have expended in order to brew an equal amount of beer of the same quality to replace it.—HOLDEN (LIMITED) *v.* BOSTOCK & Co. (LIMITED), *C.A.*, 323.

See also Divorce, 5; Vendor and Purchaser, 5.

DEBTORS ACT.—See Attachment, 2; Bankruptcy, 23.

DEED:—

1. *Alteration—Name of party—Misdescription—Mortgage—Reconveyance—Married woman—Trustee mortgagee—Concurrence of husband—Separate acknowledgment.*—Upon a sale of freehold property the abstract of title delivered to the purchaser commenced with a mortgage to three persons, of whom the third was described as "William" G. It appeared from the original deed that the name "William" had been erased, and the names "Edward Thomas" substituted. The alteration was made after execution, but it was not known when or by whom. It was proved that the person described as William G. was really Edward Thomas G., and that the misdescription was due to inadvertence.

Held, that the alteration was immaterial, and, in the absence of fraud did not avoid the deed.

The mortgage was dated in 1878 and was granted to trustees; and in 1896, upon payment of the mortgage debt, the property was reconveyed by the sole surviving trustee, who was a married woman.

Held, that under section 16 of the Trustee Act, 1893, she was competent to reconvey without the concurrence of her husband and a separate acknowledgment.—HOWGATE AND OSBORN'S CONTRACT, RE, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180.

2. *Setting aside—Solicitor—Trustee of settlement—Subsequent variations of settlement—Surrender of rights by married woman—No independent advice.*—Deeds whereby a married woman was without consideration induced to surrender rights conferred by a post-nuptial settlement set aside on the ground that the solicitor who prepared the deeds being himself a trustee thereof failed in his duty in not making the lady understand the real nature of the transaction and in not seeing that she had advice independently of her husband.—WILLIS *v.* BARRON, *H.L.*; [1902] A. C. 271; 71 L. J. Ch. 609; 86 L. T. 805.

DESCENT.—See Gavelkind, 1; Inheritance, 1.

DISCOVERY.—See Practice, 27-29.

DIVORCE—

1. *Costs—wife's costs—Application by solicitor who had acted for wife to tax costs against respondent—No previous application for security.*—A wife filed a petition for judicial separation, and the case was in due course set down for trial. Subsequently she wrote to her solicitors saying that she had returned to her husband. On the 29th of May her solicitors wrote to her expressing a wish to withdraw from the case, and they did not afterwards act for her. Up to that date they took no steps, under the prevailing practice of the Divorce Division, to obtain security for the wife's costs from the husband. On the 3rd of July they carried their costs into a registry for taxation against the husband. On a summons adjourned into court for further argument, the court held that, as the solicitors had not applied for security in the ordinary way, they must be left to their remedy at common law; that the application was not in accord with the practice of the court; that it was out of time; that it was not made by the wife's solicitors, but merely by a firm that had at one time acted for her; that the court had no jurisdiction to deal with it; and that it must be dismissed with costs against the applicants personally.—NAIRNE *v.* NAIRNE, *P.D. & Ad.D.*; 71 L. J. P. 37; 85 L. T. 649.

2. *Costs—Wife's costs—No security—Disagreement of jury—Second trial — Co-respondent's costs.* — A husband petitioned for a dissolution of marriage on

the ground of his wife's adultery with the co-respondent. The respondent alleged that the petitioner had been guilty of cruelty and adultery, and the jury were discharged without giving a verdict, as they were not able to agree on all the issues. The wife had not applied for security for costs before the trial, and the court declined to make any order after the trial, on the ground that, as a second trial was pending, the application was premature. The wife then obtained security for her costs of the second trial. The jury at that second trial found that the respondent and co-respondent had committed adultery, and that the petitioner had committed adultery, but that it had been condoned by the respondent.

Held, that the wife was entitled to her full costs of both trials, and that the co-respondent must pay the costs of the issues on which he had failed.—WAUDBY *v.* WAUDBY, *P.D. & Ad.D.*, 176; [1902] P. 85; 71 L. J. P. 43; 86 L. T. 123.

3. *Costs — Wife's petition—Husband's petition—Costs against co-respondent—Costs of wife's petition—Party to proceedings—Appeal—Final order—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 34 —*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.—The power to order payment of costs conferred on the court by section 5 of the Judicature Act, 1890, must be confined to parties to the proceedings. The co-respondent to a petition presented by a husband does not become a party to a cross-petition presented by the wife on the making of an order for the consolidation of the two suits, as such an order is only an arrangement for the convenience of trying the two suits together and involves nothing analogous to "consolidation" at common law. A co-respondent, therefore, in such a case not being a "party to the proceedings" within section 34 of the Matrimonial Causes Act, 1857, there is no jurisdiction to make him pay the costs of the wife's petition.

An order directing payment of costs is not an interlocutory order working out the final judgment, but is part of the final judgment though separated from it by an interval of some days.—FORBES-SMITH *v.* FORBES-SMITH, *C.A.*, 6; [1901] P. 258; 70 L. J. P. 61; 84 L. T. 789.

4. *Cruelty—Wife's petition—Adultery of husband with servants in house—Breakdown of the health of the wife.*—If the conduct of the husband is such as to cause a breakdown of the health of the wife, by reason of the disgrace and shock arising out of a conviction of the husband under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), the court will hold this to constitute legal cruelty on the part of the husband, and will grant a decree *nisi* to the wife, the adultery having been also proved.—THOMPSON *v.* THOMPSON, *P.D. & Ad.D.*; 85 L. T. 172.

5. *Damages claimed against co-respondent—Amount of damages not specified.*—In a husband's petition for divorce by reason of his wife's adultery with the co-respondent, when there is a claim for damages, the amount claimed must be specified in the petition.—PEGLER *v.* PEGLER, *P.D. & Ad.D.*; 85 L. T. 649.

6. *Decree* nisi—*Intervention of co-respondent—Decree absolute—Matrimonial Causes Act*, 1880 (23 & 24 *Vict. c.* 144), *s.* 7.—A co-respondent entered an appearance in a divorce suit, but did not defend the action. A decree *nisi* was obtained by the petitioner. It was held by the court that the co-respondent could not afterwards intervene to show cause why the decree should not be made absolute.—HARRIES *v.* HARRIES, *P.D. & Ad.D.*; 86 L. T. 262.

7. *Desertion—"Reasonable excuse"—Refusal of wife to allow marital intercourse—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 27.—After a husband and wife had been for some years living apart by (as the court held) mutual consent, the husband committed adultery.

Held, that this was not evidence of desertion by him.

A wife who without cause refuses to permit marital intercourse to her husband cannot allege "desertion" by him "without reasonable excuse" if in consequence he refuses to live with her.

Decision of Jeune, P., [1900] P. 180, affirmed.—SYNGE *v.* SYNGE, *C.A.*; [1901] P. 317; 70 L. J. P. 97; 85 L. T. 83.

8. *Judicial separation—Wife's petition—Husband's desertion and adultery—Custody of children—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 7.—Upon a wife's petition for judicial separation on the ground of her husband's desertion and adultery, the court will require very strong evidence of the aggravated character of the conduct of the husband before making an order, under section 7 of the Guardianship of Infants Act, 1886, that he is a person unfit to have the custody of his children.

Skinner v. *Skinner*, 58 L. T. R. 923, 13 P. D. 90, distinguished—WOOLNOTH *v.* WOOLNOTH, *P.D. & Ad.D.*; 86 L. T. 598.

9. *Maintenance—Permanent maintenance—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Gross sum—Payment to petitioner.*—The court ordered a gross sum of money to be paid to a petitioner by way of permanent maintenance.—KIRK *v.* KIRK, *P.D. & Ad.D.*; [1902] P. 145; 71 L. J. P. 78.

10. *Nullity—Decree* nisi—*Intervention by King's Proctor—Motion by petitioner to rescind decree and dismiss petition—Costs—Consent—Motion granted.*—Upon the petitioner's application—the King's Proctor, who had intervened and filed his plea, assenting—the court (Jeune, P.) rescinded a decree *nisi* for nullity of marriage and dismissed the petition.

No order for the King's Proctor's costs was made, he having waived his right to ask for the same.—A. *v.* A., *P.D. & Ad.D.*; [1901] P. 284; 70 L. J. P. 90; 85 L. T. 171.

11. *Nullity—Domicil—Matrimonial residence—Jurisdiction.*—In suits for nullity of marriage the true test of jurisdiction is the matrimonial residence as distinguished from domicil, which is the test in suits for dissolution.—BRENNAN (OTHERWISE ROBERTS *v.* BRENNAN, *P.D. & Ad.D.*, 414; [1902] P. 143; 71 L. J. P. 74; 86 L. T. 599.

12. *Nullity—Frigidity—Refusal to allow intercourse—Six months' cohabitation—Variation of settlements.*—Where the respondent resisted all attempts at intercourse for a period of six months,

The court annulled the marriage and varied the marriage settlement, ordering the respondent to pay an annual sum to the petitioner.—E. *v.* E. (OTHERWISE T.), *P.D. & Ad.D.*, 607.

13. *Practice—Costs—Co-respondent.*—Where, upon an application to make a co-respondent liable for the costs of a petition, the only proof of scienter was an admission by him that within a fortnight after he first committed adultery with the respondent he became aware that she was a married woman,

Held, that the petitioner was entitled to an order for costs against the co-respondent.—BILBY v. BILBY AND HARROP, *P.D. & Ad.D.*; [1902] P. 8; 71 L. J. P. 31; 86 L. T. 123.

14. *Practice—Evidence* de bene esse—*Application for commission—Costs—Petition filed but not served.*—An order for a commission to take the evidence of witnesses out of the jurisdiction was made, at the risk and expense of the applicant, immediately after the petition had been filed and before there had been time to effect service.—VALLENTINE v. VALLENTINE, *P.D. & Ad.D.*; [1901] P. 283; 70 L. J. P. 89; 85 L. T. 171.

15. *Practice—Particulars of adultery.*—Under an order to give further and better particulars of the dates and places when and where alleged acts of adultery extending over ten months were committed, the petitioner must give the best particulars which he can extract from the witnesses upon whom he relies to prove his case. It is not a sufficient compliance with such an order to allege generally that the respondent and co-respondent were constantly meeting, and were in the respondent's boudoir and bedroom together, and that they were frequently out riding and driving alone together, from which the court will be asked to infer that they committed adultery.—HARTOPP v. HARTOPP, *C.A.*; 71 L. J. P. 78.

16. *Practice — Particulars — Witnesses, names of probable—Order for disclosure.*—Where in a petition by the wife against the husband he was, for the purpose of establishing cruelty, charged with using insulting language to her in the presence of servants and guests, with the object of humiliating and degrading her, the petitioner was ordered to give particulars, setting forth the names of such servants and guests.—BISHOP v. BISHOP, *P.D. & Ad.D.*; [1901] P. 325; 70 L. J. P. 93; 85 L. T. 173.

17. *Rape—Indecent assault—Conduct amounting to cruelty.*—Where in a suit for dissolution of marriage on the ground of rape the respondent was proved to have been convicted at the quarter sessions of a series of indecent assaults upon children,

The court granted the petitioner a decree *nisi* on the ground of the respondent's having committed rape;

And held further, that such conduct of the respondent, causing nervous shock to the petitioner, amounted to cruelty.

Thompson v. *Thompson*, 17 Times L R. 572, and *Coffey* v. *Coffey*, [1898] P. 169, 46 W. R. Dig. 51, followed.—BOSWORTHICK v. BOSWORTHICK *P.D & Ad D.*, 217; 86 L. T. 121.

18. *Restitution of conjugal rights — Custody of children—Practice*—Interim *order.*—The court has power, under section 6 of 47 & 48 Vict. c. 68, to make an *interim* order as to custody of the children of the marriage, and to save expense will make such an order at the time of the pronouncing of a decree of restitution of conjugal rights.—PAINE v. PAINE, *P.D. & Ad.D.*, 382.

19. *Restitution of conjugal rights—Form of written demand before institution of proceedings—Practice—Divorce Court Rules*, 1866, *r.* 2—*Additional Rules and Regulations*, 1869, *r.* 175.—Upon an undefended petition by the wife for restitution of conjugal rights, the preliminary letter, put forward as in accordance with the rules, was in the terms following:

"I write to you to express my desire to cohabit and live you as your wife, and to require from you a full restitution of the conjugal rights of which you have deprived me for now over a year."

The President: This letter is not quite in the usual form. The word "require" is rather peremptory, and might possibly be taken exception to as not being within the judgments of the Court of Appeal: *Field* v. *Field*, (1889) 14 P. D. 26; *Smith* v *Smith*, (1890) 15 P. D. 47. In my view, however, it is not reasonable to expect a woman to write affectionate letters to her husband under circumstances such as are usually shown to have existed in this class of cases. All that ought to be required is that a clear request should be shown to have been made, received, and not complied with. I shall allow this letter to pass as a sufficient compliance with the rule, and there will be the usual decree.—ELLIOTT v. ELLIOTT, *P.D. & Ad.D.*; 85 L. T. 648.

20. *Return of wife to cohabitation—Suit pending—Application of solicitor as to costs of suit—Reserved list.*—If the parties return to cohabitation whilst a matrimonial suit is pending, the petition will not necessarily be struck out of the list for want of prosecution whilst the costs of the petitioner's solicitor are unpaid. The proper course is for the case to be put into the reserved list.—WARWICK v. WARWICK, *P.D. & Ad.D.*; 85 L. T. 173.

21. *Variation of settlements—Jurisdiction to entertain—Petition by guilty party.—Semble*, the court has power to entertain a petition for variation of settlements at the instance of the party through whose misconduct the marriage has been dissolved.

If a wife is in receipt of an allowance derived from funds settled by the husband, and if out of that allowance she keeps up their joint establishment, the husband is not entitled to a reduction of the wife's allowance after she has obtained a divorce by reason of his cruelty and adultery.—WOOTTON-ISAACSON v. WOOTTON-ISAACSON, *P.D. & Ad.D.*; [1902] P. 146; 71 L. J. P. 80.

22. *Variation of settlements—Policy payable at fixed date to husband if alive, and if not to wife—Matrimonial Clauses Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Matrimonial Clauses Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.—Where a wife had certain rights under a policy on her husband's life, and the marriage was afterwards dissolved by reason of her adultery,

The court ordered her to settle her interests thereunder for the benefit of the petitioner and the children of the marriage.—STEDALL v. STEDALL, *P.D. & Ad.D.*, 320; 86 L. T. 124.

23. *Variation of settlements—Principle of* quid pro quo—*Power of appointment upon petitioner's second marriage—Children's reversionary interests affected—Extinguishment of respondent's interests—Matrimonial Clauses Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.—The court has power to vary a marriage settlement so as to deprive infant children of the marriage of part of their interests secured to them by such settlement.

Where a marriage settlement gave the petitioner (wife) power to appoint, after the death of the respondent, in favour of a second husband and the children of a second marriage, the court, recognizing the principle of *quid pro quo* in such cases, gave to the petitioner power so to appoint, during the respondent's lifetime, a portion of the fund which had been settled for the ultimate benefit of the children of the marriage, upon the ground that the extinguishment of the respondent's interests being part of the order would, while depriving them of that portion, accelerate their interests in the remainder.—WHITTON v. WHITTON, *P.D. & Ad.D*; [1901] P. 348; 71 L. J. P. 10; 85 L. T. 646.

24. *Variation of settlement—Settled property wholly brought in by husband—Extinction of husband's life*

interest—Matrimonial Causes Act, 1859, *s.* 5.—After a divorce on the wife's petition the court extinguished the husband's life interest in the property included in the marriage settlement, the income of which amounted to £45 a year, and the whole of which had been brought into settlement by him. There was one child of the marriage, who had not attained a vested interest.

Held, that this was a proper exercise of the discretion of the court in the interests of the wife and child.—KAYE *v.* KAYE, *C.A.*, 499; 86 L. T. 638.

25. *Variation of settlement—Vested interest of child—Settled property—Extinguishment of rights of guilty party—Matrimonial Causes Act*, 1859 (21 & 22 *Vict. c.* 61), *s.* 5.—By a marriage settlement property of the wife was settled upon trusts for the wife for life, then for her husband if he survived her, with remainder to the children of the marriage. There was one child of the marriage, who attained twenty-one, and died a bachelor and intestate, the beneficial interest which he had acquired in the property on attaining twenty-one passing to his father as sole next-of-kin. Subsequently to the death of this child the wife obtained a divorce from her husband.

Held, that the property was settled property within section 5 of the Matrimonial Causes Act, 1859, and that the court would, under the jurisdiction conferred by that section, vary the settlement by extinguishing all the rights, powers, and interests of the husband thereunder, including any beneficial derivative interest which he took as next-of kin of his deceased son.

Decision of Barnes, J. (*ante*, p. 138), affirmed.—BLOOD *v.* BLOOD, *C.A.*, 547; [1902] P. 190; 86 L. T. 641.

See also Practice, 30.

DOMICIL:—

Renunciation of domicil of origin—Acquisition of domicil of choice—Evidence—Presumption—The testator, whose domicil of origin was the United States of America, went for trade purposes to live in Russia, from which country he yearly paid visits to England. Afterwards, being advised by his doctors, on account of his bad health, not to live in Russia, he came to England, and took a house at Brighton. For a few years he paid visits to Russia, but on giving up his trade connections he ceased to do this. For the last twenty-seven years of his life he lived in Great Britain, having leases of houses in London and Brighton, and spending the shooting season in Scotland, where he rented deer forests. He also used to go for his health's sake to visit a watering-place in Germany. While living in England he bought an estate in the United States, apparently for the purpose of selling it again as a speculation, but he had no residence in America during the period for which he lived in Great Britain. He described himself in certain American documents as an American citizen sojourning in England. He was advised by his doctors that a voyage to America would be dangerous in his state of health, but he sometimes expressed an intention of returning to America in a vessel which he invented, and took out patents for, which was intended not to roll or pitch when at sea.

Held, upon the evidence before the court, that there was an unrebutted presumption in favour of the testator having abandoned his domicil of origin and acquired a domicil of choice in Great Britain.—ATTORNEY-GENERAL *v.* WINANS, *C.A.*; 85 L. T. 508.

See also Conflict of Laws, 2, 4; Divorce, 11.

DONATIO MORTIS CAUSA:—

1. *Delivery of a cheque accompanied by a written request that a third party shall pay same to donee after decease of donor—Gift declared invalid.*—An invalid lady with the help of a friend sent three cheques, each for the sum of £100, made out to three different persons, to another friend of hers with a letter couched in the following terms: "Miss Davis wishes me to send you the three inclosed cheques for you to keep for her, and in case of her death, and then see the said persons have the money, &c." Miss D. died upon the following day.

Upon an originating summons taken out by the executor to ascertain whether he was justified in paying the three sums of £100,

Held, that there had been no valid *donatio mortis causâ*, and that the executor was not at liberty to honour the cheques.—DAVIS, RE, GRIFFITH *v.* DAVIS, *Ch.D. Farwell, J.*; 86 L. T. 889.

2. *Donor's cheque—Cheque presented but not paid in donor's lifetime.*—The delivery of a donor's own cheque to a donee does not operate as an equitable assignment to the donee of any part of the donor's balance at the bank. Consequently, if the cheque be not paid, actually or constructively, before the donor's death, there can be no *donatio mortis causâ* of such cheque; where the donor's account is in debit, even though the banker is willing to honour an overdraft, the mere presentation of the cheque does not amount to a constructive payment.

Hewitt v. *Kaye*, 16 W. R. 835, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R, 13 Eq. 489, 20 W. R. Ch. Dig. 4, followed.

Bromley v. *Brunton*, 16 W. R. 1006, L. R. 6 Eq. 275, explained.—BEAUMONT, RE, BEAUMONT *v.* EWBANK, *Ch.D. Buckley, J.*, 389; [1902] 1 Ch. 889; 71 L. J. Ch. 478; 86 L. T. 410.

3. *Post Office Savings Bank deposit book—Certificate of Local Loans 3 per Cent. Stock—Validity.*—A. was possessed of a certain sum in the Post Office Savings Bank and a sum of £50 10s. Local Loans 3 per Cent. Stock. Three days before her death, being well aware that her death was imminent, she expressed a desire that her sister should, in the event of her death, have all the money in the savings bank and the sum of £50 10s. Local Loans 3 per Cent. Stock. She accordingly delivered to her sister a desk containing the savings bank deposit book and the certificate of the Local Loans Stock, and gave her also the key of the desk.

Held, that the gift of the money in the savings bank was a proper subject for a *donatio mortis causâ*, and therefore valid, but that the gift of the Local Loans Stock was not, and was therefore invalid.—ANDREWS, RE, ANDREWS *v.* ANDREWS, *Ch.D. Kekewich, J.*, 569.

4. *Subject-matter — Post Office Savings Bank deposit book.*—A Post Office Savings Bank deposit book is capable of being given so as to create a *donatio mortis causâ*.—WESTON, RE, BARTHOLEMEW *v.* MENZIES, *Ch.D. Byrne, J.*, 294; [1902] 1 Ch. 680; 71 L. J. Ch. 343; 86 L. T. 551.

EASEMENT:—

1. *Light—Ancient lights—Consent or agreement—Prescription Act* (2 & 3 *Will.* 4), *s.* 3.—In 1873 E., the owner and occupier of an hotel, erected on the northern side of his premises a conservatory adjoining the defendant's property, and entered into an agreement, dated the 13th of July, 1873, with the defendant's predecessor in title, whereby E. agreed to pay 1s. a year to the defendant's predecessor for allowing "the window" of his conservatory to overlook and open on to the defendant's property. The sloping top of the conservatory was of glazed glass, as also was the whole of the vertical side

adjoining the defendant's property above a few feet from the ground. Portions of the glazed side of the conservatory were movable, so that, when opened, they overhung the defendant's property. The yearly rent was duly paid until 1888, when the conservatory was converted into a passage or corridor of the hotel, the sloping top of the conservatory being retained in its former position and by means of its glazed glass giving light to the hotel corridor, and forming the roof to the corridor. The defendant erected certain buildings which obstructed the access of light to the hotel corridor through the glazed roof; and the plaintiff, E.'s successor, brought an action for an injunction and damages.

Held, that the agreement of the 13th of July, 1873, referred to the sloping roof of the conservatory as well as the vertical side.

Held, also, that E. and his successor, the plaintiff, enjoyed the light only by virtue of the said agreement, which was a consent or agreement within the meaning of section 3 of the Prescription Act, and therefore that the plaintiff's action failed. —EASTON *v.* ISTED, *Ch.D. Joyce, J.*, 472; 71 L. J. Ch. 442; 86 L T 442.

2. *Light—Building estate—Deviations from building agreement—Implied grant of light—Derogation from grant—Conveyancing Act*, 1881, *s.* 6 (2).—The grantee of a house with the lights under the words imported into the grant by the Conveyancing Act, 1881, s. 6 (2), is only entitled to such an easement of light as is consistent with the intention of the parties to be implied from the circumstances existing at the time of the grant and known to the grantee.

O. entered into a building agreement with S., a builder, a plan on the usual lines being attached to the agreement with the sites of the proposed buildings plotted out upon it. S., having built some of the houses in accordance with the agreement, with the assent of O., built upon certain of the remaining plots a block of mansions not in accordance with the building scheme. S. constructed the mansions with a party-wall, one-half of which was upon the adjoining plot, his intention being to add a corresponding block upon the adjoining plots. This intention was never carried into effect. The plots on which the first block had been erected were conveyed by O. to S. in fee simple, the conveyance containing no express grant of light. S. the next day mortgaged the premises to X., who had full knowledge of the building agreement and of the manner in which the mansions had been erected. O. subsequently sold the plots adjoining the party-wall to S., who in turn conveyed the some to the defendants. X. subsequently sold the block of mansions, under his power of sale, to O., who made a settlement of the property, under which he was himself interested.

On an action being brought by the trustees of the settlement to restrain the defendants from building in such a manner as to obstruct the lights of the mansions.

Held, that the plaintiffs were not entitled under the Conveyancing Act, 1881, s. 6 (2), to any greater easement of light than such modified easement as was contemplated by O. and S. at the time when the block of mansions was erected.

Birmingham Banking Co. v. *Ross*, 36 W. R. 914, 38 Ch. D. 295, applied.—GODWIN *v.* SCHWEPPES (LIMITED), *Ch.D. Joyce, J.*, 409; [1902] 1 Ch. 926; 71 L. J. Ch. 438; 86 L. T. 377.

3. *Light—Prescription—Extent of right—Light for ordinary purposes—Substantial interference—Substantial damage—Rule as to 45 degrees.*—If ancient lights are interfered with substantially and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief. "Substantial" does not indicate any particular percentage.

Without substantial interference there is no right of action, and in addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened. There is no standard or fixed amount of light to which alone a plaintiff is entitled.

There may be real damage to the owner or occupier of a building used for particular purposes, or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes.

There is no rule of law that a man may always build up to an angle of 45 degrees.—HOME AND COLONIAL STORES *v.* COLLS, *C.A.*, 227; [1902] 1 Ch. 302; 71 L. J. Ch. 146; 85 L. T. 701.

4. *Light—Prescription—Extent of right—Light for ordinary purposes — Trade requiring extraordinary degree of light.*—There is no standard of light. In considering whether ancient lights have been substantially interfered with, regard must be had to the ordinary uses by way of habitation or business to which the house has been put or might reasonably be supposed to be capable of being put.

A plaintiff is therefore entitled to relief where his extraordinary amount of light has been substantially interfered with, even though sufficient light is left for ordinary purposes.

Decision of Wright, J. (49 W. R. 206, [1901] 1 Q. B. 722), reversed.—WARREN *v.* BROWN, *C.A.*, 97; [1902] 1 K. B. 15; 71 L. J. K. B. 12; 85 L. T. 444.

5. *Light—Prescription—Purposes requiring special quantity of light—Abandonment—Mandatory injunction.*—Although less than twenty years have elapsed since an ancient light has been used for a business requiring a special quantity of light, and although such business could not have been carried but for the enlargement of the ancient light, which enlargement was made within that period,

Held, nevertheless, that the light, so far as ancient, must not be substantially interfered with, and that the court would take into consideration the nature of the business.

Warren v. *Brown, ante*, p. 97, [1902] 1 K. B. 15, discussed.—PARKER *v.* STANLEY, *Ch.D. Farwell, J.*, 282.

6. *Right of way—Alleged extinguishment and partial abandonment—Obstruction—Mandatory injunction to remove obstruction refused.*—The plaintiffs, as owners of certain lands situate in the borough of Croydon, known as Whitehorse-lane, had a right of way over a strip of land ten feet wide on adjoining property in the occupation of the defendants. Some years before action brought, the plaintiffs erected a summer-house which projected over the strip of land to the extent of 2ft. 4in. Before action brought, the defendants erected and eight months prior to the date of the writ they completed the erection of a stable on the strip of land, which obstructed the plaintiff's right of way. The plaintiffs brought an action—first, for a declaration that they were entitled to the right of way; secondly, an order requiring the defendants to remove the buildings in question; thirdly, for an injunction to restrain the defendants, their servants and agents, from obstructing the plaintiffs and their tenants, and the agents of the

plaintiffs and their tenants, in the exercise of such right of way. The defendants pleaded extinguishment or abandonment before action brought.

Held, first, on the facts, that the plaintiffs had proved their title to and had not abandoned or extinguished their right of way; secondly, that partial abandonment, by the erection of a summer-house projecting across a portion of the strip of land was not, in the circumstances, sufficient evidence of abandonment; that the plaintiffs were entitled to an injunction and 40s. damages, but that, owing to the fact that the defendants' obstructing building had been completed eight months before action, an order for its removal could not be made.—YOUNG *v.* STAR OMNIBUS CO., *Ch.D. Farwell, J.*; 86 L. T. 41.

7. *Right of way—Licensees of grantee—Reasonable user.*—A grant of a right of way to premises which may lawfully be used for a given purpose authorizes the use of the way in question in any reasonable manner by all persons lawfully going to or from such premises in pursuance of such purpose, whether such persons be mentioned in the grant or not.—BAXENDALE *v.* NORTH LAMBETH LIBERAL CLUB, *Ch.D. Eady, J.*, 650.

ECCLESIASTICAL LAW:—

1. *Consistory court—Jurisdiction of bishop—Jurisdiction of chancellor—Patent appointing chancellor—Reservation to bishop of certain causes—Validity of reservation—Prohibition.*—Letters patent granted by a bishop, appointing an official principal and vicar-general, and conferring on him power to determine suits in the consistory court, contained the following reservation: "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment."

Held, that the reservation was valid, and that prohibition lay to the official principal to prohibit him from proceeding without the bishop's consent in a suit in which one of the parties earnestly craved the bishop's judgment.

Judgment of the Divisional Court, [1901] 2 K. B. 141, reversed.—REX *v.* TRISTRAM, *C.A.*, 477; [1902] 1 K. B. 816; 71 L. J. K. B. 418; 86 L. T. 515.

2. *Clergy discipline—75th and 109th Canons—"Immoral conduct"—Clergy Discipline Act*, 1892, *s.* 2.—If the conduct of a clerk in holy orders is "unworthy of the character of ministers of religion," then he is guilty of "immoral conduct" within the meaning of section 2 of the Clergy Discipline Act, 1892, notwithstanding that no act of indecency is proved against him.—SWEET *v.* GORDON YOUNG, *Consistory Ct. of Rochester*, 96; [1902] P. 37.

3. *Judicial separation from wife—Persistent cruelty—Vicar deprived of his preferment by bishop—Validity of bishop's declaration—Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19). *s.* 4—*Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s* 1, *sub-section* 1 (d) (e)—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 12—*Interpretation Act*, 1889 (52 & 53 *Vict c.* 63), *s.* 38.—A separation order under the Summary Jurisdiction (Married Women) Act, 1895, was made against the vicar of C. by justices at petty sessions upon the ground of his persistent cruelty to his wife. Upon the order becoming conclusive, the bishop of the diocese declared the living of C. vacant, purporting to act under section 1 of the Clergy Discipline Act, 1892.

Held, that the bishop's declaration was invalid.

A clergyman cannot be deprived of his living by reason only of a separation order, based upon persistent cruelty, being made against him.

Interpretation Act, 1889, s. 38, considered.—SWEET *v.* BISHOP OF ELY, *Ch.D. Joyce, J.*, 520; 86 L. T. 679.

4. Mandamus—*Confirmation of bishop-elect by Archbishop or Vicar-General—Objections as to doctrine*—25 *Hen.* 8. *c.* 20.—There is no jurisdiction in the Archbishop of Canterbury or his Vicar-General to entertain, upon the confirmation of the election of a bishop-elect, objections raised to such confirmation alleging ecclesiastical offences—the contravention of the articles of religion by the publication of false doctrine, want of prudence and discretion, and unfitness to fill the office of a bishop.

Semble, that a *mandamus* will not lie to the archbishop to compel him to inform his mind as to the fitness of the bishop-elect before he proceeds to confirmation.—REX *v.* CANTERBURY (ARCHBISHOP), GORE, RE, *K.B.D.*, 348; 86 L. J. 79.

5. *Offences of clergymen—Officiating without leave of incumbent of parish and contrary to inhibition of Ordinary—Unconsecrated building—Public performance of divine service—Administration of Holy Communion—Canon* 71 *of* 1603—*Collection of offertory alms—Preaching—Church Discipline Act*, 1840 (3 & 4 *Vict. c* 86)—*Monition—Costs.*—It is an ecclesiastical offence under the Church Discipline Act, 1840, for a clerk in Holy Orders of the Church of England to publicly perform any of the services of the Church of England without lawful authority in a parish without the consent and against the express wish of the incumbent of the parish, and such offence is aggravated where the accused clerk has in so acting disobeyed the inhibition of the Ordinary.—NESBITT *v.* WALLACE, *Arches Ct.*; [1901] P. 354.

ELECTION LAW:—

1. *Registration—Parliamentary franchise—Household qualification—Inhabitant occupier as owner or tenant—Wife owner of house—Husband breadwinner—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.—A man who lives with his wife in a house of which she is the sole and separate owner, her name appearing on the rate-book as the owner and his name as the occupier, the rates and all expenses of maintaining the house and household being paid by the husband, is not, in the absence of any evidence of a tenancy, entitled to be registered as a voter under section 3, sub-section 2, of the Representation of the People Act, 1867.—HALL *v.* MICHELMORE, *K.B.D.*, 172; 86 L. T. 17.

2. *Registration—Parliamentary franchise—Misdescription in list—Declaration for correcting—Power of revising barrister to amend—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 24.—Where a voter has made a statutory declaration under section 24 of the Parliamentary and Municipal Registration Act, 1878, in order to correct an erroneous description on the list of voters of the nature of his qualification and the description of his qualifying premises, the revising barrister ought to amend the list by making the necessary corrections.

Foskett v. *Kaufman*, 34 W. R. 90, 16 Q. B. D. 279 applied.

Lord v. *Fox*. [1892] 1 Q. B. 199, distinguished.—GOODRICH *v.* GRIMSBY (TOWN CLERK), *K.B.D.*, 170; [1902] 1 K. B. 301; 71 L. J. K. B. 99; 85 L. T. 583.

3. *Registration—Parliamentary franchise—Parochial relief—Medical relief—Maintenance of voter's wife as pauper lunatic—Disqualification—*

Representation of the People Act, 1832 (2 *Will.* 4, *c.* 45), *s.* 36—*Medical Relief Disqualification Removal Act.* 1885 (48 & 49 *Vict. c.* 46).—In all cases in which relief is given, partaking more or less of the nature both of medical relief and of ordinary relief, it is a question of fact for the revising barrister to decide what is the real character of the relief.

The appellant claimed to have his name inserted in Division I. of the occupiers' list of voters; he was qualified in all respects except for the fact that his wife had, during the whole of the qualifying period, and for nine months previously to that period, been maintained out of the poor rates in the county lunatic asylum, the appellant contributing nothing towards her maintenance. The revising barrister, in these circumstances, held that the maintenance of the appellant's wife was not "medical assistance" within the meaning of that expression in the Medical Relief Disqualification Removal Act, 1885, and that the appellant was disqualified by virtue of section 36 of the Representation of the People Act, 1832.

The court affirmed the barrister's decision.—KIRKHOUSE *v.* BLAKEWAY, *K.B D.*, 206; [1902] 1 K. B 306; 71 L. J. K. B. 130; 86 L. T. 19.

ELECTRIC LIGHTING ACTS:—

Arrears due to electric supply corporation—Receiver—Occupier—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *s.* 19—*Electric Lighting Orders Confirmation* (*No.* 2) *Act*, 1889 (52 & 53 *Vict. c.* 178), *Schedule, clause* 47.—A hotel company contracted with an electric lighting company for a supply of electricity to the hotel. A receiver and manager was appointed of the property of the hotel company by an order in a debenture-holders' action. The receiver entered into possession of the premises. At the time the receiver entered into possession the hotel company was indebted to the electric lighting company for electricity supplied, and the latter company threatened to discontinue the supply unless the arrears due to them were paid. The receiver brought an action for an injunction to restrain the company from cutting off the supply.

Held, that, assuming in the receiver's favour that he was a new occupier of the premises, still he had no right to a supply under the Electric Lighting Acts till he had entered into a new contract with the electric lighting company, and that the motive of the electric lighting company in demanding a contract could not affect their statutory rights. On the other hand, if he claimed under the contract with the hotel company he was bound to discharge the arrears.

The injunction was accordingly refused.—HUSEY *v.* LONDON ELECTRIC SUPPLY CORPORATION, *C.A.*, 420; [1902] 1 Ch. 411; 71 L. J. Ch. 313; 86 L. T. 166.

EMPLOYER AND WORKMAN.—See Master and Servant.

ESTOPPEL.—See Attachment, 3; Company, 19; Landlord and Tenant, 4; Sale of Goods, 1; Trustee, 3.

EXECUTORS.—See Probate, 4, 5, 10; Will, 30, 34.

FACTORY:—

1. *Master and servant—Self-acting machine—Safety—Employment of "young person"—Factory and Workship Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 9, *sub-section* 2.—Section 9, sub-section 2, of the Factory and Workshop Act, 1895, provides that "a person employed in a factory shall not be allowed to be in the space between the fixed and traversing portions of a self-acting machine unless the machine is stopped, with the traversing portion on the outward run. . . ."

A boy, a "young person" within the meaning of the Factory and Workshop Act, 1878, was employed in a factory by a man who was in the employment of the respondents, the occupiers of the factory, and who was in charge of a self-acting machine. This man ordered the boy to clean a certain part of the machine, and in order to do so the boy was obliged to be in the space between the fixed and the traversing portions of the machine. At the time the order was given the traversing portion of the machine was stopped on the outward run. While the boy was still in the said space the man in charge, thinking the boy was clear of such space, re-started the machine, whereby the boy received injuries from which he died.

Held, that, as the man when he re-started the machine thought that the boy was clear of the space, the boy was not at the time of the accident "allowed" to be within the space by the occupiers of the factory or by any person for whom they were responsible.

The court could not interpret the words "shall not be allowed" in sub-section 2 of section 9 as meaning "shall be prevented."—CRABTREE *v.* FERN SPINNING CO., *K.B.D.*, 167; 85 L. T. 549.

2. *Non-textile—Bottling and ærating beer—Mechanical power used in aid of the manufacturing process—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93.—On premises used for the purpose of ærating and bottling beer, the ærating process was produced by mechanical power, but the bottling process was not worked by mechanical power.

Held, that such premises were a non-textile factory within section 93 of the Factory and Workshop Act, 1878

Law v. Graham, 49 W. R. 622, [1901] 2 K. B. 327, distinguished.—HOARE *v.* TRUMAN, HANBURY, BUXTON, & CO, *K B.D.*, 396; 71 L. J. K. B. 380; 86 L. T. 417.

3. *Provision against fire—Power of county court judge to apportion cost of safety appliances—Factory Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 7.—By section 7 of the Factory Act, 1891, the use of certain safety appliances is made compulsory on the owner, but if he alleges that the tenant "ought" to bear any part of the cost he can apply to the county court judge, who is to make such order as may appear just and equitable under the circumstances.

Held, that the word "ought" was not to be construed as a word of legal liability, the Legislature intending to insure the safety of the factory and to leave it to the county court judge to do what was right between the parties.—MONK *v.* ARNOLD, *K.B.D.*, 667; [1902] 1 K. B. 761; 71 L. J. K. B. 441; 86 L. T. 581

See also Master and Servant, 11-14, 28.

FINANCE ACTS.—See Inland Revenue, 1-7; Will, 3, 12.

FISHERY:—

1. *Bye-law—Fishing for salmon in weekly close time—Intention—Evidence.*—D. had a net fixed and kept up and closed in salmon waters capable of taking salmon during the weekly close time provided by the bye-laws, and in which salmon had been in fact taken, and in respect of which he had taken out a salmon licence. The mesh of the net was smaller than that allowed by the bye-laws.

Held, that, provided the justices found intention, there was evidence of fishing for salmon otherwise than by rod and line during the weekly close time,

and of attempting to take salmon with smaller meshes than that allowed by the bye-laws.—DAVIES *v.* EVANS, *K.B.D.*; 86 L. T. 419.

2. *Lease of land including stream—No reservation of fishery rights to landlord—Passing of fishery rights under lease to tenant—Right of landlord to prosecute for taking fish—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 24.—By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, unless expressly reserved to the lessor in the lease, passes to the tenant, and the lessor cannot prosecute persons for unlawfully taking fishing in the river.—JONES *v* DAVIES, *K.B D.*; 86 L. T. 447.

3. *Oyster fishery—Depositing oysters on foreshore as incident to right of fishery—Municipal corporation—Short lease of foreshore taken by corporation—Powers of corporation to take lease—Sea Fisheries Act*, 1868 (31 & 32 *Vict. c* 45), *s.* 41—*Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *s.* 1—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 107.—A right to deposit freshly dredged oysters which are unfit for the market by reason of their being contaminated with certain impurities in the water in which the oyster beds were situate, on a particular part of the foreshore of the fishery for the purpose of purifying them, which right have been exercised from time immemorial by fishermen, is a right which may be legally incident to the right of oyster fishery, and may be justified against the owner of the foreshore either by an immemorial custom or as part of the common law rights of oyster fishing.

A municipal corporation who have obtained from the Board of Trade an order for the regulation of the oyster fishery in their harbour, which order has been confirmed by Act of Parliament, may, under section 41 of the Sea Fisheries Act, 1868, take a short lease of the foreshore for the purpose of carrying out the objects of their Act, and such lease is not rendered invalid either by the Mortmain Act, 1888, or by section 107 of the Municipal Corporations Act, 1882.—TRURO (CORPORATION) *v.* ROWE, *K.B.D.*, 151; [1901] 2 K. B. 870; 70 L. J. K. B. 1026; 85 L. T. 422.

FIXTURES:—

1. *Tenant for life and remainderman—Tapestry—Attachment to the structure.*—Valuable tapestries belonging to the tenant for life and by her fixed to the walls of the mansion-house, but removable without damage to the structure, do not become part of the freehold, but remain the property of the tenant for life.

Decision of the Court of Appeal (*In re De Falbe, Ward* v. *Taylor*. 49 W. R. 455, [1901] 1 Ch. 523), affirmed.—LEIGH *v.* TAYLOR, *H.L.*, 623; [1902] A. C. 157; 71 L. J. Ch. 272; 86 L. T. 239.

FOOD AND DRUGS.—See Adulteration.

FRAUD.—See Bill of Exchange, 2; Natal, Law of, 1; Partnership, 3; Practice, 48; Trustee, 7.

FRAUDULENT CONVEYANCE:—

Deed of arrangement—Registration—Affidavit of creditors' names—Omission of creditor's name—Exclusion of creditor—Deeds of Arrangement Act. 1887 (50 & 51 *Vict. c.* 57), *ss.* 5, 6—13 *Eliz. c.* 5.—A deed of arrangement may be duly registered under the Deeds of Arrangement Act, 1887, although the affidavit made by the debtor under section 6 of the Act does not contain the names and addresses of all the creditors of the debtor.

A deed of arrangement is not necessarily void under 13 Eliz. c. 5, either because it contains provisions in favour of the debtor or because a particular creditor is intentionally excluded from its operation.—MASKELYNE *v.* SMITH, *K.B D.*; [1902] 2 K. B. 158; 71 L. J. K. B. 476; 86 L. T. 832.

See also Bankruptcy, 8.

FRIENDLY SOCIETY:—

1. *Insurance—Life—Policy—Assignment—Policy under £50—Nomination—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15 (3).—There is nothing in the Friendly Societies Act, 1875, to prevent a policy issued by a society constituted under the Friendly Societies Acts, 1875 to 1895, having the ordinary incidents of property, including assignability; and a legal assignment of such a policy can be made otherwise than by nominating some person to receive the money payable under it as provided by the Act.

Where, therefore, no nomination has been made under the Act, the assignee of a deceased member is entitled to receive the policy moneys as against the legal personal representative.

In re Redman, ante, p. 19. [1901] 2 Ch. 471, and *Caddick* v. *Highton*, 47 W. R 668, overruled.—GRIFFIN *v.* GRIFFIN, *C.A.*, 250; [1902] 1 Ch. 135; 71 L. J. Ch. 112; 86 L. T. 38.

2. *Insurance—Life—Policy assignable only by way of nomination—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 56, 57.—A policy issued by a society constituted under the Friendly Societies Act, 1875 to 1896, cannot be assigned except by nominating some person to receive the moneys payable under it as provided by the Acts.

Caddick v. *Highton*. 47 W. R. 668, followed.—REDMAN, RE; WARTON *v.* REDMAN, *Ch.D. Kekewich, J*, 19; [1901] 2 Ch. 471; 70 L. J. Ch. 669; 85 L. T. 13.

See also Action, 1; Company, 20.

GAMING:—

1. *Betting slips—Horse-races—Wagering on a game of chance—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83)—*Vagrant Act Amendment Act*, 1873 (36 & 37 *Vict. c.* 38, *s.* 3.—The appellant was charged and convicted under the Vagrancy Acts of unlawful betting by way of wagering in a public place. It was proved that several persons had on the day of the charge handed him sums of money and slips of paper with the names of the horses and the amount of their bets written thereon, and that the appellant accepted the money and placed the slips of paper in his pocket, and that he did not remain standing in one place in the recreation ground, but walked about within certain limits.

Held, quashing the conviction, that the slips of paper were not tokens of gaming within the statute, nor was the betting in respect of a game of chance.—LESTER *v.* QUESTED, *K.B.D.*, 207; 85 L. T. 487.

2. *Betting—Office used for betting—Coupons for prizes for naming winners of horse-races issued from office in London—Money received in Holland—Betting Act*, 1853 (16 & 17 *Vict. c* 119), *ss.* 1, 3, 4.—Coupons were issued in connection with a newspaper from an office in London kept by the appellant. The coupons, which could be obtained on application free of charge were to be filled in by the competitors in a wagering competition, and when so filled in were to be sent in postal orders to an office in Holland. These postal orders were not payable in Holland, and had to be returned to England to be cashed. The money so sent in by competitors was eventually received by the appellant.

Held, that an offence had been committed under section 1 of the Betting Act, 1853, notwithstanding that the money was received from the competitors abroad, and that the appellant had been rightly convicted.—STODDART *v.* HAWKE, *K.B.D.*, 93; [1902] 1 K. B. 353; 71 L. J. K. B. 133; 85 L. T. 687.

3. *Coupon competition—Money paid in respect of a wagering contract and received by a person keeping a betting-house—Right to recover money so paid—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 5—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.—Section 1 of the Gaming Act, 1892, which provides that no action shall be brought or maintained to recover money paid in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, does not impliedly repeal section 5 of the Betting Act, 1853, which provides that any money received by any person, being the owner or occupier of a betting-house, as a deposit on a bet shall be deemed to have been received to or for the use of the person from whom the same was received, and such money may be recovered in any court of competent jurisdiction; and therefore a person who has paid money in a coupon competition in respect of horse-races may, under section 5 of the Act of 1853, maintain an action for the recovery of such money.—DAVIS *v.* STODDART, *K B.D.*, 397; [1902] 2 K. B. 21.

4. *Coupon competition—Office used for making bets or wagers—Information with respect to bets or wagers—Publishing advertisement of office.*—Any person publishing an advertisement whereby it is made to appear that an office is used for the purpose of a coupon competition, being a scheme whereby money is received as the consideration for a promise to pay money on the event of a football match, is liable to the penalty mentioned in section 7 of the Betting Act, 1853. Any person publishing an advertisement whereby it is made to appear that any person will on application give information or advice with respect to a coupon competition, being a scheme whereby, through the medium of an office, money is received as the consideration for a promise to pay money on the event of a football match, is liable to the penalty mentioned in section 3 of the Betting Act, 1874.—HAWKE *v.* MACKENZIE (No. 1); HAWKE *v.* MACKENZIE (No. 2), *K.B.D.*; [1902] 2 K. B. 225; 71 L. J. K. B. 565.

5. *Knowingly and wilfully permitting office to be used for gaming purposes—Coupon competition abroad—Advertisement in newspaper—Office of newspaper—Registered proprietor.*—The manager of a football coupon competition being a means of receiving money as the consideration for a promise to pay money on the event of football matches, as an essential part of his scheme published in a newspaper an advertisement of prizes offered to and the rules to be observed and amounts to be paid by intending competitors, who were directed to fill in coupon sheets or forms appended to the advertisement, and to send them, with the amounts payable, to an address in Holland. He also published in the same newspaper lists of the prize-winners in previous competitions. The office of the newspaper was opened and kept for the purpose of the competition.

Held, that there was evidence that the manager of the competition was a person using the office of the newspaper for the purpose of money being received by him as the consideration of a promise to pay money on the event of a game within the meaning of section 1 of the Betting Act, 1853; and that the registered proprietor of the newspaper was a person knowingly and wilfully permitting the office to be used as aforesaid within the meaning of section 3 of that Act.—MACKENZIE *v.* HAWKE, *K.B.D.*; [1902] 2 K. B. 216; 71 L. J. K. B. 561.

See also Lottery, 1.

GAVELKIND:

Descent—Partibility among heirs male—Extension to collaterals.—The rule that land held according to the tenure of gavelkind is partible among the nearest male heirs extends to collaterals to the remotest degree.—CHENOWETH, RE, WARD *v.* DWELLEY, *Ch.D. Farwell, J.*, 663; 86 L. T. 890.

GUARANTEE:—

Indemnity—Promise to answer for debt or default of another—Verbal promise—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.—Where there is a main contract, the object of which is not to answer for the debt or default of another, such a contract is not within section 4 of the Statute of Frauds, even though incidentally it may involve a liability to answer for the debt of another. But where the object of a contract is to answer for the debt of another, the contract is not taken out of the statute by the fact that the person making it incidentally gains a personal advantage, and that such personal advantage was his motive in making the contract. Accordingly, where a director of, and a large shareholder in, a company verbally promised a judgment creditor of the company to give bills for the amount of the debt due to him in consideration of his refraining from levying execution on the company's goods,

Held, that the promise was a promise to answer for the company's debt within the Statute of Frauds, and must therefore be in writing.—HARBURG INDIA RUBBER COMB CO. *v.* MARTIN, *C.A.*, 449; [1902] 1 K. B. 778; 71 L. J. K. B. 529; 86 L. T. 505.

See also Principal and Surety, 1.

HAWKER:—

Taking round sewing machines—Offer for sale to persons who had not previously requested agent to call—Hawkers Act, 1888 (51 & 52 *Vict. c.* 33), *ss.* 2, 6.—A person who carries about from place, or to other men's houses, by means of a horse and cart, unsold goods and offers them on approval for the purpose of sale is a hawker within the meaning of section 2 of the Hawkers Act, 1888, and the fact that the goods had been shown only to persons of whom it had been ascertained by means of a canvasser that they would like to see them, and would probably be purchasers, does not prevent the person showing them from being a hawker within the meaning of the statute.—HOLLAND *v.* HALL, *K.B.D.*, 525.

HIGHWAY:—

1. *Bridge over canal—Raised approaches to bridge—Liability to repair fences.*—A canal company liable to repair bridges and the "wing walls, ramparts, and side banks thereof," but not liable to repair "roads approaching bridges" beyond the extremity of the wing walls thereof, is not liable to repair the fences to the raised approaches to bridges.—ATTORNEY-GENERAL *v.* OXFORD CANAL NAVIGATION, *Ch.D. Kekewich J.*; 71 L. J. Ch. 660.

2. *Drain—Power of highway authority to keep open drain—Pipe conveying water from highway on to adjoining land—Proper outlet—Long user—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 67.—The defendant was the owner of land adjoining a highway at a place where the highway had an upward

gradient in each direction. At the lowest point of the road there had been for many years a catch-pit, into which the rain-water which fell on the road found its way, and from which it passed through a pipe about six feet long, from whence it flowed, not in any defined channel, over the surface of the defendant's land. The defendant having stopped up the pipe, the rural district council, as the highway authority, brought an action for an injunction to restrain him from continuing the obstruction.

Held, that the pipe was such a drain as was contemplated by section 67 of the Highway Act, 1835, and that after user for many years the court ought to presume that it had been made under the power given by that section; and that therefore the plaintiffs were entitled to an injunction.

Judgment of Lord Alverstone, L.C.J. (49 W. R. 489, [1901] 2 K. B. 101), reversed.—ATTORNEY-GENERAL *v.* COPELAND, *C.A.*, 490; [1902] 1 K. B. 690; 71 L. J. K. B. 472; 86 L. T. 486.

3. *Locomotive — Motor-car — Excessive speed — Driven "to the common danger of passengers"—Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *s.* 4—*Light Locomotives on Highways Order*, 1896, *Art. IV.*, *s.* 1.—Article IV., section 1, of the Light Locomotives on Highways Order, 1896, provides that a person shall not drive a light locomotive on a highway at any greater speed than is reasonable and proper, having regard to the traffic on the highway.

The appellant drove a motor-car at a high rate of speed through a village. The justices convicted the appellant under the above section of the order, on the ground that the speed was "to the common danger of the passengers" using the road, although there was no evidence that anybody was on the road at the time in question.

Held, that the justices were right in convicting the appellant.—MAYHEW *v.* SUTTON, *K.B.D.*, 216; 71 L. J. K. B. 46; 86 L. T. 18.

4. *Power to dedicate—Land vested in company for statutory purposes — Canal company — Reservoir embankments.*—A statutory body cannot dedicate to the public a right of way which would be incompatible with the special purpose for which it was incorporated.

So a canal company, which was empowered and obliged to make a canal and the works incident and necessary for the purpose of making and maintaining the canal, was to held have been incapable of dedicating to the public a right of way over the embankment of reservoirs constructed by or in pursuance of its powers in a case where it was subsequently proved that the user by the public of the right of way must ultimately lead to the destruction of the embankment and consequent damage to the public unless great expense was incurred by the company to prevent such a result.

Mulliner v. *Midland Railway Co.*, 40 L. T. Rep. 121, 11 Ch. Div. 611, followed.—GREAT WESTERN RAILWAY *v.* SOLIHULL DISTRICT COUNCIL, *C.A.*; 86 L. T. 852.

5. *Public footpath—Land appropriated as a private carriage-way—Extent of dedication—Presumption.*—Where there is a public right of footway across land, and a certain amount of the surface of the land lying alongside the course of the public footpath has been devoted to traffic, although only private traffic, then *primâ facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even although only to private traffic.

The owners of a rectangular piece of land ending at the River Mole, along which there ran a public footway, entering at the south-east corner and leading out at the north-west corner to a footbridge over the river, had appropriated the land for a private carriage-way. They take no steps to prevent the public who were using the footway going over any part of the land they pleased, although they (the owners) subsequently exercised certain acts of ownership over it.

Held, that it would be presumed that the whole of the land had been dedicated to the public for the purposes of the footway, and that the subsequent acts of ownership were not sufficient to rebut that presumption. — ATTORNEY-GENERAL *v.* ESHER LINOLEUM CO., *Ch.D. Buckley, J.*, 22; [1901] 2 Ch. 647; 70 L. J. Ch. 808; 85 L. T. 414.

6. *Repairs—Excessive weight—Extraordinary traffic —"Person by whose order"—"By or in consequence of whose order"—Highway and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12. —The defendant, being about to build a house in the plaintiffs' district, entered into a contract with a brick company for the delivery of a large number of bricks on the land where he intended building, but he gave no order as to the manner or time in which such bricks were to be delivered. The brick company, in the defendant's absence abroad, and without his knowledge, caused the bricks to be delivered by means of traction engines and trucks, the excessive weight of which caused damage to certain of the plaintiffs' roads, and they in consequence brought an action in the county court againt the defendant to recover the amount of the expenses to which they had been put in repairing the roads. The county court judge, under the circumstances, came to the conclusion that the defendant was not a person "by or in consequence of whose order" such excessive weight had been conducted over the plaintiffs' roads within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12, sub-section 1 (*c*), of the Locomotives Act, 1898, and that he was therefore not liable.

Held, that, under the circumstances of the case, and in view of the facts, the learned county court judge was not wrong in arriving at the conclusion he had come to.—EGHAM RURAL DISTRICT COUNCIL *v.* GORDON, *K.B.D.*, 703; [1902] 2 K. B. 120; 71 L. J. K. B. 523.

7. *Repairs—Local government—Expenses—Justices —Wakefield Corporation Act*, 1887, *ss.* 28-31—*Private Street Works Act*, 1892, *ss.* 6, 8.—A finding of the magistrates that a certain street is a highway repairable by the inhabitants at large is not conclusive, and does not operate as a judgment *in rem.* in any subsequent proceedings taken by the local authority respecting the same street against different parties.

Reg. v. *Hutchings*, 29 W. R. 724, 6 Q. B. D. 300, followed.—WAKEFIELD CORPORATION *v.* COOKE, *K.B D.*, 254; [1902] 1 K. B. 188; 71 L. J. K. B. 257; 86 L. T. 198.

8. *Repairs—New road in place of old—Obligation to repair* ratione tenurse—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25 (2).—In the year 1773 O. was the owner of lands now comprised in the plaintiffs' district, through which there passed an old highway. O. desired to stop up and inclose this highway, and in due course received licence to do so on his undertaking to make, as he did, upon his own land, another road in lieu of the old road, "as fit for horses, carts, carriages, and foot passengers to pass and repass," and on his under-

taking that he and his heirs would keep the substituted road in repair.

The defendant was the owner and occupier of part of the lands formerly held by O., and the plaintiffs desired to make him liable for the repair of the road.

Held, that the defendant was liable *ratione tenuræ* as being an assign of O., and that he was none the less liable because he was the assign of part only of such land.—ESHER URBAN DISTRICT COUNCIL *v.* MARKS, *K.B D.*, 330; 71 L. J. K. B. 309; 86 L. T. 222.

9. *Repairable by inhabitants—Substitution—Disrepair—Order under section* 10 *of Highways and Locomotives Act,* 1878—*Width not specified in indictment—Liability of defaulting highway authority.*—In 1891, by an order of quarter sessions, a highway was stopped and a new road substituted for it, which was made by the owner, at whose instance the change was made. The certificate stated that the new road was 12 yards wide, but in fact it was 14 yards or 15 yards wide.

The new road having got into bad repair, an order was made, under section 10 of the Highways and Locomotives Act, 1878, on the defendants, and an indictment was preferred.

After the order the defendants served notices on the frontagers under section 150 of the Public Heath Act, 1875.

The width of the road was not specified in the indictment, and the jury found that the old road was a highway repairable by the inhabitants at large before 1835.

Held, that judgment was rightly entered for the Crown.—REX *v.* CROMPTON DISTRICT COUNCIL, *K.B.D.*; 86 L. T. 762.

10. *Surveyor of highways—Power to incur expenditure—Agreement with county council—Construction of bridge—Agreement for payment of money after expiration of surveyor's term of office—Liability of rural district council as successor to surveyor of highways—Highways and Bridges Act,* 1891 (54 & 55 *Vict. c.* 63), *s.* 3—*Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 25.—The surveyor of highways for a parish, acting on behalf of himself and his successors as highway authority, entered into an agreement with the county council for the payment of a sum of money in two instalments by the highway authority for the parish towards the expenses to be incurred in the construction of a bridge. The second instalment was agreed to be paid on a date after the expiration of the surveyor's year of office. Before the expiration of that year the rural district council, under section 25 of the Local Government Act, 1894, became the highway authority for the parish. The work of constructing the bridge lasted a year. In an action by the county council against the rural district council to recover the second instalment,

Held, that the surveyor of highways had power, under section 3 of the Highways and Bridges Act, 1891, to enter into the contract, and that the rural district council were liable, as his successors, to pay the second instalment.—HERTFORDSHIRE COUNTY COUNCIL *v.* BARNET RURAL DISTRICT COUNCIL, *C.A*, 582; [1902] 2 K. B. 48; 71 L. J. K. B. 610; 86 L T. 880.

HONG KONG, LAW of:—

1. *Company—Adoption of articles of association—Registration of unsigned articles—Acquiescence.*—Although a special resolution is the statutory mode of enacting articles of association, the adoption thereof by a company may be proved by a long course of acquiescence.

The unsigned articles of a company incorporated under Hong Kong Ordinance I. of 1865 (similar to the English Companies Act, 1862) were irregularly registered along with its memorandum of association; but it appeared that they had for nineteen years been published, acted on without objection, and from time to time amended and added to by special resolutions.

Held, that they must be treated as valid and operative, and as having been adopted by the shareholders.—HO TUNG *v.* MAN ON INSURANCE CO., *P.C.*; [1902] A. C. 232; 71 L. J. P. C. 46; 85 L. T. 617.

2. *Statute of Limitations* (*Ordinance No.* 13 *of* 1864)—*Administrator—Right to sue—Vesting of intestate's property in registrar of court.*—H., who carried on business in partnership with the appellants, died intestate in 1880. In 1886 a will was produced, and probate was granted to the executor named therein. In 1896 the probate was revoked on the ground that the alleged will was a forgery. In 1897 letters of administration were granted to the respondent, and in 1899 he brought an action against the appellants for an account.

Held, that the Statute of Limitations only began to run from the grant of letters of administration in 1897, and that the action was not barred. By Ordinance No. 8 of 1860 and Ordinance No. 9 of 1870, the property of intestates is vested in the registrar of the Supreme Court until administration is granted, and he is given power to get in and protect the estate, but no power to sue is conferred upon him.

Held, that no right of action accrued to the registrar on the death of the intestate which would make the statute run from that date.—CHAN KIT SAN *v.* HO FUNG HANG, *P.C.*; [1902] A. C. 257; 71 L. J. C. P. 49; 86 L. T. 245.

HUSBAND AND WIFE:—

1 *Desertion—Deed of separation—Summary Jurisdiction* (*Married Women*) *Act,* 1895 (58 & 59 *Vict. c.* 39)—If a wife, having cause of complaint under the Summary Jurisdiction (Married Women) Act, 1895, against her husband on the ground of desertion, enters into a valid deed of separation, the effect is to put an end to any desertion theretofore existing.

Quære, whether a complaint, if made within six months after the deed, could properly be entertained.—PIPER *v.* PIPER, *P.D. & Ad.D.*; [1902] P. 198.

2. *Desertion—Protection order—Practice—Married woman—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s* 21—*Matrimonial Causes Act,* 1858 (21 & 22 *Vict. c.* 108)—*Husband's address unknown—Citation dispensed with.*—Upon an application by a wife who had been deserted by her husband, and whose only information as to his whereabouts consisted of a statement by his brother that he was believed to be somewhere in Melbourne, the judge (Jeune, P.), in chambers, granted a protection order without notice being given to the husband.—MORRIS, RE, *P.D. & Ad.D.*; [1902] P. 104; 71 L. J. P. 56; 86 L. T. 596.

3. *Summary jurisdiction—Separation—Agreement—Bankruptcy of husband—Neglect causing wife to separate—Time for proceedings.*—When a husband and wife have lived apart for several years, and the husband has agreed to pay to his wife a certain weekly allowance, his failure to pay such allowance and his subsequent filing of his petition in bankruptcy, with the object of evading the payment of arrears, do not replace the parties in the same

position towards each other which they occupied before the separation took place, and under such circumstances a wife is not entitled to a separation order under the Summary Jurisdiction Act, 1895.—ROWLANDS *v.* ROWLANDS, *K.B D.*; 86 L. T. 125.

See also Attachment, 4; Election Law, 1; Justices, 7; Married Women, 1-3; Settlement, 4.

INCLOSURE:—

1. *Action for breach of duty to repair roads—Canon of construction to be applied in construing Act.*—By an Inclosure Act passed in the 7 Geo. 3 with reference to the inclosure of certain commons and waste grounds known as B. Moor, after reciting that the persons interested were owners and proprietors of messuages, &c., in the several townships therein mentioned, including, amongst others, the township of W., it was enacted that the commissioners should appoint and undertake the repair of (*inter alia*) two roads mentioned in the statement of claim.

The plaintiffs alleged that these roads were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of W., and that the said township was included in the defendant urban district, and that the defendants were liable to repair them.

There was no evidence, that the inhabitants of W., taken as a body, had ever in fact repaired or paid for the repair of the roads in question since 1767, although it was shown that since 1859 certain of the inhabitants of the township had contributed towards the repair of the roads for their own convenience. It was contended by the plaintiffs that liability to repair the roads in question was imposed upon the defendants.

Held, in the circumstances, that the court was justified in reading in after the words "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively" the words "within whose district such public highways are situated"; that the doctrine of *contemporanea expositio* did not apply; that the defendants were not liable to repair the roads in question as the same were outside their district; and that in construing an Inclosure Act it is right to take the whole of the document as one complete document. It is not sufficient to take out one section and disregard others which are germane to the same subject.

Rex v. *Inhabitants of Cottingham*, 6 T. R. 20, followed.—ATTORNEY-GENERAL *v.* LUNESDALE DISTRICT COUNCIL, *Ch.D. Farwell, J.*; 86 L. T. 822.

2. *Private road—Pasturage—Ownership of soil—User in excess of award—Prescription—Presumption of lost grant.*—By an award made under an Inclosure Act of 1812, which was passed for the draining, inclosing, and improving of a district of fen country, it was provided that all the herbage which should from time to time grow upon all the private roads therein set out should belong to and be the property of the surveyor of highways for the time being, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever.

The plaintiff was the occupier of a farm, allotted under the award, adjoining a private road. Since 1846 the pasturage of this private road, along with other roads, had been let annually, pursuant to directions given at public vestry meetings, without any restriction providing for depasturing sheep only. In an action by the plaintiff against the rural district council (the successors of the surveyor of highways) complaining of their having let the road for the depasturing of the cattle and horses,

Held, that, inasmuch as the restriction of pasturage to sheep was part of a permanent scheme for the drainage of a large area of land, and was intended for the benefit of the public and not only of the owners of land adjoining the road, any grant of a right to depasture cattle or horses on the road would have been illegal; and, therefore, the court ought not to presume a lost grant of any such right.

Judgment of Cozens-Hardy, J. (49 W. R. 154, [1901] 1 Ch. 22), reversed.—NEAVERSON *v.* PETERBOROUGH RURAL DISTRICT COUNCIL, *C.A.*, 549; [1902] 1 Ch. 557; 71 L. J. Ch. 378; 86 L. T. 738.

See also Charity, 5; Water, 7.

INCOME TAX.—See Inland Revenue, 8-13.

INFANT:—

1. *Building society—Infant member—Advances—Mortgage—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 32), *s.* 1.—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 38.—Though the Building Societies Act, 1874, authorizes an infant to become a member of a building society, it does not authorize him to borrow money by means of advances on his property, as it is not a necessary part of a member's position that he should have advances or mortgage his property.

An infant member of a building society purchased a piece of land by means of a loan from the society, and gave the society a mortgage to secure the loan and further advances which were expended in building houses on the land.

Held, that the society was entitled to a charge on the land for the actual purchase-money, with interest at 4 per cent. thereon, but that by reason of the Infants' Relief Act, 1874, the mortgage was void as against the infant, and must be delivered up to be cancelled.

Decision of Joyce, J. (49 W. R. 56, [1901] 1 Ch 88), varied.—THURSTON *v.* NOTTINGHAM BUILDING SOCIETY, *C.A.*, 179; [1902] 1 Ch. 1; 71 L. J. Ch 83; 86 L. T. 35.

2. *Life interest contingent upon attaining twenty-one years—Accumulations during minority—Person "ultimately entitled"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-section* 2.—Where property is held in trust for an infant for life, contingently upon his attaining the age of twenty-one years, the accumulations of the income during the minority of the infant belong to him upon his attaining that age under sub-section 2 of section 43 of the Conveyancing and Law of Property Act, 1881, and such accumulations are not to be added to the *corpus*. In the above case the infant, on attaining twenty-one, is "the person who ultimately becomes entitled to the property" under that sub-section, the words "the property from which the same arise" meaning the income from which the accumulations arise.—SCOTT, RE, SCOTT *v.* SCOTT, *Ch.D. Buckley, J.*, 454; [1902] 1 Ch. 918; 71 L. J. Ch. 475; 86 L. T. 348.

3. *Tenant for life—Rents and profits—Testamentary guardian—Trustees of will—Power of sale*—12 *Car.* 2, *c.* 24 *s.* 9—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict c.* 41), *s.* 42.—Trustees who are appointed trustees for the purposes of the Settled Land Acts, and, therefore, where the tenant for life is a minor, have the statutory authority to exercise on behalf of the tenant for life the power of sale vested in him under those Acts, are not, thereby, "trustees with the power of sale" under section 42 of the Conveyancing and Law of Pro-

perty Act, 1881, so as to entitle them to enter into possession of the land and receive the rents and profits under that section.—HELYAR, RE. HELYAR *v.* BECKETT, *Ch.D. Joyce, J.*, 285; [1902] 1 Ch. 391; 71 L. J. Ch. 209; 85 L. T. 627.

4. *Ward of court—Testamentary guardian—Guardian's change of religion—Removal of guardian*—A testator, who died in 1896, by his will appointed his sister guardian of his infant daughter, then aged eleven. The testator was a Protestant, and the infant was brought up in that faith. In 1900 the sister, from conscientious motives, became a Roman Catholic.

Held, that, under the circumstances, it was for the benefit of the infant that the testator's sister should be removed from her guardianship.—F. *v.* F., *Ch.D. Farwell, J.*; [1902] 1 Ch. 688; 71 L. J. Ch 415.

See also Advowson, 1; Married Woman, 2.

INHERITANCE:—

Root of descent—"Purchaser"—Devise to testator's "right heirs" — Co-heiresses — Joint tenancy or tenancy in common—Inheritance Act, 1833 (3 & 4 *Will.* 4, *c.* 106), *s.* 3.—Under a devise to or in trust for a testator's "right heirs," the person who at the time of the testator's death is his heir-at-law takes now, by virtue of section 3 of the Inheritance Act, 1833, as devisee, and not by descent as before the Act.

The word "heir" in that section includes "heirs."

And section 3 operates also to alter the quality of the estate taken by the heir; so that, if a testator leaves co-heiresses, they, under such a devise, take as joint tenants, not as tenants in common.

Re Baker, (1898) 79 L. T. 343, approved.—OWEN *v.* GIBBONS, *C.A.*; [1902] 1 Ch. 636; 71 L. J. Ch. 338; 86 L. T. 571.

INJUNCTION:—

Injunction to restrain nuisance after nuisance abated.—The plaintiffs claimed damages in respect of injury caused to their trees and crops by smoke and effluvia from the defendants' works. They also claimed an injunction to restrain continuance of the nuisance. The nuisance had ceased owing to defendants having stopped work after action brought.

Held, that the plaintiffs were entitled to an injunction and an inquiry as to damages.—DEAN OF CHESTER *v.* SMELTING CORPORATION, *Ch.D. Farwell, J.*; 85 L. T. 67.

See also Attachment, 3; Company, 22; Easement, 5; Landlord and Tenant, 1; Local Government, 2; Principal and Agent, 3; Trade Name, 1.

INLAND REVENUE:—

1. *Beer—War tax—Conditional contract of sale—Incidence of tax—Customs Consolidation Act*, 1876 (39 & 40 *Vict. c.* 36), *s.* 20—*Finance Act*, 1900 (63 *Vict. c.* 7), *s.* 8.—By section 20 of the Customs Consolidation Act, 1876, as applied by section 8 of the Finance Act, 1900, the new excise duty on beer imposed by the latter Act may be added to the contract price of the beer where the contract or agreement for the sale or delivery of the beer duty paid was made before the passing of the Act.

An agreement under which the purchaser is bound to buy his beer from a certain brewer, provided the latter is willing to sell it to him duty paid, at a certain price is not a contract for the sale or delivery of the beer within section 20. The contract for sale in such case is made only when the order for the delivery of beer is given to the brewer in pursuance of the conditional agreement, and, if such order was given after the passing of the Finance Act, 1900, the brewer is not entitled under section 8 to add the new duty to the price payable by the purchaser though the conditional agreement was made before it. — NEWBRIDGE RHONDDA BREWERY CO. *v.* EVANS, *K.B.D.*; 86 L. T. 453.

2. *Corporation duty — Real property — Cricket ground—Principle of assessment—"Annual value"—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51). *s.* 11.—The Surrey County Cricket Club, an unincorporated body, were lessees of the Kennington Oval Cricket Ground. Parts of the property comprised in the lease were underlet by the club, but the rest was in their possession. The club had also certain investments of stock from which they received income. The other receipts of the club were members' subscriptions, gate-moneys, and other payments received from the public for viewing cricket and other matches played on the ground.

Held, that the gate-money and other payments received from the public are not "annual value, income, or profits of the property" within section 11 of the Customs and Inland Revenue Act, 1885, and that, for the purposes of assessment to duty under section 11, the "annual value" of the real property of the club should be ascertained on the basis of assessments to income tax under Schedule A of the Income Tax Act, 1842, subject to deductions for repairs and ground-rent; and, further, that in respect of income derived from stocks, the club should be assessed under Schedule C, and in respect of their income from land under Schedule B.—SURREY COUNTY CRICKET CLUB, RE, *K.B.D.*, 173; [1901] 2 K B. 400; 70 L. J. K. B. 823; 85 L. T. 213.

3. *Estate duty — Annuities — Amount set apart to pay—Settlement estate duty—Property settled by will — Bequest of residue — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-section* 1; *s.* 22—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1.—A testator by his will devised and bequeathed all his real and personal estate to trustees on trust for conversion into money, and out of the moneys so produced to pay his funeral and testamentary expenses, and debts, and certain pecuniary legacies given by the will, and to set aside a sufficient amount of the residuary estate upon trust to pay annuities for life to certain persons, and, subject to that provision, to divide the residuary estate in certain proportions among residuary legatees. The trustees did, in pursuance of the testator's directions, set aside out of the residuary estate a certain amount, which they invested so as to produce an income sufficient to pay the annuities,

Held, that the fund so set aside was property settled by the testator's will within the meaning of the Finance Act, 1894, *s.* 5, sub-section 1, and therefore settlement estate duty was payable upon it.—CAMPBELL, RE, *C.A.*; [1902] 1 K. B. 113; 71 L. J. K. B. 160; 85 L. T. 708.

4. *Estate duty—Incidence—Settled fund—Will—Exercise of general power of appointment over reversionary interest—Direction to pay testamentary expenses out of residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30).—Where a fund is held in trust for A. for life, and after his death for B. for life, and after B.'s death for A., either absolutely or by way of general power of appointment; on A.'s death estate duty becomes payable in respect, not of the reversionary interest, but of the whole settled

fund; and inasmuch as this does not pass to A.'s executors, B. or the trustees of the fund, and not A.'s executors, are accountable for the duty, and it is payable out of the settled fund and not out of the residue.

The duty in these circumstances is not a testamentary expense.—DIXON, RE, PENFOLD *v.* DIXON, *Ch.D. Buckley, J.*, 203; [1902] 1 Ch. 248; 71 L. J. Ch. 96; 85 L. T. 622.

5. *Estate duty—Settled property—Mortgage by tenant for life and remaindermen for benefit of remaindermen—Indemnity to tenant for life—Value of property passing on death of tenant for life—Finance Act*, 1894 (57 & 58 *Vict. c* 30), *ss.* 1, 2 (1) (b), *and* 7 (7).—By his will the Duke of B. settled a certain estate on his wife for life, then on his second son, Lord M., for life, with remainder in fee tail on the eldest son of Lord M. With the consent of the duchess-dowager Lord M. and his said son disentailed the estate and resettled it subject to the life estate of the duchess-dowager to such uses as Lord M. and his son should jointly appoint, and in default of appointment to the use of Lord M. for life, with remainder to his said son in tail male. In exercise of the above power of appointment Lord M. and his son—the duchess-dowager joining in in respect of her life estate only—mortgaged the estate in fee to secure a sum of £27,000, which money was entirely for the benefit of Lord M. and his son, and they alone entered into the personal covenants. By an indenture of even date between the duchess-dowager and Lord M. and his said son the latter jointly and severally covenanted to indemnify the former from any liability or loss of profits or any action or suit arising through or from the mortgage, and they conveyed an annuity and rent-charge to trustees as security for the performance of the covenant. On the death in 1895 of the duchess-dowager, Lord M., in delivering an account for the purposes of assessing estate duty, claimed to deduct the mortgage debt of £27,000 from the capital value of the said settled estate.

Held, that as the duchess-dowager during her life must be deemed to have been beneficially interested in the estate to its full value, the estate which passed on her death was the full beneficial life interest in it, and that estate duty was therefore payable without deduction of the incumbrance of £27,000.—ATTORNEY-GENERAL *v.* MONTAGU (LORD), *K.B.D.*, 270; [1902] 1 K. B. 429; 71 L. J. K. B. 333; 86 L. T. 57.

6. *Estate duty—Succession duty—Gift of sum of money in lieu of legacy in consideration of an annuity* —Bonâ fide *purchase—Exception for money consideration—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 2 (1) (*c*), 3 (2)—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 7.—An unincorporated society, which was associated for charitable purposes of a religious character, and which was possessed of considerable funds held by its trustees and disposed of by its directors, in acceptance of an offer by C. B., one of its directors, entered into an arrangement in 1889 that, in consideration of the payment to the society of £500 in lieu of a legacy by the said C. B., the society would pay the sum of £25 per annum to C. B. during his life, and a like payment to his wife during her life should she survive him. C. B. died in 1895, and his widow died in 1900. The Crown claimed that, upon the death of C. B., estate duty became payable by the society under the Finance Act, 1894, s. 2 (1) (*c*), on the whole sum of £500, and that upon the death of the widow succession duty became payable by the society on the £500 under section 7 of the Succession Duty Act, 1853. The commercial value of the annuity, it appeared, was £210.

Held, that, as regards estate duty, the whole sum of £500 was, in the first instance, taxable under section 2 (1) (*c*), but that as the commercial value of the annuity was £210, that sum, representing the purchase-money, must be deducted under section 3 (2), and duty paid on £290 only. Further, that, as regards succession duty, the transaction was a *bonâ fide* sale within the meaning of section 7 of the Succession Duty Act, 1853, and that, therefore, no succession duty was payable on the death of the widow.—ATTORNEY-GENERAL *v.* JOHNSON, *K.B.D.*, 366; [1902] 1 K. B. 416; 71 L. J. K. B. 187; 86 L. T. 296.

7. *Estate tail—Scotch testator—Money to be laid out in the purchase of land in England—Discretion—Finance Act*, 1894 (57 & 58 *Vict. c* 30), *s.* 23.—Where a testator gave a sum of money in trust for the purpose of purchasing land in Scotland to be entailed in accordance with the directions of his will, and by codicil authorized his trustees (if in their discretion they should think it desirable) in place of purchasing land in Scotland to purchase land in England to be entailed according to English law,

Held, that the money, or so much of it as for the time being remained uninvested in land, was not "entailed estate" within the meaning of the provisions of the Finance Act, 1894, applicable to Scotland.—LORD ADVOCATE *v.* STEWART. *H.L.*, 673; [1902] A. C. 344; 71 L. J. P. C. 66; 86 L. T. 603.

8. *Income tax—Benefice, incumbent of—Perquisites or gains accruing by reason of office—Grant by affiliated branch of Queen Victoria Clergy Sustentation Fund—Public office or employment of profit—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146; 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule E.*—The appellant, a beneficed clergyman, received for several years an annual charitable grant of money from one of the diocesan branches affiliated to the Queen Victoria Clergy Sustentation Fund, which is a body incorporated with the object of giving pecuniary assistance to poor clergymen holding benefices. The funds of the diocesan branch were administered by a council under rules which provided that no assistance should be given where the income of the applicant's benefice exceeded £200 a year, or where, though the income of his benefice did not exceed that sum, he was not a poor man, and that the onus should rest upon the applicant of deciding whether his own circumstances justified him in applying for charitable assistance out of the funds. The giving, withholding, continuance, or discontinuance at any time, of grants out of the funds were matters wholly within the discretion of the council.

Held, that the sums received by the appellant from the diocesan branch were not "perquisites or profits accruing by reason of" his office within the meaning of the first rule, contained in section 146 of the Income Tax Act, 1842, for charging duties under Schedule E, and therefore that he was not liable to pay income tax in respect of those sums. —HERBERT *v.* MCQUADE, *K.B.D.*; [1901] 2 K. B. 761; 70 L. J. K. B. 725; 84 L. T. 661.

9. *Income tax—Deductions—Sum payable or chargeable by virtue of any Act of Parliament—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *rr.* 1, 9—*Manchester Corporation Act*, 1891, *s.* 5.—The Manchester Corporation Act, 1891, empowered the corporation to establish a fund for encouraging thrift among its officers and servants, and for

providing a fund for them or their representatives on their retirement or death. The scheme passed by the corporation provided that persons who were in their employ previous to the passing of the Act should, on their applying in writing, be admitted to the benefits of the fund, and having been admitted they could not, while in the service of the corporation, withdraw from the fund.

Held, that a servant of the corporation who had been so admitted on his own application could not deduct the amount of his payments to the fund from the amount payable by him for income tax, on the ground that it was a deduction pursuant to section 146, r. 1, of the Income Tax Act, 1842, by which duty is payable on salaries after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament.

Beaumont v. *Bowers*, 48 W. R. 557, [1900] 2 Q. B. 204, distinguished.—HUDSON *v.* GRIBBLE, *K.B.D.*, 685.

10. *Income tax—Interest arising from foreign securities—Receipt in United Kingdom—Profit and loss—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, Fourth Case.*—The income tax assessed under the Fourth Case of section 100, Schedule D, of the Income Tax Act, 1842, in respect of interest arising from foreign securities which have been or will be received in Great Britain in the current year without any deduction or abatement, should be charged only on the amount of such interest actually received in this country.

Decision of the Court of Appeal ([1901] 1 Q. B 153, 49 W. R. Dig. 77) reversed.—GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP, *H.L.*, 593; [1902] A. C. 287; 71 L. J. K. B. 618; 86 L. T. 693.

11. *Income tax—Life policy — Exemption on premiums—Assurance company agreed to return half of each of the first seven premiums paid as loans to the assured on interest—Such advances treated as first charge on policy—Actual premium paid—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s* 4, *Schedules D, E.* —By the terms of a policy issued by an assurance company the assured had the option of receiving back by way of loan at interest from the company half of each of the first seven years' premium paid by him in respect of an assurance he had effected on his own life, the money so advanced to him being a first charge on the capital money of the policy.

The assured having elected to exercise the option, paid £66 17s 6d., the first premium, and received back as a loan £33.

Held, that the amount which the assured had paid in premium was £66 17s. 6d., and that he was entitled to claim exemption from income tax on the whole of that sum.—HUNTER *v.* REX, *K.B.D.*, 618; [1902] 2 K. B. 255.

12. *Income tax—Payment on aggregate income—Loss in trade, manufacture, or husbandry—Application for adjustment and for repayment—Decision of commissioners—Right of appeal—Jurisdiction to state case.*—Where a person who has sustained a loss in any trade, manufacture, profession, or employment, or in the occupation of lands for the purpose of husbandry only, applies, under section 23 of the Customs and Inland Revenue Act, 1890, to the Commissioners for General Purposes of the Income Tax Acts, for an adjustment of his liability by reference to the loss and to the aggregate amount of his income, and for repayment to him of a proportionate part of the income tax paid by him, or applies for exemption or relief under section 27 of the Finance Act, 1896, the decision of the commissioners upon such applications is final, and the commissioners have no jurisdiction under section 59 of the Taxes Management Act, 1880, to state a case for the opinion of the High Court in reference thereto, such applications not being appeals under that section.—BRUCE *v.* BURTON, *K.B.D.*; 85 L. T. 227.

13. *Income tax—Trade carried on partly abroad—Jurisdiction of Tax Commissioners—Prohibition.*—An English joint stock company carrying on business in London was assessed to income tax by the Tax Commissioners in respect of the profits of a business carried on in America by an American company, which business and profits in the opinion of the commissioners were really the business and profits of the English company. The English company applied for a writ of prohibition to the commissioners on the ground that the business of the American company was not really their business, and the commissioners, therefore, could not, by deciding wrongly, give themselves jurisdiction to assess the English company in respect of the profits of the American company.

Held, that prohibition did not lie, and that if the commissioners decided wrongly, the proper remedy was an appeal upon a case stated.—REX *v.* CLERKENWELL INCOME TAX COMMISSIONERS, *C.A.*; [1901] 2 K. B. 879; 70 L. J. K. B. 1010; 85 L. T. 503.

14. *Stamp duty — Conveyance on sale — Person authorized by statute to purchase property—Purchase of realty and chattels—Stamp duty on consideration for sale of chattels—Finance Act*, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.—By section 12 of the Finance Act, 1895, where by virtue of any Act, either (*a*) any property is vested by way of sale in any person, or (*b*) any person is authorized to purchase any property, such person shall produce to the Commissioners of Inland Revenue a copy of the Act or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property.

Held, that the word "property" means specific property, whether real or personal, which is either vested in the purchaser by some Act or which the purchaser is authorized by some Act to purchase, and stamp duty is payable upon the whole consideration for the purchase.

Judgment of the Divisional Court (*ante*, p. 59, [1901] 2 K. B. 773) affirmed —ATTORNEY-GENERAL *v.* EASTBOURNE (MAYOR), *C.A.*, 161; [1902] 1 K. B. 403; 71 L. J. K. B. 181; 85 L. T. 745.

15. *Stamp duty—Lease—Bond, covenant, or instrument being the only or principal or primary security for any annuity—Ad valorem duty—Covenant relating to the matter of the lease—Lease of tramways by municipal corporation to electric traction company—Covenant to pay additional rent for repair of demised premises—Covenant to purchase electrical energy from corporation—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 4, 77 (2); *First Schedule.*—By an indenture made between a municipal corporation and an electric traction company in pursuance of section 19 of the Tramways Act, 1870, the corporation demised to the company the right of user of certain tramways for a term of years. The indenture provided for the payment by the lessees of an annual rent of £3 250. It further provided for the payment by the lessees of an annual sum of £900 for the repair of the demised premises. It further provided that the lessees should pay the corporation an annual sum of £4,000 for the

supply of electric energy. A special power of distress was given in the event of non-payment of any of the rents or moneys thereby made payable, except the payments to be made for or in respect of electrical energy.

Held, first, that the instrument was chargeable with *ad valorem* stamp duty on the total sum of £3,250 plus £900, the latter sum being in the nature of additional rent. Secondly, that it was not chargeable with any further stamp duty in respect of the sum of £4,000; for the provision for the payment of that sum was a "covenant relating to the matter of the lease" within the meaning of section 77, sub-section 2, of the Stamp Act, 1891, and therefore the lease, being made for a consideration in respect whereof it was chargeable with *ad valorem* duty and in further consideration of that covenant, was not to be charged with any duty in respect of such further consideration. —BRITISH ELECTRIC TRACTION CO. *v.* INLAND REVENUE COMMISSIONERS. *C.A.*, 280; [1902] 1 K. B. 441; 71 L. J. K. B. 92; 85 L. T. 663.

16. *Stamp duty—Loan capital—Issue of stock—Date of issue—Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.—The Finance Act, 1899 (which came into operation the 20th of June, 1899), by section 8, enacts that where any local authority, corporation, company, or body of persons propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue, and every such statement shall be charged with an *ad valorem* stamp duty.

Held, that by the time scrip certificates are issued to allottees the loan capital is issued within the meaning of section 8, and therefore the statement should be delivered to the Inland Revenue Commissioners before scrip certificates are issued.

Held, also, that where scrip certificates in respect of a loan to a corporation were issued to allottees before the 20th of June, 1899, although the payment of the final instalment in respect of the loan was not due or paid until after the 20th of June, 1899, section 8 of the Act had no application.—ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION, *K.B.D.*, 328; [1902] 1 K. B. 411; 71 L. J. K. B. 195; 86 L. T. 300.

17. *Stamp duty—Railway company—"Increase in the amount of nominal share capital"—Conversion of stock—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 113. —The Midland Railway Co., in pursuance of a special Act, converted various classes of stock, preferential and ordinary, into other stocks of higher nominal value, but bearing a corresponding lower rate of interest.

Held, that, although nothing was added to the working capital of the company, yet there was an "increase of the amount of the nominal share capital" within the meaning of the Stamp Act, 1891, s. 113.

Decision of the Court of Appeal (49 W. R. 243, [1901] 1 Q. B. 220), affirmed.—MIDLAND RAILWAY CO. *v.* ATTORNEY-GENERAL, *H.L.*, 433; [1902] A. C. 171; 71 L. J. K. B. 315; 86 L. T. 206.

18. *Stamp duty—Separation deed—Agreement in consideration of fixed weekly payments—Duty assessable on covenant—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 4, *and Schedule* 1.—By the schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity) or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument or rent reserved by a lease or tack, is chargeable for a definite and certain period so that the total amount to be ultimately payable can be ascertained, with the same *ad valorem* duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of 2s. 6d. for every £5, and also for any fractional part of £5, of the annuity or sum periodically payable.

A deed of separation entered into by the appellant and his wife contained a clause to the effect that the appellant would and should during the joint lives of himself and his wife, if his wife should continue to perform and observe the stipulations therein contained and on her part to be performed and observed, pay to his wife "the clear weekly sum of £1," and in the event of the wife surviving the appellant and not having forfeited payment during his lifetime, the sum should continue to be paid to her by her husband's representatives.

Held, that the agreement was a security for an indefinite period for a sum of money at weekly periods, and not for an annuity or yearly sum payable by weekly instalments, and was, therefore, only liable to *ad valorem* duty upon the sum agreed to be paid weekly, and not upon the total amount of such weekly payments for a year.

Clifford v. *Commissioners of Inland Revenue*, [1896] 2 Q. B. 187, 44 W. R. Dig. 76, followed.—JACKSON *v.* COMMISSIONERS OF INLAND REVENUE, *K.B.D.*, 666.

19. *Stamp duty — Settlement — Instrument of appointment—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 6, *sub-sections* 1 *and* 2—*First Schedule* "*Settlement*"—*Exemption.*—By a deed of settlement dated the 26th of June, 1895, the settlor granted to trustees certain funds, and by a deed dated the 12th of December, 1896, certain other funds, upon trust for his five children, but so nevertheless that the share of each child should be held by the trustees upon trust to pay the income thereof to such child during his or her life, and after his or her death upon trust for such one or more of the others as such child should by will appoint, and in default of appointment for the other children in equal shares. It was further provided that the trustees should have power, on or subsequent to the marriage of any of the children, to revoke the trusts of the settlement and to declare, as they thought fit, new trusts by way of resettlement for the benefit of such child, or any wife or husband of such child, or such child's children or remoter issue, or the next-of-kin of such child, but not in favour of any other person or persons, and to transfer the funds to the trustees of such settlement. These deeds were stamped with *ad valorem* duty as settlements.

By two deeds, both dated the 10th of April, 1899, the trustees of the settlements of the 26th of June, 1895, and the 12th of December, 1896, revoked the trusts of those settlements so far as they concerned the share of C. E. H.-R., one of the children, who was then about to be married, and declared that such share should, from and after the solemnization of the intended marriage, be held upon trust to pay the income thereof to C. E. H.-R., during his life, and after his decease to transfer such share to trustees of the marriage settlement of C. E. H.-R., to be held by them upon the trusts declared in the marriage settlement. These deeds were each stamped with a duty of ten shillings.

By the marriage settlement, a deed of even date with the two last-mentioned deeds, it was provided that after the death of C. E. H.-R. the trustees of

the settlement should stand possessed of his share of the funds comprised in the settlement of the 26th of June, 1895, and the 12th of December, 1896, upon the trusts of the settlement, which were, as regards the husband's fund, after the death of the husband, to pay the income to the intended wife during her life, and after her death upon trust for the children or remoter issue of the intended marriage as the intending husband and wife jointly, or the survivor of them, should appoint, and in default of appointment in trust for the children in equal shares.

Held, that the marriage settlement was not, as regards the share of C. E. H.-R. in the funds comprised in the settlements of the 26th of June, 1895, and the 12th of December, 1896, exempt from the payment of settlement duty, either under the exemption under the heading "Settlement" in the First Schedule to the Stamp Act, 1891, or under section 106, sub-section 1, of the Act.

Decision of the Divisional Court (49 W. R. 569) affirmed.—HAMILTON-RUSSELL *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 193; [1902] 1 K. B. 142; 71 L. J. K. B. 201; 85 L. T. 738.

20. *Succession duty—Acceleration of succession—Power of appointment—Extinction of prior interest—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 18—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.—By a settlement made in 1883 the Blackmoor estate was settled upon such trusts and with and subject to such powers as the then (first) Lord Selborne and Viscount Wolmer should by deed appoint, and in default of or until appointment to the use of Lord Selborne for life, and after his death to the use of Viscount Wolmer in fee simple, if he should survive Lord Selborne, and, if not, then to the use of the first son of Viscount Wolmer who should attain twenty-one, and in default of such son to the use of the first Lord Selborne in fee simple.

In 1894 the first Lord Selborne and Viscount Wolmer by deed appointed that from and after the date of the deed the Blackmoor estate should go and remain to the use of Viscount Wolmer in fee simple for his own absolute use and benefit.

The first Lord Selborne died in 1895, and the Crown claimed succession duty under the Succession Duty Act, 1853, on the principal value of the Blackmoor estate.

Held (reversing the judgment of the King's Bench Division), that the title to the succession created by the settlement of 1883 was not accelerated "by the surrender or extinction" of the prior life estate by the exercise of the power of appointment in 1894 within the meaning of section 15 of the Succession Duty Act, 1853, and that succession duty was not payable.—ATTORNEY-GENERAL *v.* SELBORNE (EARL), *C.A.*, 210; [1902] 1 K. B. 388; 71 L. J. K. B. 289; 85 L. T. 714.

See also Will, 3, 12.

INNKEEPER:—

Rights of—Traveller—Power of innkeeper to refuse.—An innkeeper is not bound to admit travellers when the inn is full, and having regard to modern habits, it may be said to be full when all the bedrooms are occupied.—BROWNE *v.* BRANDT, *K.B.D.*, 654; [1902] 1 K. B. 696; 71 L. J. K. B. 367; 86 L. T. 625.

INSURANCE:—

1. *Accident—Principal and agent—Misstatements in proposal made by agent of insurers without knowledge of insured—Authority of agent.*—A policy of insurance against accidental injury was effected with an insurance company through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a declaration in which the applicant agreed that the statements in the proposal should form the basis of the policy, and the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured.

Held, first, that it was the duty of the applicant to read the answers in the proposal before signing it, and that he must be taken to have read and adopted them; and, secondly, that in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance company, but as the agent of the applicant; and that, therefore, the policy was void.—BIGGAR *v.* ROCK LIFE ASSURANCE CO., *K.B.D.*; [1902] 1 K. B. 516; 71 L. J. K. B. 79; 85 L. T. 636.

2. *Bullion — Perils — "Arrests, restraints, and detainments"—"Warranted free of capture, seizure, and detention" — Bullion taken possession of by assured's government—Subsequent declaration of war.*—Gold bullion the property of a Transvaal company was insured during transit from the Transvaal to the United Kingdom by a policy which covered the risks of "arrests, restraints, and detainments" of rulers, and which contained a clause "Warranted free of capture, seizure, and detention." The gold while in transit in the Transvaal was, on the 2nd of October, 1899, removed from a railway train and taken possession of by officials acting under the orders of the Transvaal Government. At that date it was anticipated that war would shortly break out between the Transvaal and this country, and war did in fact begin on the 9th of October. According to the law of the Transvaal the taking of the gold was in the circumstances a legal act. In an action on the policy,

Held, that the gold had been seized within the meaning of the warranty, and that the plaintiffs could not recover a loss under the policy.—ROBINSON GOLD MINING CO *v.* ALLIANCE MARINE, &c., ASSURANCE CO., *K.B.D.*, 109; [1901] 2 K. B. 919; 70 L J. K. B. 892; 85 L. T. 419.

3. *Bullion—"Arrests, restraints, detainments"—Outbreak of war—Seizure—Property in enemy's territory—Right of assured to recover.*—The plaintiffs were a company incorporated and registered in Natal, and owning and working a gold mine in the Transvaal. On the outbreak of the war on the 11th of October, 1899, between the South African Republic and Great Britain the plaintiffs ceased to work their mine. A few days after the war had begun, gold products which had been extracted from the plaintiffs' mine before that date were seized by the officials of the South African Republic while still in the plaintiffs' possession. The plaintiffs had effected an insurance of the produce of their mine by a policy covering arrests, restraints, and detainments of kings, princes, and people. In an action on the policy to recover the value of the gold seized,

Held, that the plaintiffs were not disentitled by any principle of public policy from recovering the loss.—NIGEL GOLD MINING CO. *v.* HOADE, *K.B.D.*, 108; [1901] 2 K. B. 849; 70 L. J. K. B. 1006; 85 L. T. 482.

4. *Fire insurance — Arbitration clause — English*

contract—Law of Jersey.—A policy of insurance against fire upon property in Jersey issued by an English office in the English language but executed in Jersey was made subject to a condition that no action should be brought for any money payable under the policy until the liability and the amount had been settled by arbitration; and it was also provided that the submission should be subject to the provisions of the Arbitration Act, 1889, and might be made a rule of court.

Held, that the contract was governed by the law of England and not by the law of Jersey.—SPURRIER *v.* LA CLOCHE, *P.C.*; [1902] A. C. 446; 86 L. T. 631.

5. *Life—Policy taken out in name of a stranger—Intention—Resulting trust.*—A person took out a policy of insurance on his own life "for the behoof of" his wife's sister. After his wife's death he went through the form of marriage with her. She predeceased him. He always held the policy, and paid the premiums himself both before and after her death.

Held, that though her legal personal representatives were the persons entitled to receive the money at law and give a receipt for it, in equity the money belonged to the legal personal representatives of the person who had taken out the policy and paid the premiums, there being no proof that it was intended for her benefit.—SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY'S POLICY, RE, *Ch.D. Joyce, J.*, 327; [1902] 1 Ch. 282; 71 L. J. Ch. 189; 85 L. T. 720.

6. *Life—Proposal—Continuing declaration—Insurance in other office—Proviso—Second proposal and policy between first proposal and policy.*—A policy contained a proviso "that if the insured be at any time during the continuance of this policy insured against death or disablement by accident or disease in any other company without notice being given to the said directors and their written consent obtained . . . this policy shall be absolutely void." After the proposal for this policy was made, but before it was issued, the insured made a proposal, which was accepted, and the policy issued, by another company. No consent was obtained in accordance with the proviso.

Held, that the first policy was void. Declarations made in the proposal for a policy are in the nature of continuing declarations until the issue of the policy.—MARSHALL AND SCOTTISH EMPLOYERS' LIABILITY CO., RE, *K.B.D.*; 85 L. T. 757.

7. *Marine—Freight—Lump chartered freight—Insurance—On "freight chartered or as if chartered"—Loss not by perils insured against—Cesser of liability clause—Loss of bill of lading freight—Waiver of lien for chartered freight.*—Shipowners chartered a ship for a voyage at a lump freight, the charterers' liability to cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, and demurrage on arrival, and the vessel to have a lien on the cargo for the recovery of all freight, dead freight, demurrage, and all other charges. The shipowners and charterers jointly insured the lump freight "chartered or as if chartered value" at the lump sum "on board or not on board." The charterers loaded the ship with a general cargo, and the master signed bills of lading by which the goods mentioned in each bill were made deliverable upon payment of the bill of lading freight payable in respect of those goods. The aggregate of the bill of lading freight exceeded the chartered freight. On the voyage part of the cargo was lost by jettison upon the ship running aground. The cargo which arrived was worth the freight, dead freight, and demurrage. Owing to the loss of cargo the bill of lading freight payable on the cargo delivered was less than the chartered freight. To recover the difference an action was brought on the policy by the shipowners and charterers jointly.

Held, that the action was not maintainable, the loss having been caused not by perils of the seas, but by the master's not having reserved in the bills of lading the lien over the whole cargo for the chartered freight.

The decision of the Court of Appeal (reported as *Brankelow Steamship Co.* v. *Canton Insurance Office*, 47 W. R. 611, [1899] 2 Q. B. 178) affirmed.—WILLIAMS & CO. *v.* CANTON INSURANCE OFFICE, *H.L.*; [1901] A. C. 462; 70 L. J. K. B. 962; 85 L. T. 317.

8. *Marine — General average — Charter-party — Voyage out and home—General average sacrifice on outward voyage—Liability of homeward freight to contribute.*—A ship was chartered to proceed to a foreign port and there load a cargo for carriage to a home port, the chartered freight to be paid on delivery of the cargo. The ship sailed in ballast, and before she arrived at the foreign port of loading she sustained a general average loss. She proceeded on her voyage, loaded a cargo in accordance with the charter-party, carried it home, and delivered it, and the chartered freight was duly paid. In an action by the shipowners against the underwriters on ship,

Held, that the chartered freight was liable to contribute in general average.

Judgment of Mathew, J. (*ante*, p. 42, [1901] 2 K. B. 861), affirmed.—CARISBROOK STEAMSHIP CO. *v.* LONDON AND PROVINCIAL MARINE INSURANCE CO., *C.A.*, 691.

9. *Marine — General average sacrifice — Joint ownership of ship and cargo—Liability of underwriters.*—A sacrifice made to avert perils of the sea is a general average act, quite independently of unity or diversity of ownership. Although the assured is the owner both of ship and of cargo, the underwriters of a policy on cargo are liable to pay his loss by reason of the deduction made by the underwriters of the policy on the ship in respect of his contribution as the owner of cargo.

Decision of Mathew, J. (49 W. R. 221, [1901] 1 K. B. 147), affirmed.

Judgment of Barnes, J., in *The Brigella* ([1893] P. 189, 41 W. R. Dig. 92), disapproved.—MONTGOMERY & CO. *v.* THE INDEMNITY MUTUAL MARINE INSURANCE CO., *C.A.*, 440; [1902] 1 K. B. 734; 71 L. J. K. B. 467; 86 L. T. 462.

10. *Marine—General average—Policy on ship valued at £33 000—Ship found of the value of £40,000—Liability of underwriters.*—The plaintiffs insured their ship *Balmoral* with the defendant and other underwriters, the value of the ship by agreement being put at £33,000.

During the currency of the policy *The Balmoral* received certain salvage services in respect of which a salvage award was made in the Admiralty Court against the ship, freight, and cargo, and certain general average expenses were also incurred.

In a salvage action the value of the ship was proved by her owners to be £40,000, and the average adjusters accepted that figure as the contributory value of the ship for the purpose also of the general average. The shipowners sought to recover from the underwriters the whole of the ship's proportion of the salvage and of the general average contribution.

Held, on appeal, affirming the decision of

Bigham, J. (49 W. R. 137, [1900] 2 Q. B. 748), that the underwriters were liable only to pay thirty-three-fortieths of the £40 000 the proportion which the value in the policy bore to the actual value on which the statement had been made.—BALMORAL STEAMSHIP CO. *v.* MARTEN *C.A.*, 35; [1901] 2 K. B. 896; 70 L. J. K. B. 1018; 85 L. T. 389.

11. *Marine—Insured value to be taken as repaired value—Reinsurance against total loss—"To pay as may be paid thereon."*—Attached to a policy of insurance on a vessel was a clause that "the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss. The vessel was valued at £16,000 and was insured against all risks. The underwriter effected a policy of reinsurance on the vessel against total, including constructive total, loss only "being a reinsurance applying to policy or policies and to pay as may be paid thereon." During the period covered by the policies the vessel ran ashore, and notice of abandonment was given. The vessel could have been repaired at a less sum than £16,000, and if the ordinary rules had been applied the vessel would have been a constructive total loss.

Held, that the reinsurers were not liable under the reinsurance policy, since the original underwriter was not liable for a constructive total loss, and that the words "pay as may be paid thereon" meant that he could only recover such a sum as he could have been compelled to pay.—MARTEN *v.* STEAMSHIP OWNERS' UNDERWRITING ASSOCIATION, *K.B.D.*, 587.

12. *Marine — Policy on cattle — "Restraint of people"—Inability to land cattle at foreign port owing to order prohibiting landing—"Warranted free of capture, seizure, and detention."*—Under a Lloyd's policy cattle were insured for a voyage from Liverpool to Buenos Ayres against "arrests, restraints, and detainments of princes and people." The policy also contained the following clause: "Warranted free of capture, seizure, and detention." Prior to the shipment the Argentine Government passed a decree prohibiting the entry of animals suffering from contagious diseases. On arrival at Buenos Ayres the authorities refused to allow the cattle to be landed, as they were found to be suffering from a contagious disease. The cattle, being transhipped, were subsequently sold at a considerable loss.

Held, in an action on the policy, that such a loss was not a loss within the policy, and that the mere operation of a municipal law affecting or preventing the delivery of the insured goods at their destination was no restraint of people" within the meaning of the policy; that the words did not cover the operation of the ordinary law of the land, but related only to some violent departure from the ordinary course of things.

Held, also, that "warranted free of capture, seizure, and detention" freed the underwriters from liabilities under the words arrests, restraints, and detainments in the body of the policy.—MILLAR *v.* LAW ACCIDENT INSURANCE SOCIETY, *K.B.D.*, 474; 71 L. J. K. B. 551.

13. *Marine—Policy on "chartered or hire money" to cover "loss of hire money"—Loss of hire through vessel becoming inefficient—Government charter-party—Option to discharge vessel—Loss by discharge of vessel—Right of assured to recover.*—By a charter-party in the Government form the Admiralty chartered a vessel for transport service for three months certain, and thenceforward until they should give notice to the owners that the vessel was discharged from their service, such notice to be given when the vessel was in port in the United Kingdom; and the charter-party provided that if the ship became incapable from any defect, or from any cause whatsoever, to perform the service efficiently, the Admiralty might make abatement by way of mulct out of the freight. The shipowners effected a time policy upon "chartered or hire money" to "cover the loss of hire money calculated at" so much per day caused by (amongst other things) want of repairs or breakdown of machinery, rendering the vessel inefficient for the service. Under the charter-party the vessel had made a voyage and had returned to England, and, the three months having previously expired, the Admiralty had continued the employment, and had given instructions that the vessel was to proceed on another voyage on a certain day. While the vessel was in dry dock it was discovered that some of the blades of her propeller were cracked and that it would take some time to repair the damage. In consequence of this the Admiralty, under their option in the charter-party, gave the owners notice discharging the vessel, and the vessel was discharged from the Government service as from that date. The vessel then underwent repairs, which took fifteen days from the date of her discharge by the Admiralty. In an action on the policy by the owners of the ship to recover from the insurers the loss of hire money for the fifteen days,

Held, that there was no loss under the policy for which the shipowners were entitled to recover. —MANCHESTER LINERS *v.* BRITISH AND FOREIGN MARINE INSURANCE CO., *K.B.D.*; 86 L. T. 148.

14. *Marine—Policy on dog—All risks including mortality—Cattle clause—Walking to be deemed safe arrival.*—A policy of insurance on a dog during transit from Liverpool to Lahore contained the following clause: "This insurance is against all risks, including mortality from any cause, jet ison and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." The dog was injured during the transit, and on arrival at Lahore could only walk on three legs.

Held, first, that the policy covered all risks, and not merely mortality; secondly, that the dog did not walk at Lahore within the meaning of the policy.—JACOB *v.* GAVILLER, *K.B.D.*, 428.

15. *Marine—Reinsurance—Delay in commencement of voyage—Alteration of risk.*—The plaintiffs, by an open cover, insured all shipments of a firm of merchants for twelve months from the 11th of May at premiums varying with the date of sailing and the port of destination. On the 30th of July a declaration of a proposed shipment from the Tyne to Lulea was made under the cover, the premium for which was 12s. 9d. if the ship sailed in August and 15s. in September. The plaintiffs effected a reinsurance with the defendant at Lloyd's by a slip dated the 2nd of August, the premium payable to the defendant being 6s. 8d. The vessel was named in the slip, which contained also the reinsurance and deviation clauses. The vessel did not sail till the 25th of September, and with her cargo was totally lost on the 2nd of October. The plaintiffs' original policy under the cover was issued on the 25th of September, and the reinsurance policy was signed by the defendant on the 5th of October.

Held, that the delay in the commencement of the voyage constituted a material alteration in the risk, and that the defendant was not liable on the reinsurance policy.—MARITIME INSURANCE CO. *v.* STEARNS, *K.B.D.*, 238; [1901] 2 K. B. 912; 71 L. J. K. 86.

16. *Marine—Time policy—Continuation clause—Time policy for more than twelve months—Specification of particular risk—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 93.—A policy of marine insurance on a ship, expressed to be for and during a period of twelve months, contained a clause which provided that, if the ship was at sea or abroad at the expiration of the policy, it was agreed to hold her covered by the policy until arrival at the port of final destination. The ship was lost upon a homeward voyage after the expiration of the twelve months. In an action on the policy,

Held, that the policy was invalid for failure to satisfy the requirements of section 93 of the Stamp Act, 1891.

Judgment of Bigham, J. (*ante*, p. 25, [1901] 2 K. B. 567), affirmed. — ROYAL EXCHANGE ASSURANCE CORPORATION *v.* SJOFORSAKRINGS AKTIE-BOLAGET VEGA, *C.A.*, 694.

INTEREST:—

Lunacy—Bankruptcy—Winding up of lunatic's estate—Claim by co-surety under contract of indemnity—Costs.—Interest is still allowed at the rate of 4 per cent. on judgment debts, and the same rate is allowed a co-surety in contribution. — HUNT, SIR FREDERICK, RE, *C.A.*; [1902] 2 Ch. 318; 86 L. T. 504.

See also Settlement, 6; Trustee, 1; Will, 2, 16.

JUSTICES:—

1. *Costs of appeal to quarter sessions—Payment by treasurer of county or borough—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 32.—By section 29 of the Alehouse Act, 1826, upon a successful appeal under the Act to quarter sessions from a decision of justices, the justices in quarter sessions are empowered to order the treasurer of "the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment" to pay the respondent justices' costs.

A county borough had a separate commission of the peace, but not a separate court of quarter sessions; it was not directly subject to the county rate, but under a financial adjustment made under section 32 of the Local Government Act, 1888, it paid a fixed contribution towards the expenses of the county incurred in part on behalf of the borough, including the expenses of quarter sessions.

Held, that the county borough, not having a separate court of quarter sessions, and being liable to contribute to quarter sessions expenses, was not a place separate from the county, and therefore not a "place" within the meaning of section 29 of the Alehouse Act, 1828; that the licensing justices had acted for the county, that their costs were costs of quarter sessions, and that the order of quarter sessions had, therefore, been wrongly made upon the borough treasurer, and should have been made upon the treasurer of the county.—REX *v.* WARWICKSHIRE JUSTICES, *K.B.D.*; [1902] 2 K. B. 101; 71 L. J. K. B. 505; 86 L. T. 568.

2. *Discretion to issue summons—Proceedings against Jesuits upon information under Roman Catholic Relief Act*, 1829 (10 *Geo.* 4, *c.* 7), *s* 34—*Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), *s* 9.—Upon an application by a private person for summonses against three Jesuit priests on an information which alleged that they had committed an offence under section 34 of the Roman Catholic Relief Act, 1829, in that they had, since the commencement of the Act, been admitted or become Jesuits within the United Kingdom, and had thereby committed a misdemeanour, the magistrate refused to grant the summonses upon the ground that the application was wrongly instituted, as the enactment should be enforced by the Crown and not by a private informer; and, further, that the information was too scanty and too bare a statement and insufficient to support an application for a criminal process; and, therefore, in exercise of the discretion conferred upon him by the Indictable Offences Act, 1848, he dismissed the information.

Held, upon a rule *nisi* for a *mandamus*, that the learned magistrate had exercised the discretion conferred upon him, and that in the exercise of such discretion he had declined to grant the summonses, and, therefore, that the court ought not to interfere. —REX *v.* KENNEDY. *K.B.D.*, 633; 86 L. T. 753.

3. *Jurisdiction—Summary conviction on charge of assault—Question as to title to land—Offences Against the Person Act*, 1861 (24 & 25 *Vict. c.* 100) *s.* 46.—By section 46 of the Offences Against the Person Act, 1861, it is provided that nothing therein contained "shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any land, tenements, or hereditaments, or any interest therein or accruing therefrom."

Where one commoner commits an assault upon another commoner for an alleged improper use by the latter of his right of common, and no question arises as to title to the common or any interest therein or accruing therefrom, the jurisdiction to hear and determine the case of assault is not ousted by the above proviso.

The words "title to" govern not only the words "lands, tenements, or hereditaments," but also the words "any interest therein or accruing therefrom"—REX *v.* FRENCH, ROBERTS, EX PARTE, *K.B.D.*, 555; [1902] 1 K. B. 637; 71 L. J. K. B. 382; 86 L. T. 587.

4. *Licensing law—Refusal to renew licences—Justices themselves the objectors—Notices of objection by the justices served on the licensees—Jurisdiction of same justices to hear and determine applications—Appeal entered to quarter sessions—Mandamus—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42 *sub-section* 2—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26 —The licensing justices of F. gave notice that they intended to object to the renewal of certain licences, having themselves previously taken steps to get information as to the requirements of the division and the number of licensed houses and on that information they considered there were too many licensed houses for the population.

The applications were made and refused. The licence-holders thereupon entered an appeal to quarter sessions, and also moved and obtained a rule *nisi* for a *mandamus* directed so the justices on the following grounds: (1) That the justices were not entitled to be objectors to the granting of the licences; (2) that if they were so entitled, and if in fact they did object, they were not entitled to sit and adjudicate on the applications; (3) that in these particular cases the justices were disqualified by reason of the steps they had taken to get information concerning the houses, and had prejudiced the case; and (4) that one of the justices was a member of the authority actively engaged in opposing the renewal of these licences, and had been party to a resolution in opposing them.

Held, discharging the rules, that the justices could raise these objections under section 42 of the Licensing Act, 1872, and that the proceedings were not invalid because the notice of objection had been given by the justices.

Held, also, that the notices of appeal to the quarter sessions were no bar to proceedings for *mandamus*, and conversely that the failure of the application for a *mandamus* did not invalidate the notice of appeal.—REX *v.* LICENSING JUSTICES OF FARNHAM, *K.B.D.*, 573.

5. *Penalty—Right of informer to share of penalty—Discretion of police magistrate.*—Notwithstanding section 9 of the Betting Act, 1853, a metropolitan police magistrate who imposes a penalty on a defendant charged on an information with an offence under that Act has, by section 34 of the Metropolitan Police Courts Act, 1839, a discretion to deprive the informer of any share in the penalty, even though the informer has been guilty of no corrupt practice.—HAWKE *v.* MACKENZIE (No. 3), *K.B.D.*; [1902] 2 K. B. 234; 71 L. J. K. B. 570.

6. *Public meetings—Insulting language—Apprehended breach of the peace—Power of justices to bind over.*—The appellant had, in addressing meetings in public places, used language abusive of, and insulting to, other persons, and had threatened to hold similar meetings and use similar language in future.

Held, that the natural and probable consequence of such conduct on the part of the appellant would be to occasion breaches of the peace being committed by others, and that the justices had jurisdiction to bind over the appellant in recognizances to be of good behaviour. — WISE *v* DUNNING, *K.B.D.*, 317; [1902] 1 K. B. 167; 71 L. J. K. B. 165; 85 L. T. 721.

7. *Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39)—*Liability of a husband to maintain step-children.*—The court of summary jurisdiction has power when making an order for maintenence under the Summary Jurisdiction Act, 1895, to take into consideration the fact that the applicant has children dependent upon her by a former marriage, since the husband is liable under the Poor Law Acts to maintain them.—HILL *v.* HILL, *P.D. & Ad.D.*, 400; [1902] P. 140; 71 L. J. P. 81; 86 L. T. 597.

8. *Summons—Application for*—Primâ facie *evidence of offence—Discretion of magistarte.*—On an application for a summons, if the magistrate, after hearing the applicant's statement, is of opinion that if the summons were issued and the offence were proved he would nevertheless under the circumstances dismiss the summons at the hearing, he may in the exercise of his discretion refuse to issue the summons.—REX *v.* BROS, *K.B.D.*; 85 L. T. 581.

9. *Trifling offence—Discharge of accused without punishment—Previous conviction.*—The powers of a justice of the peace, under section 16 of the Summary Jurisdiction Act, 1879, to dismiss an information for an offence punishable on summary conviction, where in his opinion the charge though proved is in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, is not limited to a first offence, but may be exercised, notwithstanding proof of previous conviction be tendered.—VINTERS *v.* FREEDMAN, *K.B.D.*; 71 L. J. K. B. 48; 85 L. T. 628.

See also Adulteration, 10; Highway, 7; Lands Clauses Act, 1; Licensing Law, 3, 5; Practice, 46.

LAND TRANSFER:—

Registration—Conditions annexed to title—Building restrictions—Modification—Consent—"Persons principally interested"—Land Transfer Act, 1875 (38 & 39 *Vict. c.* 87), *s.* 84.—Certain building land in Middlesex, forming part of a larger estate belonging to the defendants and registered with an absolute title, was sold by them to the plaintiff company. The defendants, in order to protect their remaining property, exacted from the company certain restrictive conditions as to the class of houses to be built upon the purchased land, and these conditions were registered against the title of the company. The company applied under section 84 of the Land Transfer Act, 1875, with the consent of the defendants, for an order modifying these conditions by reducing the minimum size and value of the houses. The company had mortgaged the purchased land, and had also sold off several plots to various purchasers, and the defendants had contracted to sell their remaining property. The consent of all parties, except the purchasers of three outlying plots, had been obtained.

Held, (1) that the court ought to accept the consent of the parties interested, if competent to consent, as sufficient proof within section 84 that modifications would be beneficial to them; (2) upon the evidence, that, in the absence of consent, this fact was not proved to the satisfaction of the court; (3) that all the persons who took with notice of the conditions were bound by them and were "persons principally interested" in the enforcement of them within the section, and that the order could only be made subject to their consent being obtained.

Observations as to the meaning of "persons principally interested."—GROUND RENT DEVELOPMENT CO. *v.* WEST, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 674; 71 L. J. Ch. 354; 85 L. T. 403.

See also Administration, 1; Vendor and Purchaser, 4.

LANDLORD and TENANT:—

1. *Brewer's lease—Covenant to buy beer of lessors and "their successors in business"—Covenant running with the land—Lease executed by lessee only—Assignment of reversion—Breach of covenant—Injunction at suit of assignee—*32 *Hen.* 8, *c.* 34—*Benefit of covenant a* chose in action—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6—*Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *ss.* 10, 58.—In 1892 A. executed under seal an agreement to take an hotel as yearly tenant to B. & Co., and thereby covenanted to purchase all his beer of B. & Co. "and their successors in business." The covenant did not mention "assigns." B. & Co. did not execute the agreement, and there was nothing on the face of it to show that they were brewers. They were, in fact, brewers, and A. occupied the hotel under the agreement as their tenant and purchased beer of them.

In 1889 B. & Co. sold and conveyed their brewery, tied houses (including the hotel), and business to C. & Co., who were brewers, and who incorporated B. & Co.'s business with their own. After the sale B. & Co. ceased to carry on business. Notice of the change of ownership was given by C. & Co. to A., and for a time he purchased beer of them. In an action by C. & Co. to restrain A. from committing a breach of the covenant,

Held, that the covenant was not personal to B. & Co., but ran with the land, and that C. & Co., as successors in business of B. & Co. and owners of the reversion in fee of the hotel, were entitled to the benefit of it.

Held, also, that C. & Co., as assigns of B. & Co., being clearly entitled against A. to specific performance of the agreement under which he was in possession of the hotel, could sue him on the covenant in the same manner as they could have

done if B. & Co. had actually executed the original agreement.

Clegg v. *Hands*, (1890) 44 Ch. D. 503, and *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9, followed.

Semble, the benefit of the covenant was a *chose in action*, assignable in equity before the Judicature Act, 1873, and by virtue of section 25, sub-section 6, of that Act the covenant could, after an absolute assignment thereof in writing and due notice given, be sued upon by the assignee.—MANCHESTER BREWERY CO. *v.* COOMBS, *Ch.D. Farwell, J.*; [1901] 2 Ch. 608; 70 L. J. Ch. 814.

2. *Covenant to pay "rates, taxes, assessments, and outgoings"—Paving expenses—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—Apportioned paving expenses under the Public Health Act, 1875, which the landlord has paid, can be recovered from the tenant, where the latter has covenanted to pay all rates, taxes, assessments, and outgoings payable, or to become payable, whether by the landlord or tenant, in respect of the premises.—WELD *v.* CLAYTON-LE-MOORS DISTRICT COUNCIL, *K.B.D.*; 86 L. T. 584.

3. *Demise—Nature of tenancy—Construction of agreement—Weekly rent—"Rent not to be raised" during continuance of lessor's interest*—On the 11th of January, 1900, a shop was demised to the plaintiff under a written agreement as follows: "I shall be pleased to accept you as tenant for barber's shop at the rental of seven shillings per week, the rent not to be raised during my present tenancy."

The landlord was the lessee of the shop under a lease which would expire on the 24th of June, 1901.

Held (reversing the decision of Ridley, J.), that the plaintiff was not a mere tenant from week to week, but was entitled to a term which would expire on the 24th of June, 1901.—ADAMS *v* CAIRNS, *C.A.*; 85 L. T. 10.

4. *Distress—Exemption from distress—Machine on hire-purchase agreement—Estoppel—Substitution of complainant in summons.*—A sewing machine in the possession of a tenant under a hire-purchase agreement, and used by the tenant's wife to support the family, is exempt from distress, under section 4 of the Law of Distress Amendment Act, 1888, as a tool and implement of the trade of such tenant. Upon a distraint being made upon such a sewing machine, and a man being put in possession, a letter was written to the landlord: "I hereby request you to remove the sewing machine and other goods you have distrained on my premises."

Held, that this did not estop the respondent from raising the question whether the machine could be distrained upon at all.

Semble, that although the husband was the tenant and the hirer, the proceeding could be maintained by the wife, but that in any case the proceedings could be put right, either by having fresh proceedings or substituting the husband for the wife as complainant.—MASTERS *v.* FRASER, *K.B.D.*; 85 L. T. 611.

5. *Lease—Covenant—Breach—Assigns—Underlessee of assign—Absolute covenant by lessee—Liability of assigns for default of underlessee.*—The owner of a licensed public-house demised the same for a term of years to a lessee who covenanted for himself and his assigns that he "the lessee will at all times during the continuance of this demise" so conduct the house as to afford no reasonable ground for the justices refusing to renew the licence or objecting to the renewal of the same. The lessee assigned the lease to assignees, who afterwards sublet the house to a tenant from year to year. The tenant, while occupier and licensee of the house, committed breaches of the Licensing Acts for which he was convicted, and the value of the house as a licensed house was in consequence diminished, though the licence had not been indorsed.

Held, that the covenant by the lessee was an absolute covenant, and that the assigns of the lessee and the trustees of the will of the lessee, who had died, were liable in damages to the lessor for the acts and defaults of the tenant, the underlessee of the assigns.—MUMFORD *v.* WALKER, *K.B.D.*; 71 L. J. K. B. 19; 85 L. T. 518.

6. *Lease—Covenant against assignment—Fishing, demise of exclusive right of—Lease—Construction—Grant by lessee of limited licence to fish.*—By an indenture of lease the defendant demised to the plaintiff the exclusive right of fishing in a certain portion of the river, "together with full liberty of ingress, egress, and regress for the said lessee and his authorized friends at all times" during the term thereby granted "to fish with rods and lines in a proper and sportsmanlike manner . . . and the fish which they shall then and there take to have and retain to his and their own use." The lessee covenanted that he would not during the term "underlet, assign, transfer, or set over, or otherwise by any act or deed procure the said premises to be assigned, transferred, or set over unto any person or persons whomsoever" without the consent in writing of the lessor, his heirs or assigns.

Held, that, as the covenant did not extend to "any part" of the premises, the lessee was not precluded from granting a licence to another person (limited to two rods) to fish in the river during the residue of the term granted by the lease.

Dictum of Lord Eldon in *Church* v. *Brown*, (1808) 15 Ves. 258, followed.—GROVE *v.* PORTAL, *Ch.D. Joyce, J.*; [1902] 1 Ch. 727; 71 L. J. Ch. 299; 86 L. T. 350.

7. *Lease—Covenant not to assign a lease without consent of lessor—Injunction.*—A covenant by a lessee not to assign without the lessor's consent runs with the land, and applies to a reassignment to the original lessee. An injunction will lie on a threat to commit a breach of it.

Doherty v. *Allman*, (1878) 3 App. Cas. 709, followed, and held to be especially applicable under the Australian system of land registry.—MCEACHARN *v.* COLTON, *P.C.*; [1902] A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594.

8. *Lease—Covenant by lessee to pay taxes, rates, and impositions—Expenses of abating nuisance—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 4.—A lease of premises for a term of years contained a covenant by the lessee to "pay and discharge all taxes, rates, including sewers, main drainage assessments, and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted may be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises, or any part thereof, on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair either by lessor or lessee. During the continuance of the term a notice was served on the lessor, under section 4 of the Public Health (London) Act, 1891, requiring him to abate a nuisance arising on the premises, and for that purpose to execute certain structural alterations, and he duly complied therewith.

Held, that the lessor was entitled, under the covenant, to recover from the lessee the expenses incurred in complying with the notice.

Decision of the Divisional Court (49 W. R. 442, [1901] 2 K. B. 151) reversed.—FOULGER *v.* ABDING, *C.A.*, 417; [1902] 1 K. B. 700; 71 L. J. K. B. 499; 86 L. T. 488.

9. *Lease—Lease of theatre—Covenant not to assign—Grant of right to supply refreshments—Breach of covenant.*—The lessee of a theatre covenanted "not to assign, demise, or otherwise part with the indenture" of lease "or any estate or interest therein" without the licence of the lessor. Subsequently the lessee granted to a third person the free and exclusive licence and right to use the refreshment-rooms and bars in the theatre.

Held, that his so doing was not any breach of the covenant.

Decision of the Court of Appeal (sub. nom. *Daly* v. *Edwardes*, 49 W. R. 244). affirmed.—EDWARDES *v.* BARRINGTON, *H.L.*, 358; 85 L. T. 650.

10. *Lease—Light—Covenant not to object to adjoining buildings — "Adjoining" — "Neighbouring."*—Where a lessee covenanted not to object to any works to adjoining premises,

Held, that "adjoining" did not mean "neighbouring," but was used in the sense of "in physical contact with."

Decision of Joyce, J. (*ante*, p 166), reversed.—WHITE *v.* HARROW; HARROW *v.* MARYLEBONE DISTRICT PROPERTY CO., *C.A.*, 259; 86 L. T. 4.

11. *Lease—Re-entry on liquidation, condition for—Limited company—Solvent company—Voluntary liquidation—Forfeiture—Bankruptcy — Conveyancing and Law of Property Act.* 1881 (44 & 45 *Vict. c.* 41), *s.* 2, *sub-section* 15; *s.* 14, *sub-section* 6.—A proviso in a lease for re-entry, if the lessees being a company should enter into liquidation either compulsory or voluntary, applies to the case of a solvent company going into voluntary liquidation for the purpose of reconstruction or amalgamation only, and is "a condition for forfeiture on the bankruptcy of the lessee" within the Conveyancing and Law of Property Act, 1881, s. 14, sub-section 6.

The decisions of Kekewich, J., and the Court of Appeal ([1901] 1 Ch. 499) affirmed as to these points.

Horsey Estates (Limited) v. *Steiger*, [1899] 2 Q. B. 79, approved as to these points.—FRYER *v.* EWART, *H.L.*; [1902] A. C. 187; 71 L. J. Ch. 433; 86 L. T. 242.

12. *Lease—"Subject to a three months' notice on either side at any time to terminate this agreement"—Such notice given between dates when rent was payable—Validity.*—By an agreement of tenancy dated the 15th of May, 1895, the plaintiff let to the defendants certain licensed premises "from the 1st day of May, 1895 at a yearly rent of £40, payable every three months in advance if required, on the 1st day of May, the 1st day of August, the 1st day of November, and the 1st day of February in each year, the first payment being due and payable on the 1st day of May, subject to three months' notice on either side at any time to terminate this agreement.

Notice to quit was given on the 24th of January, 1901, in the following terms: "I hereby give you three months' notice and require you to quit and deliver up to me or my assigns on the 25th of April, 1901, all that messuage, &c."

Held, that the notice was good under the terms of the agreement, and that it was not necessary for the validity of the notice that it should be a notice to terminate the tenancy on one of the quarter days named. — SOAMES *v.* NICHOLSON, *K.B.D.*, 169; [1902] 1 K. B. 157; 71 L. J. K. B. 24; 85 L. T. 614.

13. *Mortgage—Sub-demise—Receiver—Liability of receiver for rent and damages*—A receiver appointed by the court on behalf of mortgagees of leasehold property by way of sub-demise, who has gone into possession, is under no liability to pay to the lessor rent due under the lease out of funds coming to hand during his occupation of the premises. A receiver in such a case is in exactly the same position as the mortgagees would have been in had they gone into possession, and no special right arises against him in favour of the landlord by reason of his position as an officer of the court.—HAND *v.* BLOW *C.A.*, 5; [1901] 2 Ch. 271; 70 L. J. Ch. 687; 85 L. T. 156.

14. *Notice to quit—Tenancy from year to year—Service by registered letter—Agricultural Holdings (England) Act* 1883 (46 & 47 *Vict. c.* 61), *ss.* 28. 33. —Section 28 of the Agricultural Holdings (England) Act, 1883, by which a notice under the Act may be served by sending it through the post in a registered letter, applies to a notice to quit in the case of a tenancy from year to year, which by section 33 is required to be a year's instead of a half-year's notice.—VAN GRUTTEN *v.* TREVENEN, *C.A.*, 516; [1902] 2 K. B. 82; 71 L. J. K. B. 544.

15. *Renewal "at costs of lessee"—Costs of reference and award as to amount of fine payable on renewal*—By a covenant for renewal in a lease for years the lessor covenanted at any time during the term, upon the request and "at the costs of the lessee," to renew the lease for a further term on payment of a fine calculated (in part) upon the full improved annual value of the premises at the time of renewal, such value to be determined by the landlord's surveyor or, at the option of the lessee, by the award of two referees or their umpire. The lessee having required a renewal of the lease, and the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award.

Held, that the costs of the renewal which were to be paid by the lessee were the ordinary conveyancing costs only, such as the costs of drawing, settling, and completing the new lease, and that they did not include the costs of the reference and award, which were in the discretion of the umpire. —MOSTYN *v.* FITZSIMMONS, *K.B.D.*; [1902] 1 K. B. 512; 71 L. J. K. B. 89.

16. *Sporting rights—Licence—Notice of determination—Reasonable notice*—A landlord, by an agreement not under seal, dated the 14th of May, 1895, let sporting rights for a certain rent over his lands to two tenants, A. and B., for the term of one year, and by a subsequent letter, dated the 31st of December. 1895, agreed to a reduction of the "annual" rent. A. and B. continued to enjoy the shooting rights for six years, paying the rent agreed upon. Shortly before the sixth year was up A. and B. were, first verbally and subsequently by written notice, informed that the arrangement would be revoked as from the end of the sixth year. The landlord then let the shooting rights as from the latter date to C. exclusively. A. and B., however, insisted on exercising sporting rights over the lands, alleging that they should have had six months' notice of the determination of the tenancy. In an action brought

by C. for an injunction to restrain A. and B. from shooting over the lands,

Held, that the rules, as to notice, applicable to a tenancy of corporeal hereditaments do not necessarily apply to incorporeal hereditaments, and that reasonable notice had been given.—LOWE *v.* ADAMS. *Ch.D. Cozens-Hardy, J.*, 37; [1901] 2 Ch. 598; 70 L. J. Ch. 783; 85 L. T. 195.

LANDS CLAUSES ACT:—

1. *Compensation—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 121—*Tenant from year to year—Jurisdiction of magistrate—Possession.*—The justices, where a claim has been made for compensation under the Lands Clauses Compensation Act, have no power to inquire into the claimant's title, but it is a condition precedent to any claim that the claimant shall have been required to give up possession of lands occupied by him.—GREAT NORTHERN AND CITY RAILWAY CO *v.* TILLETT, *K.B.D.*, 652; [1902] 1 K. B. 874; 71 L. J. K. B. 525; 86 L. T. 723.

2. *Compulsory taking lands—Compensation—Coal mine—Notice to treat—Subsequent rise in price of coal—Basis of assessment.*—Where a notice to treat has been given under the Lands Clauses Act, 1845, for the assessment of compensation payable in respect of certain seams of coal which a waterworks company requires the coal owner to leave unworked, the arbitrator is not entitled to take into consideration, in assessing the compensation, a rise in the value of coal which has taken place subsequently to the date of the notice to treat.

Judgment of the Divisional Court (*ante*, p. 135, [1901] 2 K. B. 798) reversed.—BWLLFA, &c., STEAM COLLIERIES AND PONTYPRIDD WATERWORKS, RE, *C.A.*, 627; [1902] 2 K. B. 135; 71 L. J. K. B. 613.

3. *Compulsory taking of land—Notice to treat—Interest created by owner in adjoining land subsequently to date of notice—Injurious affection of such land—Right to compensation—Land Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 68.—The defendants, under their statutory powers, served a notice to treat on the owner of certain land. After the date of this notice the owner leased certain adjoining land, not included in the notice to treat, to the predecessor in title of the plaintiff for a long term of years. Subsequent to such lease an agreement was made between the owner and the defendants in respect of the land included in the notice to treat, and compensation paid to the owner for all damage sustained by him by reason of the severing of the property purchased from him from his other property, or otherwise injuriously affecting such other property. Owing to the execution of certain works by the defendants the plaintiff's property was injuriously affected.

Held, that the plaintiff, although his predecessor's title was created after the date of the notice to treat, was entitled to claim compensation for the injurious affection of his interest in the property.

The service of a notice to treat does not prevent the owner of the property to which the notice to treat relates dealing with property other than that included in the notice, and persons who *bonâ fide* acquire interest in such other property are not deprived of their claim to compensation for injurious affection by works subsequently executed simply because, after the date of the creation of their interest, an agreement has been made between the purchaser and the owner whereby the owner has been paid compensation for the land taken and for the injurious affection of his own property.—MERCER *v.* LIVERPOOL AND SOUTH LANCASHIRE RAILWAY CO., *K.B.D.* 155; [1901] 2 K. B. 753; 70 L. J. K. B. 775; 85 L. T. 283.

4. *Injuriously affecting land—Breach of restrictive covenant—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 68.—Where a railway company, having taken land under its compulsory powers, does an act which amounts to a breach of a restrictive covenant imposed for the benefit of adjoining land, such breach may be the subject-matter of compensation for injuriously affecting the adjaintng land, under section 68 of the Lands Clauses Consolidation Act, 1845.

Judgment of Lawrance, J. (*ante*, p. 120). affirmed.—LONG EATON RECREATION GROUNDS CO. *v.* MIDLAND RAILWAY CO., *C.A.*, 693; 86 L. T. 873.

See also Common, 1; Practice, 15; Railway, 1.

LEASE.—See Administration, 9; Bankruptcy, 5; Fishery, 2 3; Inland Revenue, 15; Landlord and Tenant, 1-15; Merger, 1; Settled Land, 7-10; Vendor and Purchaser, 9, 10, 16.

LIBEL:—

Action for—Practice—Pleas of justification and privilege—Defendant successful on one and unsuccessful on the other—Costs of witnesses relating exclusively to plea on which defendant unsuccessful.—Where in an action for libel pleas of justification and privilege are set up, and the defendant fails to establish the plea of justification, and judgment is given for him on the plea of privilege, the plaintiff is not entitled to the costs of witnesses whose evidence does not relate exclusively to the plea of justification.—BROWN *v.* HOUSTON, *C.A.*; [1901] 2 K. B. 855; 70 L. J. K. B. 902; 85 L. T. 160.

LICENSING LAW:—

1. *Club—Sale of liquor to agent of member—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.—A member of a *bonâ fide* club purchased at the club, by means of an agent, a bottle containing intoxicating liquor to be consumed off the premises. The club has no licence to sell intoxicating liquors.

Held (following *Graff* v. *Evans*, 30 W. R. 380, 8 Q. B. D. 373), that there was no sale within the meaning of the Licensing Act, 1872.—DAVIES *v.* BURNETT, *K.B.D.*, 391; [1902] 1 K. B. 666; 71 L. J. K. B. 355; 86 L. T. 565.

2. *Licensed person—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 17.—The executor of a deceased licence-holder carrying on the business is himself a licence-holder within the meaning of the Licensing Act, 1872.—MACDONALD *v.* HUGHES, *K.B.D.*, 318; [1902] 1 K. B. 94; 71 L. J. K. B. 43; 85 L. T. 727.

3. *Objections by justices—No objection taken at meeting—Adjournment—Refusal of renewal—Jurisdiction—Mandamus—Form of.*—Where no notice of objection has been served not less than seven clear days before the commencement of the general licensing meeting any objection then made under section 42 (2) of the Licensing Act, 1872, must be made in open court before the adjournment, otherwise, when the justices deal with the renewal upon the adjournment, they will have no jurisdiction except to renew the licence. An objection can be made under section 42 (2) at the general annual licensing meeting by the justices themselves, but such objection must be made in open court. The court will not by *mandamus* order a judicial tribunal to act in a particular way unless it is quite plain that what it has to do is purely ministerial and not judicial. Therefore, a *mandamus* will not be

granted to justices to hold a further adjournment of the general annual licensing meeting, and at such further adjournment grant a renewal of a licence, but it will merely order the justices to hear and determine according to law.—REX *v.* JUSTICES OF KINGSTON, DAVEY, EX PARTE, *K.B.D.*; 86 L. T. 589.

4. *Public-house—Right to refuse entry—Licensing Act*, 1872, *s.* 18.—The occupier of licensed premises (other than an inn) may request any customer to leave the premises, even though he be not drunk, quarrelsome, violent, or disorderly.—SEALEY *v.* TANDY, *K.B.D.*, 347; [1902] 1 K. B. 296; 71 L. J. K. B. 41; 85 L. T. 459.

5. *Transfer—Off-licence—Condition of original grant that if licensee retired, licence should not be renewed—Application for transfer—Jurisdiction of magistrates to entertain application—Beerhouse Act*, 1830 (11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 64).—An off-licence was granted to the occupier of a grocer's shop upon the condition that the licence should be given up upon the applicant leaving or ceasing to carry on the grocery business upon the premises. The licensee sold his business, and the purchaser applied to the licensing justices for a transfer of the licence to him.

The justices refused to grant the transfer, on the ground that they were debarred from so doing by the condition upon which the licence was granted.

Held, that the condition was not an absolute bar to the transfer of the licence, but only a matter to be taken into consideration when considering whether or no in their discretion they would grant the transfer.—GEE *v.* OLDHAM JUSTICES, *K.B.D.*, 394; 86 L. T. 389.

See also Justices, 4.

LIGHT.—See Easement, 1-5.

LIMITATIONS, STATUTE OF:—

1. *Action on judgment—Part payment—Bankruptcy—Release—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—A plaintiff in 1884 obtained judgment in the English courts for £15,067. He afterwards obtained judgment in the courts of the South African Republic for £9,335 in respect of the same debt, and received the latter sum in full under the defendant's bankruptcy.

Held, that his judgment in the English court was now barred by the Real Property Limitation Act, 1874, and that it was not taken out of the statute by the payment under the bankruptcy proceedings in the South African courts, and that the judgment obtained there operated as a discharge of the original judgment debt.—TAYLOR *v.* HOLLARD, *K.B.D.*, 558; [1902] 1 K. B. 676; 71 L. J. K. B. 278; 86 L. T. 228.

2. *Land tax—Redemption—Yearly sum paid by way of interest—Charge on premises—Land Tax Redemption Act*, 1802 (42 *Geo.* 3, *c.* 116), *ss.* 123, 125—*Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 1—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 8.—By section 123 of the Land Tax Redemption Act, 1802, it is provided that where any person having any estate or interest (other than an estate of inheritance) in any lands, tenements, or hereditaments, shall redeem the land tax charged thereon, such lands, tenements, or hereditaments shall be chargeable for his benefit with the amount of the moneys paid as the consideration for the redemption of such land tax, and with the payment of a yearly sum of money by way of interest thereon, equal in amount to the land tax redeemed. Such "yearly sum" is either "rent," within the meaning of section 1 of the Real Property Limitation Act, 1874, or the principal sum is a "sum of money charged upon or payable out of land," within the meaning of section 8 of that Act, and, therefore, an action to recover such yearly sum is barred by the said sections unless brought within the time thereby limited.—SKEEE *v.* COOK, *C.A.*, 506; [1902] 1 K. B. 682; 71 L. J. K. B 446; 86 L. T. 319.

3. *Leaseholds—User of adjoining land—Accretion to holding—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 7.—A. was the tenant of two plots of land from the same landlord. He executed in his lifetime a deed directing that after his death the two plots should be held by the trustees on different trusts. He died in 1848. The *cestui que trustent* of the one plot used and occupied the other plots without acknowledgment or payment of rent for over forty years.

Held, that their occupation was not that of trespasser or tenant at will, but was under the trusts of the will, and that consequently the Statute of Limitations did not run as against the landlord.—EAST STONEHOUSE LOCAL BOARD *v.* WILLOUGHBY, *K.B.D.*, 698.

4. *Mortgage—Payment of interest by person liable to the mortgagor to pay—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Solicitors books—Entry against interest—Admissibility in evidence.*—Payment to a mortgagee of interest due upon the mortgage by a person who is liable to make the payment as between himself and the mortgagor is a sufficient payment within section 8 of the Real Property Limitation Act, 1874, to prevent time running against the mortgagee under the statute.

Decision of Buckley, J. (49 W. R. 698), affirmed.—BRADSHAW *v.* WIDDRINGTON, *C.A.*, 561; 71 L. J. Ch. 627; 86 L. T. 726.

5. *Real Property—Action to recover land—Person under disability—Claim by husband in right of wife—Real Property Limitation Acts* (3 & 4 *Will.* 4, *c.* 27), *ss.* 16, 17, 34; 37 & 38 *Vict. c.* 57, *ss.* 3, 5)—*Will—Construction—Gift of "all the shares of my late husband's estate"—Real estate, whether passed.*—B. died intestate in December, 1869, possessed of copyholds held of the manor of Taunton Dene, which by the custom of that manor devolved upon his widow. He left surviving him, besides his widow, his son P. and two daughters, of whom one was the plaintiff, Mrs. H. The widow died on the 7th of January, 1870, having by her will devised to her two daughters "the share of her late husband's estate" that she took or was entitled to on his decease, to be divided between them, share and share alike. She also gave them pecuniary legacies, and declared that she made this provision for them in lieu of the freehold and copyhold lands which descended to her son on the intestacy of her husband; and she appointed H., the husband of Mrs. H., to be her executor. On her death it was erroneously assumed that the Taunton Dene copyholds had, upon B.'s death, devolved upon P. as his customary heir, and from that time the rents were collected by H., and applied to the maintenance of P. until he attained twenty-one, in 1878, when H. accounted to him and handed over the title-deeds. P. continued in possession till his death in 1890, having devised all his real estate to the defendants. The facts as to the devolution of the copyholds on B.'s death having been discovered, on the 25th of September, 1900, an action was brought by Mrs. H. and her husband in her right for a declaration that they

were entitled to a moiety of the copyholds under the will of B.'s widow,

Held, assuming that the copyholds passed under the will, that inasmuch as P. had been in possession through H. from the death of the widow, the action was barred by section 5 of the Real Property Act, 1874, it not having been brought within thirty years of the 7th of January, 1870, when the plaintiff's right first accrued; but,

Semble, on the construction of the will, the copyholds did not pass thereunder.—HOUNSELL *v.* DUNNING, *Ch.D. Joyce, J.*; [1902] 1 Ch. 512; 71 L. J. Ch. 259; 86 L. T. 382.

See also Trustee, 4.

LOCAL GOVERNMENT:—

1. *Building erected in contravention of bye-law—Continuing offence—Sale of building—Liability of purchaser—Public Health Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—A purchaser of a building erected in contravention of the Public Health Act, 1888, s. 3, who allows it to remain in the same state after written notice from the urban authority, is not a "person offending" against the enactment, and cannot be convicted of allowing the offence to continue.—BLACKPOOL CORPORATION *v.* JOHNSON, *K.B.D.*; [1902] 1 K. B. 646; 71 L. J. K. B. 485.

2. *Bye-laws—Infringement—Erection of houses abutting on public highway—Laying out new street—Injunction—Special remedy—Proceedings before justices—Jurisdiction—Urban authority.*—The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, erected houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as new streets which did not comply with the requirements of the borough bye-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the by-laws. The bye-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the bye-laws.

Held, (1) that the defendants were not laying out or intending to lay out the highways as new streets within the meaning of the bye-laws; (2) that the by-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the Attorney-General; and (3) that no such declaration as asked for ought to be made.—DEVONPORT CORPORATION *v.* TOZER, *Ch.D. Joyce, J.*; [1902] 2 Ch. 182; 86 L. T. 612.

3. *Bye-laws—Power to make bye-laws for regulating sale of articles on beach—Bye-law forbidding sale except under agreement—Validity—Local Government Board's Provisional Orders Confirmation* (*No.* 10) *Act*, 1890 (53 & 54 *Vict. c. clxxix.*), *s.* 1, *and Schedule.*—Under statutory powers enabling a corporation to make bye-laws for regulating the selling or hawking of any article on their beach and foreshore, the corporation make a bye-law that: "A person shall not on the said beach or foreshore sell or hawk or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose."

Held, that the bye-law was unreasonable and bad on the ground that it gave the corporation power to make any agreement they chose without reference to the question of the reasonableness or unreasonableness of such agreement, and that it reserved to them a right to refuse to give a licence to any particular person.—PARKER *v.* BOURNEMOUTH CORPORATION, *K.B.D.*; 86 L. T. 449.

4. *Bye-law prohibiting wilful annoyance of passengers in the streets—Validity—Uncertainty.*—A bye-law made by a municipal corporation for the good rule and government of their borough provided that "No person shall wilfully annoy passengers in the streets"; and other bye-laws made at the same time dealt with particular kinds of annoyances in the streets.

Held, that the bye-law was void for uncertainty.—NASH *v.* FINLAY, *K.B.D.*; 85 L. T. 682.

5. *District council—Parliamentary opposition—Expenses of opposition—Application of district rate—Ratepayers' consent—Sanction of Local Government Board—Borough Funds Act*, 1872 (35 & 36 *Vict. c.* 91), *ss.* 2, 4, 8, 10—*Local Authorities* (*Expenses*) *Act*, 1887 (50 & 51 *Vict. c.* 72), *s.* 3.—An urban district council cannot apply the district rate towards payment of the expenses of opposing a local Bill not affecting their own duties, rights, or privileges, without first obtaining the consent of the ratepayers under section 4 of the Borough Funds Act, 1872, nor is section 3 of the Local Authorities (Expenses) Act, 1887, under which such expenses if incurred may be sanctioned by the Local Government Board, intended to prevent the court from intervening to restrain such expenses being thrown on the rate when the sanction of the Local Government Board has not been applied for.—ATTORNEY-GENERAL *v.* RICKMANSWORTH DISTRICT COUNCIL, *Ch.D. Kekewich, J.*; 86 L. T. 521.

6. *Drains—New house—Block of two houses—Combined drain—Necessity of separate drains for each house.*—An urban authority have power under section 25 of the Public Health Act to require in respect of each newly-built house the construction of a separate drain for each house, and their powers under that section are not limited to questions as to the size, materials, and level of the drain.—WOODFORD DISTRICT COUNCIL *v.* STARK, *K.B.D.*; 86 L. T. 685.

7. *Jurisdiction—Temporary structures—London Building Act*, 1894—*London Government Act*, 1899.—The powers over temporary wooden structures conferred by section 84 of the London Building Act, 1894, on the London County Council are transferred by the London Government Act, 1899, to the borough councils created by that Act.—WESTMINSTER CITY COUNCIL *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 429; [1902] 1 K. B. 326; 71 L. J. K. B. 244; 86 L. T. 53.

8. *London County Council—Authority created by statute—Statutory powers—Tramways—Ancillary business*—Ultra vires—*Attorney-General—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 2, 68, *and* 79.—The London County Council, being a statutory body only, has no powers other than those conferred by statute. Therefore, where it has the power of acquiring and working tramways, it is not entitled to run a service of omnibuses in connection therewith.

The powers and duties of the Attorney-General observed upon.

Decision of the Court of Appeal ([1901] 1 Ch.

781, 49 W. R. Dig. 97) affirmed.—LONDON COUNTY COUNCIL *v.* ATTORNEY-GENERAL, *H.L.*, 497; [1902] A. C. 165; 71 L. J. Ch. 268; 86 L. T. 161.

9. *Metropolitan borough—Abolition of office—Compensation—Statutory duty of borough council*—Mandamus—*London Government Act*, 1899 (62 & 63 *Vict.* c. 14), *s.* 30—*Local Government Act*, 1894 (56 & 57 *Vict.* c 73), *s.* 81—*Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *s.* 120.—A metropolitan borough council is bound, having regard to section 120 of the Local Government Act, 1888, to exercise its own discretion in considering and determining the amount of compensation payable to an official for abolition of his office, and a *mandamus* will lie to compel the borough council to exercise this statutory duty, even although the same section provides for an appeal to the Treasury from the decision of the borough council by the person aggrieved.—REX *v.* STEPNEY BOROUGH COUNCIL, *K.B.D.*, 412; [1902] 1 K. B. 317; 71 L. J. K. B. 238; 86 L. T. 21.

10. *Rating—Appeal—Charges incurred more than six months before rate—Right of appeal—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 210, 218—A ratepayer applied to quash a rate on the ground that it included expenditure more than six months before the striking of the rate, contrary to section 210 of the Public Health Act, 1875.

Held, that a *primâ facie* right of appeal lay, and that it had not been taken away by section 218 of the Act.—SMITH *v.* SOUTHAMPTON CORPORATION, *K.B.D.*, 651; [1902] 2 K. B. 244; 71 L. J. K. B. 639.

11. *Rating—Empty warehouse—Occupation—Intention—Liability to rates.*—From a date prior to the making of certain rates the respondents gave notice to the appellants that they intended to keep certain warehouses unoccupied during the current overseers' year, and to claim exemption from the rates in respect thereof.

All goods had been removed before the making of the rate, and the warehouses had not been used since that date, though they were advertised in the list of warehouses to let belonging to the respondents. Each warehouse was one of a block, through which continuous shafting passed, and at the end of the block was a notice: "For storage, apply to the L. W. Company."

A warehouse in respect of which notice had been given to the appellants was still advertised on the cards issued by the respondents, and they had tried to let it by notice affixed on the warehouse.

Held, that the justices were justified in coming to the conclusion that there was no occupation of these warehouses so as to render the respondents liable to be rated in respect thereof.—BOOTLE OVERSEERS *v.* LIVERPOOL WAREHOUSING CO., *K.B.D.*; 85 L. T. 45

12. *Rating—Land covered with water—Right of appeal—Public Health Acts*, 1848 (11 & 12 *Vict.* c. 63) *s.* 88 *and* 1875 (38 & 39 *Vict* c. 55), *s.* 211—*Metropolis Valuation Act*, 1867 (32 & 33 *Vict.* c. 67), *s.* 45.—Land covered with water was, in accordance with section 88 of the Public Health Act, 1848, and section 211 of the Public Health Act, 1875, under the authority of which Acts rates were formerly levied in Woolwich, only rated at one-fourth of its net annual value.

Held, that, in accordance with section 4 of the London Government Act, 1899, the London and India Docks Co. were still entitled to that exemption although Woolwich is now governed by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120).

Held, also, that the appellants were entitled to appeal against the amount of the rate—LONDON AND INDIA DOCKS CO. *v.* WOOLWICH, *K B.D.*, 639; [1902] 1 K. B. 750; 71 L. J. K. B. 394; 86 L. T. 619.

13. *Rating—Sewage farm—Lease to tenant—Sewage works on farm—Occupation by sewerage board.*—The S. M. D. Board acquired a sewage farm, and laid down thereon certain carriers and other sewage works and plant.

They leased the farm to one C., reserving the right of entry thereon for the purpose of constructing, maintaining, altering, and repairing the works as might be requisite for using the farm as a sewage farm.

C. was to irrigate by means of the works on the farm, and was to keep the pipes and carriers properly flushed and cleaned.

The board kept the works in repair, and from time to time their surveyor and agents went on the land to see that the sewage was properly distributed and treated, and to do repairs.

Held, that the board were rightly held not to be in occupation of these carriers and other sewage works and plant, and so not legally rateable in respect thereof.—STOURBRIDGE MAIN DRAINAGE BOARD *v.* SEISDON UNION, *K.B.D.*; 86 L. T. 415.

14. *Sewering and paving streets—Apportionment of expenses amongst frontagers—Exemption—Volunteer headquarters—Premises owned and occupied by servants of the Crown for Crown purposes—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *s.* 327—The respondent purchased the fee simple of certain land for the purpose of it being transferred to and used by a volunteer corps, and pursuant to the provisions of the Military Lands Act, 1892, he mortgaged the premises to the Public Works Loan Commissioners for a sum of money which was applied in repaying the respondent the purchase price of the premises and in fitting them up for the use of the corps. The respondent had no use or occupation of the premises otherwise than as commanding officer of the corps.

Held, that there was an ownership and an occupation of the premises on behalf of the Crown for Crown purposes, and, therefore, that the respondent was not liable under section 150 of the Public Health Act, 1875, to contribute towards the expense of sewering and paving the street on which the premises fronted.

The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property, unless the Crown is expressly named or unless by necessary implication the Crown has agreed to be bound, was applicable in this case.—HORNSEY URBAN DISTRICT COUNCIL *v.* HENNELL, *K.B.D.*, 521; [1902] 2 K. B. 73; 71 L J. K. B. 479; 86 L. T. 423.

15. *Solicitor—Retainer by corporation—Retainer not under seal—Subsequent confirmation under seal—Provisional order—Dissolution of local authority—Transfer of liability for costs to other local authorities.*—The Corporation of T., having presented a memorial to the Local Government Board asking for the inclusion within their borough of the Urban District of C., the district council of C., resolved to oppose it, and by resolutions passed from time to time retained the plaintiffs, a firm of solicitors and Parliamentary agents, for that purpose. The resolutions were not under seal, but subsequently, and after the plaintiffs had done a considerable amount of work under them, the seal of the district council was affixed to the resolutions. An inquiry having been held, a provisional order was made by the Local Government Board, which was afterwards

confirmed, the effect of which was to dissolve the C. district, and to add part of it to the borough of T. and the other part to the rural district of N. The plaintiffs' bill of costs in respect of the Parliamentary opposition to the confirmation of the provisional order was delivered to the district council of C. and afterwards to the defendants. In an action brought by the plaintiffs to recover the amount of such bill from the defendants,

Held, that the confirmation under seal of the original retainers created an obligation binding upon the district council of C. without any new consideration, and that it was not *ultra vires* for them to create such an obligation.

Held, also, that the costs in question were costs authorized by section 298 of the Public Health Act, 1875, and were not subject to the requirements of the Municipal Corporations (Borough Funds) Act, 1872, and that, upon the construction of the provisional order, the defendants were liable to pay them in such proportions as might be awarded under section 62 of the Local Government Act, 1888 —BROOKS *v.* TORQUAY CORPORATION, *K.B.D.*; [1902] 1 K. B. 601; 71 L. J. K. B. 109; 85 L. T. 785.

16 *Street—Arch built under carriage-way—Cross-action—Injunction to restrain interference with electric cables.*—W. R. & Co. were occupiers of land on both sides of F.-street within the urban district of which the W. U. D. C. was the urban authority. In April, 1901, W. R. & Co. constructed a tunnel or culvert twelve feet beneath the carriage-way of F.-street for the purpose of carrying electric cables in connection with their business. The tunnel consisted of a concrete flooring and a brick archway. They subsequently changed their plans, and, cutting through the concrete, laid the cables in pipes upon or nearly upon the clay subsoil, and filled in the flooring with fresh concrete. The W. U. D. C. gave them notice to remove the tunnel in accordance with section 26 of the Public Health Act, 1875. W. R. & Co. then removed the keystone of the arch, the tunnel fell in, and the subsidence was made good with ballast. The W. U. D. C., not being satisfied, brought an action claiming a declaration that they, as the urban authority, might properly cause the arch, vault, or cellar constructed by the defendants under the carriage-way of F.-street to be altered, pulled down, or otherwise dealt with as the W. U. D. C. should think fit. W. R. & Co. instituted a cross-action for an injunction to prevent the W. U. D. C. from cutting, disturbing, or injuring their pipes or electrical wires. The two actions came on together. It was argued on behalf of the W. U. D. C. that they had a right to remove the structure, including the pipes and wires.

Held, that the pipes were not in any part of the structure, and that the W. U. D. C. were entitled to remove the structure, which they must do without injuring the pipes or wires.—WALKER URBAN DISTRICT COUNCIL *v.* WIGHAM, *Ch.D. Farwell, J.*; 85 L. T. 579.

17. *Street—Fee simple of road—Vesting in local authority—Electric light company—Overhead wires—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55) *s.* 149 —*General Turnpike Act*, 1822 (3 *Geo.* 4, *c.* 126), *s.* 84 —A strip of land was acquired in 1828 in fee simple by trustees under the General Turnpike Act, 1822, for the purpose of making a public road. In 1872 the turnpikes were removed from the road, and from 1878 onwards the Finchley Local Board and its successors, the Finchley Urban District Council, maintained the said road. In 1901 an electric light company carried their wires across the road, and the urban district council caused these wires to be cut. The electric light company now brought an action for an injunction to restrain the district council from interfering with their wires.

Held, that the legal estate in the road lay in the real representative of the surviving trustee of the original conveyance in 1828, who held for the local authority, and that the land in fee simple had been in this case acquired and still was required for the purposes of the street, and consequently the action was dismissed.—FINCHLEY ELECTRIC LIGHT CO. *v.* FINCHLEY URBAN DISTRICT COUNCIL, *Ch.D. Farwell, J.*, 470; [1902] 1 Ch. 866; 71 L. J. Ch. 450; 86 L. T. 286.

18. *Tramway—Bye-law—Validity.*—A tramway company, in a town where the Town Police Clauses Act, 1847, was in operation, made the following bye-law: "No person shall swear or use obscene or offensive language whilst in or upon any carriage."

Held, that the bye-law was not invalid because it did not contain the words "to the annoyance of the passengers"; and that a local authority has the power of defining what shall be deemed a nuisance under particular circumstances, and can deal with such by means of a bye-law.

Kruse v. *Johnson*, 46 W. R. 630, [1898] 2 Q. B. 91, followed.

Strickland v. *Hayes*, 44 W. R. 398, [1896] 1 Q. B. 290, distinguished.—GENTEL *v.* RAPPS, *K.B.D.*, 216; [1902] 1 K. B. 160; 71 L. J. K. B. 105; 85 L. T. 683.

19. *Tolls—Bicycle—"Carriage."*—By a local Act tolls were imposed on "every coach, chariot, hearse," &c., and every other carriage hung on springs the sum of 6d. for each wheel, and for each horse or other beast of draught drawing the same 2d."; and "for every waggon," &c., "or other such like carriage, with or without springs, the sum of 6d. per wheel, and for each horse or other beast of draught drawing the same the sum of 2d."

Held, without deciding whether or no it was a "carriage hung on springs," that a bicycle was not a carriage within this section, as it only referred to carriages drawn by horses or other beasts of draught.—SIMPSON *v.* TEIGNMOUTH BRIDGE CO., *K.B.D.*; 85 L. T. 726.

20. *Transfer of areas—Severance of part of district—Constitution of new district—Adjustment of liabilities—Adjustment and agreement as to existing accounts—Right to claim subsequent adjustment for loss by severance.*—By an order made by a county council under section 57 of the Local Government Act, 1888, a part of a rural district was severed from the district and constituted a new urban district, and all necessary adjustments were to be made in accordance with the provisions of section 68 of the Local Government Act, 1894. An adjustment of accounts was then made and an agreement entered into between the councils providing for the payment of certain sums in respect of matters therein specified, and these sums were paid. Subsequently the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree, and an arbitrator was appointed to determine the question of adjustment of the financial loss sustained by the rural district by the severance of the urban district, in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement.

Held, that the adjustment claimed by the rural council was an adjustment within the meaning of section 68 of the Local Government Act, 1894, although the severed portion had been formed into an urban district of itself and had not been transferred to an existing district; and further, that the claim to have such adjustment was not barred by the prior agreement between the councils.—ST. THOMAS RURAL COUNCIL AND HEAVITREE URBAN COUNCIL, RE, *K.B.D.*; 86 L. T. 153.

21. *Transference of duties of clerk of the peace—Reduction in fees—Existing officer—Compensation—"Not less salaries or remuneration."*—By section 119, sub-section 1, of the Local Government Act, 1888, "The officers and servants of the quarter sessions, or general assessment sessions, or justices, or any committee of such sessions or justices . . . who held office at the passing of this Act, and who by virtue of this Act become officers and servants of a county council (in this Act referred to as existing officers), shall hold their offices upon the same tenure and upon the same terms and conditions as if this Act had not been passed, and while performing the same duties, shall not receive less salaries or remuneration . . . than they would have if this Act had not been passed." The plaintiff, by virtue of section 118, sub-section 10, of that Act, being clerk of the peace of Surrey, continued to be clerk of the peace at the quarter sessions held for the county of London at Newington, and for the purpose of the business at those sessions he was deemed to be clerk of the peace for the county of London. The Middlesex scale of fees, which by section 115 was that taken in the county of London by the clerk of the peace, was lower than the Surrey scale, and the Middlesex scale was further reduced by the standing joint committee of the London County Council and the quarter sessions.

Held, that the plaintiff was only entitled, as clerk of the peace for the county of London for Newington, to the fees payable under the reduced scale in Middlesex; but that, by virtue of section 119, he was entitled to receive not less remuneration, whether by salary or by fees, than that to which he was entitled at the passing of the Local Government Act, 1888.—WYATT *v.* LONDON COUNTY COUNCIL, *K.B.D.*; 85 L. T. 629.

See also Justices, 1; Water, 8.

LOTTERY:—

Sale of chances—Proposal or scheme for sale of chances in newspaper—"Spot" competition in newspaper—Conviction.—It was announced in an issue of an evening newspaper belonging to a limited company and sold for the price of one halfpenny, that for a certain period in certain issues of the newspaper spots of various size and configuration would be printed in various parts of the issues. Some of such spots were distinguished as winning spots. It was also stated in the paper that on a specified day an announcement would appear in the paper showing the exact configuration of such spots as were declared to be winning spots; and it was stated in all the issues in question that the person who cut from the newspaper and sent to the offices of the same the portion of the newspaper containing any spot the facsimile of which had been declared to be a winning spot, would receive a prize. The winning spots were arbitrarily selected by the proprietors of the newspaper, and the winning of the prizes depended wholly upon chance. The appellant, the printer and publisher of the newspaper, was summoned under section 41 of the Lotteries Act, 1823 (4 Geo. 4, c. 60), for unlawfully publishing a proposal and scheme for the sale of chances in a lottery—namely, the proposal and scheme called "spots," and was convicted under the section as a rogue and vagabond.

Held, that the sale of the newspapers was the publishing a proposal and scheme for the sale of chances in a lottery, not authorized by any Act of Parliament within the meaning of the section, and that the appellant was properly convicted under the section.—HALL *v.* MCWILLIAM, *K.B.D.*; 85 L. T. 239.

LUNACY:—

Jurisdiction—Inquiry—Domiciled foreigner temporarily in England.—The Court in Lunacy has jurisdiction to order an inquiry into the state of mind of a domiciled foreigner who is temporarily resident in England.—BURBIDGE, RE, *C.A.*; [1902] 1 Ch. 426; 71 L. J. Ch. 271.

See also Interest.

MANDAMUS.—See Ecclesiastical Law, 4; Justices, 4; Licensing Law, 3; Local Government, 9; Practice, 3, 14.

MARKET:—

Franchise—Fair—Fair and market held on same day—Merger—Change of days for which charter granted—Tolls—Stallage.—The plaintiff, as lord of the manor of Worksop, was owner of a weekly provision and cattle market (held on Wednesdays) and two annual fairs granted by ancient charters with right of toll. The defendants were lessees of the markets under a lease granted in 1851 for ninety-nine years. This lease expressly excepted and reserved the fairs. In 1845 the then lord of the manor had, without licence from the Crown, changed the days of holding the fairs from the 21st of March and the 2nd and 3rd of October, the days named in the charter, to the second Wednesdays in March and October. Until the date of the lease the markets and fairs were held in the streets. After that date the markets were held in buildings or on land provided by the defendants or their predecessors in title. On the two new fair days the fair was duly proclaimed by the crier of the lord, but nothing further was done by the lord. On these fair days the defendants charged an increased toll for stalls in the market to persons who only attended on fair days, but allowed regular attendants at the market to have stalls at the usual market rate. The defendants had also issued lists of tolls showing an increased toll on fair days, for "lots" of eggs, but this had not been collected. The plaintiff brought this action for an account of all tolls received by the defendants on fair days on the ground that they were fair tolls and not market tolls. It appeared that tolls were taken at the fair in the reign of Edward III., but there was no evidence of the payment of any fair tolls between that date and the date of the lease.

Held, that there is no impossibility in holding a market and a fair in the same manor on the same day, and no presumption that the market is absorbed in the fair; that, though the change of days did not of itself forfeit the franchise of the fair, the lord could not legally recover tolls on days not named in the charter; that the increased tolls charged by the defendants on fair days were stallage payable to them as owners of the soil; that the owner of a fair or market, so long as he does not charge unreasonable tolls, is not bound to charge all persons alike, but may remit part of the toll to favoured persons; and that the parties had contracted for the lease upon the basis that no fair tolls were payable.—DUKE OF NEWCASTLE *v.* WORKSOP URBAN DISTRICT COUNCIL, *Ch.D.*

Farwell, J. [1902] 2 Ch. 145; 71 L. J. Ch. 487; 86 L. T. 405.

MARRIAGE.—See Probate, 8.

MARRIED WOMAN:—

1. *Liability to costs—Separate estate—Restraint on anticipation—Claim by wife to goods seized for husband's debts—"Proceedings instituted"—County Court Rules*, 1889, *ord.* 27, *rr.* 1, 2, 4 (a)—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.—A married woman by notice in writing directed to the sheriff or high bailiff claimed certain goods levied on for her husband's debts under process of a county court. The high bailiff, in whose possession the goods were, thereupon took out an interpleader summons, and at the trial of the interpleader issue the claimant failed to establish her claim.

Held, that the proceedings were "instituted" by her within the meaning of section 2 of the Married Women's Property Act, 1893, and therefore that the court had jurisdiction to order her to pay the costs so incurred out of her separate estate subject to a restraint on anticipation, and to enforce payment thereof by the appointment of a receiver. —NUNN *v.* TYSON, *K.B.D.*, 16; [1901] 2 K. B. 487; 70 L. J. K. B. 854; 85 L. T. 123.

2. *Marriage settlement—Covenant to settle after-acquired property—Judicial separation—"During the marriage"—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 25—*Infant—Repudiation.*—Property acquired by a wife after a decree of judicial separation does not fall within a covenant in a marriage settlement to settle property acquired "during the said intended marriage."

An infant who has executed a marriage settlement will not be allowed to repudiate it thirty years later upon the ground that she only became aware of its contents shortly before repudiation.—DAVENPORT *v.* MARSHALL, *Ch.D Buckley. J.*, 39; [1902] 1 Ch. 82; 71 L. J. Ch. 29; 85 L. T. 340.

3. *Settlement—Covenant to settle after-acquired property—Bequest to separate use subject to restraint on anticipation—"During the coverture"—Property acquired after decree of separation pronounced by foreign court—Marriage with foreigner—Domicil—Settlement in English form—Subject-matter of settlement in England.*—Where a legacy is given to a married woman for her separate use absolutely, and by a subsequent clause in the will she is restrained from anticipation; inasmuch as she would, notwithstanding the restraint, be entitled to the interest on the legacy when the time for paying such interest arrived, the legacy is bound by a covenant to settle after-acquired property contained in her marriage settlement.

Where by the law of a foreign country a decree of judicial separation pronounced by a court in such country has no effect on the property rights of the husband and wife, property falling into possession after the pronouncement of the decree is bound by the covenant.

Davenport v. *Marshall, ante*, p. 39, [1902] 1 Ch. 82, distinguished.

On the marriage of an Englishwoman with an Italian property in England was made the subject of a settlement in English form. The settlement was executed by the intended husband and wife in Italy, where the marriage took place. By the law of Italy the settlement would have been invalid, not only through informalities attending its execution, but also because it contained dispositions of property prohibited by that law.

Held, that the settlement must be construed according to English law.

Held, also, that the covenant to settle after-acquired property on the trusts of the settlement was valid and could be enforced, even though by the law of the matrimonial domicil such trusts were illegal.

Viditz v. *O'Hagan*, 48 W. R. 516, [1902] 2 Ch. 87, distinguished.—BANKES, RE, REYNOLDS *v.* ELLIS, *Ch.D. Buckley, J.*, 663; [1902] 2 Ch. 333.

See also Criminal Law, 12; Deed, 1; Husband and Wife 1-3; Probate, 7.

MARTIAL LAW:—

State of war—Ordinary tribunals—Jurisdiction of courts.—Where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities. Should martial law be proclaimed over certain districts, the civil courts, though permitted to continue for ordinary purposes, have no authority over the military tribunals.—MARAIS *v.* GENERAL OFFICER COMMANDING IN SOUTH AFRICA, *P.C.*, 273; [1902] A. C. 109; 71 L. J. P. C. 42; 85 L. T. 734.

MASTER and SERVANT:—

1. *Agreement as to compensation—Right to sue for wages while receiving compensation—Workmen's Compensation Act*, 1897.—Where a workman has by agreement received weekly compensation during incapacity for injuries, he cannot afterwards sue for wages during the period of incapacity, even though he still remains during that period in the employment of his master.—ELLIOTT *v.* ZIGGINS, *K.B.D.*, 524; [1902] 2 K. B. 84; 71 L. J. K. B. 483.

2. *Employers' liability—Accident—Compensation—Arbitration—Question as to liability to pay compensation or amount or duration thereof—Jurisdiction of arbitrator—Condition precedent to—Workmen's Compensation Act*, 1897, *s.* 1, *sub-section* 3.—In an arbitration under the Workmen's Compensation Act, 1897, it is a condition precedent to the jurisdiction of a county court judge to act as arbitrator under section 1, sub-section 3, of the Act, that a question should have arisen between the parties as to the liability to pay compensation under the Act or as to the amount or duration of such compensation.

A workman having met with an accident arising out of and in the course of an employment within the scope of the Workmen's Compensation Act, 1897, and being thereby incapacitated for work, was, from a fortnight after the accident, regularly paid by his employers weekly sums of the full amount that could be recovered under the Act—viz, fifty per cent. of his average weekly earnings, and this they promised to continue to do during his incapacity.

Held, on the workman taking arbitration proceedings under the Act, that the county court judge had no jurisdiction to hear the case, as no question within the meaning of section 1. sub-section 3, had arisen between the parties.—FIELD *v.* LONGDEN, *C.A.*, 212; [1902] 1 K. B. 47; 71 L. J. K. B. 120; 85 L. T. 571.

3. *Employer's liability—Accident—Compensation—Building—Exceeding thirty feet in height—Level to be calculated from—Foundation footings—Workmen's Compensation Act*, 1897, *s.* 7 (1).—In ascertaining the height of a building in course of erection for the purpose of deciding whether it is a building which exceeds thirty feet in height within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897, that part of the wall which is below the street level measured from

the top of the concrete foundations may properly be included; even, *semble*, where that part of the wall is intended subsequently to be covered up with soil.—McGRATH *v.* NEILL, *C.A.*, 162; [1902] 1 K. B. 211; 71 L. J. K. B. 58.

4. *Employers' liability—Accident—Compensation—Contractor—Person employed by contractor in coal mine—Conditions of employment—Liability of mine owner—"Workman"—Employers and Workmen Act*, 1875, *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.—A contractor agreed with a colliery owner to sink a shaft in a pit at a certain sum per yard. The contractor employed and paid the workmen engaged in the sinking operations. The workmen, before entering on the work, signed certain conditions prescribed by the colliery owner for the regulation of persons employed, directly or indirectly, at the colliery. One of the workmen employed by the contractor, while employed in the work, was killed by an accident owing to the negligence of the colliery owner. In an action by the personal representative of the deceased against the colliery owner to recover damages under the Employers' Liability Act, 1880,

Held, that the signing of the conditions by the deceased did not make him a workman in the employment of the colliery owner within the Employers' Liability Act, 1880, and that the action would not lie.

Judgment of the Divisional Court (49 W. R. 491, [1901] 1 K. B. 756) affirmed.—FITZPATRICK *v* EVANS, *C.A.*, 290; [1902] 1 K. B. 505; 71 L. J. K. B. 302; 86 L. T. 141.

5. *Employer's liability—Accident—Compensation—Building—"Scaffolding"—Roof of building being repaired by a ladder resting against parapet—Workmen's Compensation Act*, 1897, *s.* 7, *sub-section* 1.—A workman was employed to repair the roof of a building exceeding thirty feet in height. To do the work he used a ladder, one end of which was on the pavement and the other rested on the parapet at the top of the house. There was no second ladder, crawling-board, or other contrivance on the roof. The applicant was injured while carrying slates up the ladder for use on the roof.

Held, that the county court judge was entitled to find as a fact that the ladder was not "scaffolding" within the meaning of section 7 of the Workmen's Compensation Act, 1897, and therefore that the Act did not apply.—MARSHALL *v.* RUDEFORTH, *C.A.*, 596; [1902] 2 K. B. 175; 86 L. T. 752.

6. *Employer's liabilty—Accident—Compensation—Death resulting from injury—Natural or probable consequence—Workmen's Compensation Act*, 1897, *s.* 1, *sub-section* 1; *Schedule I.*, 1 (a).—Where a workman sustains personal injury by accident arising out of and in the course of his employment and he subsequently dies, it is sufficient for the dependants who claim compensation to show that death in fact resulted from the injury; it is immaterial that death was not the natural or probable consequence of the injury.—DUNHAM *v.* CLARE, *C.A.*, 596; 71 L. J. K. B. 683; 86 L. T. 751.

7. *Express liability—Accident—Compensation—"Dependants"—Dependency on son's earnings—Standard of living—Workmen's Compensation Act*, 1897, *Schedule I., clause* 1.—An applicant sought compensation for the loss of his son, and evidence was given that the applicant could maintain himself and his family without assistance from the earnings of the deceased.

Held, reversing the decision of the county court judge, that this fact did not debar the applicant from compensation as being partially "dependent" upon the earnings of the deceased at the time of his death.—HOWELLS *v.* VIVIAN, *C.A.*, 163; 85 L. T. 529.

8. *Employers' Liability—Accident—Compensation—Dependants—"Wholly dependent on his earnings"—Sum coming to applicant on death of workman—Workmen's Compensation Act*, 1897, *Schedule I., clause* 1 (a) (*i.*).—A workman's sole means for the support of himself and his wife and family were his weekly earnings. He was killed by an accident, and his widow applied for compensation as being "wholly dependent on his earnings," within Schedule I, clause 1 (a) (*i.*) to the Workmen's Compensation Act, 1897. It appeared that the workman was possessed of a sum of money of which the applicant received on his death the sum of £100. There was no evidence that this sum ever produced any income during his lifetime.

Held, that the applicant was "wholly dependent on his earnings," as the £100 which came to her after his death ought not to be taken into consideration.—PRYCE *v.* PENRIKYBER NAVIGATION COLLIERY CO., *C.A.*, 197; [1902] 1 K. B. 221; 71 L. J. K. B. 192.

9. *Employers' liability—Accident—Compensation—Dependants in part dependent on earnings of deceased workman—Funeral expenses—Workmen's Compensation Act*, 1897, *Schedule I.* (1) (a) (*ii.*) (*iii.*)—*Workmen's Compensation Rules*, 1898, *r.* 4 (3).—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman was at the time of the accident living with his father and mother, and that he was in the habit of paying his weekly earnings of 8s to his mother to put into the common family fund. Shortly after the accident the father left his wife and family, and the mother gave notice of request for arbitration, claiming compensation as having been partly dependent on her son's earnings. No steps were taken for making the father a respondent to the arbitration proceedings in accordance with rule 4 (3) of the Workmen's Compensation Rules, 1898. The county court judge made an award in favour of the mother for a weekly payment of 3s. for the period of three years, and the sum of £6 8s. for funeral expenses.

Held, that, even if the father ought to have been made a respondent to the proceedings under rule 4 (3), which was doubtful having regard to rule 2, the employers, not having taken the point before the county court judge, were not entitled to take it on appeal.

Held, also, that the county court judge, in determining what sum was reasonable and proportionate to the injury to the dependants under Schedule I. (1) (*a*) (ii.), was entitled to take into consideration the funeral expenses and to award a named sum in respect of those expenses, subject to the limitation imposed by the maximum mentioned in the schedule.—BEVAN *v.* CRAWSHAY, *C.A.*, 98; [1902] 1 K. B. 25; 71 L. J. K. B. 49; 85 L. T. 496.

10. *Employers' liability—Accident—Compensation—Engineering work—Railroad—Tramway—Workmen's Compensation Act*, 1897, *s.* 7, *sub section* 2.—The word "railroad" in the definition of "engineering work" in sub-section 2 of section 7 of the Workmen's Compensation Act. 1897, is not limited in its meaning to a "railway" as defined in the same sub-section, but includes a tramway.—FLETCHER *v.* LONDON UNITED TRAMWAYS, *C.A.*, 597; [1902] 2 K. B. 269; 71 L. J. K. B. 653; 86 L. T. 700.

11. *Employers' liability—Accident—Compensation—Factory—Dock, wharf, or quay—Workmen's Compensation Act*, 1897, *s.* 7.—On a claim by a workman for compensation under the Workmen's Compensation Act, 1897, the county court judge found as a fact that a piece of ground used for storing timber near to a dock where the accident happened was a factory as being a dock, wharf, or quay within the meaning of section 7 (2).

On appeal to the Court of Appeal,

Held, that there was evidence to support the finding, and therefore the court were bound by it. —KENNY *v.* HARRISON, *C.A.*; [1902] 2 K. B. 168.

12. *Employer's liability—Accident—Compensation—Factory—Mechanical power—Warehouse—Factory and Workshop Act*, 1878, *s.* 93—*Workmen's Compensation Act*, 1897, *s.* 7.—The use of machinery moved by hand power is not the use of "mechanical power" within the meaning of those words in the definition of "non-textile factory" contained in section 93 of the Factory and Workshop Act, 1878.

The word "warehouse" in section 7 of the Workmen's Compensation Act, 1897, is not confined to premises contiguous to water.—WILMOTT *v.* PATON, *C.A.*, 148; [1902] 1 K. B. 237; 71 L. J. K. B. 1; 85 L. T. 569.

13. *Employers' liability—Accident—Compensation—"Factory"—Painting ship in dock—"Undertakers"—Factory and Workshop Act*, 1895, *s.* 23—*Workmen's Compensation Act*, 1897, *s.* 7.—The respondents contracted with shipowners to do the painting and plumbing work on one of their ships which was lying in a wet dock, and which was being fitted out for a voyage. The applicant, who was in the employment of the respondents, was sent with other men to do the work, and was engaged on the painting work when he was injured by an accident. The shipowners were in charge of the ship with part of the crew on board, but the respondents were in possession of the ship as far as was necessary for the work to be done. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge made an award in favour of the applicant.

Held, that there was evidence upon which the county court judge could find that the applicant was injured while employed in a factory, in respect of which the respondents were the undertakers, and that therefore he was entitled to compensation.—BARTELL *v.* GRAY, *C.A.*, 310; [1902] 1 K. B. 225; 71 L. J. K. B. 115; 85 L. T. 658.

14. *Employers' liability—Accident—Compensation "Factory"—Ship in wet dock—Costs—Action under Employers' Liability Act*, 1880—*Action dismissed—Compensation assessed under Workman's Compensation Act*, 1897—*County Courts Act*, 1888, *ss.* 113, 186—*Factory and Workshop Act*, 1895, *s.* 23—*Workmen's Compensation Act*, 1897, *s.* 1, *sub-section* 4; *s.* 7; *Schedule II., clauses* 6, 10.—A workman was killed while employed on a ship lying in a wet dock. An action by his widow under the Employers' Liability Act, 1880, was dismissed, and the county court judge, upon the plaintiff's application, assessed compensation, under section 1, sub-section 4, of the Workmen's Compensation Act, 1897, holding that the deceased man's employment at the time of the accident was on, in, or about a "factory" within section 7 of the Act, and he gave the plaintiff the costs of and incident to the proceedings.

Held, (1) that the employment being on a ship in a dock was employment in a "factory" within the meaning of the Act; and (2) that the county court judge had power to give the plaintiff the costs of the proceedings.—CATTERMOLE *v.* ATLANTIC TRANSPORT CO., *C.A.*, 129; [1902] 1 K. B. 204; 71 L. J. K. B. 173; 85 L. T. 513.

15. *Employers' liability—Accident—Compensation—Machinery, defect in condition of—Machine no longer in use—"Machinery or plant connected with or used in the business of the employer"—Injury to workman—Employers' Liability Act*, 1880, *s.* 1, *sub-section* 1.—A machine used in the defendants' business broke down, and the foreman directed that it should be removed from the position in which it had been placed while in use. The plaintiff, who was a workman in the employment of the defendants, assisted in removing the machine, and was injured while doing so by reason of a defect in the machine which was within the knowledge of the foreman. In an action under the Employers' Liability Act, 1880,

Held, that the fact that the machine at the time of the accident had broken down, and was no longer in use, did not necessarily show that it had ceased to be "machinery or plant connected with or used in the business of the employer" within the meaning of section 1, sub-section 1, of the Act.

Judgment of the King's Bench Division ([1901] 2 K. B 483) reversed.—THOMPSON *v.* CITY GLASS BOTTLE CO., *C.A.*; [1902] 1 K. B. 233; 71 L. J. K. B. 145; 85 L. T. 661.

16. *Employers' liability—Accident—Compensation—Payment into court—Stay of proceedings—Costs up to payment into court—Jurisdiction of arbitrator—Workmen's Compensation Act*, 1897, *Schedule II., par.* 6—*Workmen's Compensation Rules*, 1898, *r.* 5 (3). —The employers of a workman who met with his death by accident in the course of his employment agreed with his widow as to the amount of compensation to which she was entitled under the Workmen's Compensation Act, 1897, but refused to pay her the amount because she had not taken out letters of administration. She commenced proceedings under the Act, and thereupon the employers paid the amount into court.

Held, that, though by rule 5 (3) of the Workmen's Compensation Rules, 1898, the payment into court operated as a stay of proceedings, the county court judge had jurisdiction to make an order allowing the widow her costs up to the payment into court and also her costs of the application for costs.—CLATWORTHY *v.* R. & H. GREEN (LIMITED), *C.A.*, 610; 86 L. T. 702.

17. *Employer's liability—Accident—Compensation Scaffolding—Ladder and crawling-board—Workmen's Compensation Act*, 1897, *s.* 7.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant and a fellow-workman, in the course of their duty, carried a crawling-board up a ladder and placed it on the roof of a building for the purpose of doing some repairs. While the applicant was adjusting the upper end of the board to the ridge of the roof, and the other man, standing on the ladder, was holding the lower end of the board, the board slipped, and the applicant fell and was injured.

Held (Stirling, L.J., dissenting), that the applicant was employed in repairing a building by means of a scaffolding within the meaning of the Act.—VEAZEY *v.* CHATTLE, *C.A.*, 263; [1902] 1 K. B. 494; 71 L. J. K. B. 252; 85 L. T. 574.

18. *Employers' liability—Accident—Compensation—Serious and wilful misconduct—Contributory negligence—Where a sudden impulse rather than wilful disobedience caused the accident—Workmen's Compensation Act*, 1897, *s.* 1, *sub-section* 2 (c). —The applicant was a lad who worked at a machine used to cut slits in the heads of screws.

He had been frequently warned not to put his hand near the wheel while it was in motion. There was no guard on the wheel. A screw having fallen out on to the table before it was cut, he leaned over the machine to pick it up and replace it, and two of his fingers were cut off.

The county court judge found that though the lad was negligent, he was not "guilty of serious and wilful misconduct."

Held, that the element of wilfulness did not enter at all into what the lad did, as he seemed to have acted on a sudden impulse, and therefore the award could be supported.—REEKS *v.* KYNOCH, *C.A.*, 113.

19. *Employers' liability—Accident—Compensation—Sub-contracting—Work ancillary to business of undertakers—Workmen's Compensation Act*, 1897, *s.* 7.—When a workman's employers, who were engineers, contracted with a firm of cotton spinners to supply and fix a driving wheel in their cotton factory, and one of the engineers' workmen was accidentally killed while engaged in the operation of lifting the wheel into its place.

Held, that what took place in the cotton factory was not "on or in or about the factory" of the undertakers (the engineers), within the meaning of the Workmen's Compensation Act, 1897, s. 7.—WRIGLEY *v.* WHITTAKER, *H.L.*, 656; [1902] A. C. 299; 71 L. J. K. B. 600; 86 L. T. 775.

20. *Employers' liability—Accident—Compensation—Sub-contractor, liability of.*—The appellants undertook to build a house and agreed with a sub-contractor that he should slate the roof. A workman employed by the sub-contractor was killed in the course of his employment and his widow was awarded compensation against the appellants as undertakers under the Workmen's Compensation Act, 1897.

Held, that the sub-contractor would have been liable as an undertaker independently of section 4 of the Act, and that the appellants were entitled to be indemnified by him against the amount of compensation awarded. — COOPER & CRANE *v.* WRIGHT, *H.L.*; [1902] A. C. 302; 71 L. J. K. B. 642; 86 L. T. 776.

21. *Employer's liability—Accident—Compensation—Sub-contractor—Work ancillary to the business of the undertakers—Erection of iron roof—Workmen's Compensation Act*, 1897, *s.* 4.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the respondent had contracted to build a boiler-house, and that the deceased workman was in the employment of a firm who had sub-contracted with the respondent to erect an iron roof to the boiler-house. The county court judge found, as a fact, that the erection of an iron roof was not part of the respondent's business, but, on a consideration of the character of the business as it was generally carried on, he found that such work was not merely ancillary to the respondent's business.

Held, that the finding of the county court judge was conclusive to show that the work was merely ancillary to the respondent's business, and therefore the respondent was not liable under section 4 of the Act, the case coming within the exemption contained in the last paragraph of the section.

Knight v. *Cubitt & Co.*, *ante*, p. 113, [1902] 1 K. B. 31, distinguished.—BUSH *v.* HAWES, *C.A.*, 311; [1902] 1 K. B. 216; 71 L. J. K. B. 68; 85 L. T. 507.

22. *Employers' liability—Accident—Compensation—Sub-contractor—Work ancillary to the business of the undertakers—Height of building—Work of demolition—Workmen's Compensation Act*, 1897, *ss.* 4, 7.—The appellants, who were builders, entered into a contract to demolish and rebuild a house which exceeded thirty feet in height. They then made a sub-contract with one Clements to do the work of demolition. A workman in the employment of Clements was killed by an accident while engaged in the work of demolition, the building at that time being only eleven feet in height, with the exception of the party-wall, which remained standing and exceeded thirty feet in height. It appeared that the appellants habitually entered into contracts to demolish and rebuild houses, but they never did the work of demolition themselves, always sub-contracting with another person to do that part of the work. In proceedings by the widow of the deceased man to recover compensation from the appellants under the Workmen's Compensation Act, 1897, the county court judge found that the house at the time of the accident exceeded thirty feet in height, and that the work of demolition was not merely ancillary to but was part of the business of the appellants, and he held that they were liable as "undertakers" to pay compensation under section 4 of the Act.

Held, that there was evidence upon which the county court judge was justified in finding that the house at the time of the accident exceeded thirty feet in height, as the party-wall which exceeded that height was standing; and, further, that the work of demolition was part of and not merely ancillary to the business of the appellants, and that they were therefore liable as undertakers under section 4.—KNIGHT *v.* CUBITT, *C.A.*, 113; [1902] 1 K. B. 31; 71 L. J. K. B. 65; 85 L. T. 526.

23. *Employers' liability—Accident—Compensation—Third party, injury caused by—Workmen's Compensation Act*, 1897, *s.* 6.—A workman having been injured in the course of his employment by the negligence of a third person obtained an award under the Workmen's Compensation Act, 1897, against his employer. He then brought an action against the third person claiming damages for pain and suffering and the expenses he had been put to and the balance of his wages.

Held, that the action would not lie by virtue of section 6 of the Workmen's Compensation Act, 1897.—TONG *v.* GREAT NORTHERN RAILWAY CO., *K.B.D.*; 86 L. T. 802.

24. *Employers' liability—Accident—Compensation Tortious act of fellow-workmen—Act having no relation to the employment—Workmen's Compensation Act*, 1897, *s.* 1.—Where an accident happened to a workman while engaged at his work through the tortious act of a fellow-workman which had no relation whatever to their employment.

Held, that the accident did not arise out of the employment within the meaning of the Workmen's Compensation Act, 1897, s. 1 (1).—ARMITAGE *v.* LANCASHIRE AND YORKSHIRE RAILWAY, *C.A.*; [1902] 2 K. B. 178; 86 L. T. 883.

25. *Employers' liability—Accident—Compensation—Weekly earnings—"Average weekly earnings"—Stevedore employed for one day—Workmen's Compensation Act*, 1897, *Schedule I.*, *cl.* 1 (b).—A casual stevedore's labourer was employed for one day to assist in discharging cargo from a vessel in a dock. During the day he met with an accident. He had then earned 3s. 3d.

Held, that as there was no presumption that the stevedore would have been employed by the same employer beyond the day, the amount of compensation he was entitled to was a weekly payment of one-half of 3s. 3d., the sum he had actually earned

in that employment.—BARTLETT *v.* SUTTON, *C.A.*, 149; [1902] 1 K. B. 72; 71 L. J. K. B. 52; 85 L. T. 531.

26. *Employers' liability—Accident—Compensation—Weekly earnings—Employed less than two weeks—Workmen's Compensation Act*, 1897, *Schedule I.*—A workman was employed to work in the demolition of a building, the terms of his employment being that he should work sixty hours a week—viz., eleven hours a day on five days of the week and five hours on Saturday, at the wages of 7½d. an hour, and that he should be liable to be discharged at an hour's notice. When he had worked for four days, for a period altogether of forty-four hours, he was accidentally injured.

Held, that, as there was a presumption that his employment would continue from week to week, there was evidence to support the finding that his average weekly earnings within the meaning of the Workmen's Compensation Act were sixty times 7½d.

A workman was employed to work as a haulier at the wages of 5s. 2d. a day. He began to work on a Wednesday and he continued to work every day, Sunday included, till the following Wednesday, when he was accidentally injured. He received as wages for eight days £2 1s. 4d.

Held, that, as he had worked for a period of more than a week at 5s. 2d. a day, although that period was partly in one calendar week and partly in another, there was evidence to support the finding that his average weekly earnings were six times 5s. 2d.—AYRES *v.* BUCKERIDGE; WHEALE AND JONES *v.* RHYMNEY IRON CO., *C.A.*, 115; [1902] 1 K. B. 57; 71 L. J. K. B. 28; 85 L. T. 472.

27. *Employers' liability—Accident—Compensation—Weekly payment—Time from which it may be ended, diminished, or increased—Workmen's Compensation Act*, 1897, *s.* 1 (*b*), 12; *Schedule I.*—When an application to review a weekly payment on the ground that the workman's incapacity has ceased is brought before an arbitrator, he is not bound to treat the weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity had ceased when the application to review was made, or at any and what subsequent time before the hearing, and to make his award with reference to the date so determined.—MORTON & CO. *v.* WOODWARD, *C.A.*; [1902] 2 K. B. 276; 86 L. T. 878.

28. *Employers' liability—Accident—Compensation—"Wharf"—Factory and Workshop Act*, 1895, *s.* 23—*Workmen's Compensation Act*, 1897, *s.* 7.—A workman was injured by an accident while employed in the hold of a ship, which was lying alongside a floating structure in the Thames, assisting in the unloading of a ship. The structure was moored in the river by chains fastened to piles driven into the bed of the river, and was used as a place where cargoes were loaded and discharged. There was no connection or communication with the shore except by means of boats.

Held, that the structure was a wharf within the meaning of section 23 of the Factory and Workshop Act, 1895, and was therefore a "factory" within section 7 of the Workmen's Compensation Act, 1897.—ELLIS *v.* CORY, *C.A.*, 131; [1902] 1 K. B. 38; 71 L. J. K. B. 72; 85 L. T. 499.

29. *Employers' liability—"Accident"—Compensation—Workmen's Compensation Act*, 1897, *s.* 1, *sub-section* 1.—A workman in the course of his employment was removing an empty yarn beam from a loom when a sudden strain, caused by his shifting it in order to get it more evenly balanced on his shoulder, had the effect of tearing some of the fibres of the muscles of his back.

Held, that the injury was caused by an "accident" within the meaning of section 1, sub-section 1, of the Workmen's Compensation Act, 1897.—BOARDMAN *v.* SCOTT, *C.A.*, 184; [1902] 1 K. B. 43; 71 L. J. K. B. 3; 85 L. T. 502.

30. *Employers' liability — Appeal — Insurance moneys—Order for payment to workman—"Action or matter"—County Courts Act*, 1888, *s.* 120—*Workmen's Compensation Act*, 1897, *s.* 5.—An appeal lies to the High Court from an order made by a county court judge for the payment of insurance moneys under section 5 of the Workmen's Compensation Act, 1897.

Kniveton v. *Northern Employers' Mutual Indemnity Co.*, [1902] 1 K. B. 880, approved.—MORRIS *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO., *C.A.*, 545; [1902] 2 K. B. 165; 86 L. T. 748.

31. *Negligence—Hire of van and driver—Liability of general master—Control of driver—Construction of hiring agreement.*—A carman entered into a written contract with an ironfounder for supplying vans, horses, and drivers to the ironfounder for use in the ironfounder's business. Under the terms of this contract the carman was to send to the ironfounder each working morning a van and horse with a capable man to drive and take charge of it, the man in the carman's employ, and all charges and claims whatsoever in reference to the van, horse, and man being paid by the carman, and he to be responsible for the same; the ironfounder to be only responsible for the due payment for the van, horse, and man at a certain rate per annum. A driver sent by the carman to the ironfounder with a van and horse under this contract was directed by the ironfounder to load some iron girders on the van and deliver them at a certain yard. By the negligence of the driver in unloading the girders, one of them fell and injured the plaintiff. No one on behalf of the ironfounder interfered in any way with the driver in unloading the girders.

Held, that, on the true construction of the contract of hiring, the driver was to remain under the control of the carman, so that the carman, and not the ironfounder, was responsible for the driver's negligence.—WALDOCK *v.* WINFIELD, *C.A.*; [1901] 2 K. B. 596; 70 L. J. K. B. 925; 85 L. T. 202.

32. *Negligence of servant—Liability of master—Jobmaster—Hire of carriage and driver for use of jeweller's traveller — Obligation to take care of carriage during temporary absence of traveller—Obligation to take care of contents of carriage—Liability of jobmaster for loss of jewellery by theft.*—The plaintiff, a wholesale jeweller, entered into a contract with the defendant, a jobmaster, for the hire of a brougham and driver for the use of the plaintiff's traveller, and the brougham was fitted up for the purpose of such use. The traveller having gone into an hotel to get his lunch, leaving the brougham in the street, the driver also went away for a similar purpose, and in their absence a quantity of the plaintiff's jewellery was stolen from the brougham. In an action to recover the value of the jewellery,

Held, that the defendant was liable, because there was an obligation on him to provide a driver who would take care of the contents of the brougham during intervals when the traveller would necessarily be absent.

Judgment of Ridley, J. (49 W. R. 653), reversed.

—ABRAHAMS *v.* BULLOCK, *C.A.*, 626; 86 L. T. 796

33. *Scotland, Law of—Workmen's Compensation Act,* 1897, *Schedule* II.; *s.* 14 (c)—*Appeal.*—By section 14 (c) of the second schedule to the Workmen's Compensation Act, 1897, no appeal lies to the House of Lords from a decision of the Court of Session upon a case stated by the sheriff as arbitrator.—MCKINNON *v.* BARCLAY, *H.L.*; 85 L. T. 286.

34. *Shop—Young person—Hours of employment—Temporary stall—Shop Hours Act,* 1892 (55 & 56 *Vict. c.* 62), *ss.* 3, 4, 9.—A temporary board on trestles is not a shop within section 4 of the Shop Hours Act so as to require a notice of the provisions of the Act; but

Semble, it is a shop for the purposes of section 3, which regulates the hours of employment.—SMITH *v.* KYLE. *K.B D.*, 319; [1902] 1 K. B. 286; 71 L. J. K. B. 16; 85 L. T. 428.

35. *Wages—Deductions—Waiver by not claiming at end of each week.*—By an agreement made between the respondents and the appellant the wages were to be at the rate of 24s. per week, and so in proportion for any less period than a week. The wages were to be at the rate of 24s. per week at the least. During the employment, owing to various causes the appellant was not employed for certain periods, and no wages were paid to him in respect of those periods, but the wages were settled up at the end of each week when the deductions were made.

Held, that the appellant could not recover the amount of these deductions at the end of the employment, as it was a claim that could be waived, being a claim for damages and not a liquidated debt.—STODDART *v.* MITCHELL, *K.B.D.*; 85 L. T. 686.

See also Contract, 6; Factory, 1; Principal and Agent, 1; Seduction, 1.

MERGER:—

Lease—Mortgage by sub-demise—Conveyance of fee simple to lessee—Mortgage of fee simple—Intention—Real Property Act, 1845 (8 & 9 *Vict. c.* 106), *s.* 9—*Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 7 (d).—Equitable merger depends upon intention, and the intention must be construed so as to do justice between the parties.

A lessee mortgaged his leasehold interest by sub-demise to the defendants, and he afterwards purchased the fee simple and mortgaged it immediately to the plaintiffs. The defendants took possession under their mortgage.

Held, that the plaintiffs had no better title than their mortgagor, and were not entitled to re-enter on non-payment by the defendants of the rent reserved by the lease.—CAPITAL AND COUNTIES BANK *v.* RHODES, *Ch.D. Kekewich, J.*; 71 L. J. Ch. 573.

See also Covenant, 1.

METROPOLIS:—

1. *Buildings—Stand for viewing state procession—Powers of supervision and inspection—Transfer of power from London County Council to borough council.*—The powers, duties, and liabilities of district surveyors with respect to the supervision or inspection of wooden structures falling within section 84 of the London Building Act, 1894, have not been transferred to the Westminster City Council by section 5, sub-section 1, of the London Government Act, 1899, and Schedule II., Part I., of the Act, but the district surveyors have neither the right, power, nor obligation of performing any duties prescribed by a licence granted by the Westminster city unless by its terms it indicates that they are the persons to fulfil the duties.

Where matters are involved which impose upon a district surveyor the right of inspecting such a wooden structure under the terms of the Act, the district surveyor should have notice given to him under section 145 of the London Building Act, 1894. For example, questions might arise of dangerous structures or as to interference with some street or street-line.—WESTMINSTER CITY COUNCIL *v.* WATSON, *K.B.D.*; 71 L. J. K. B. 603.

2. *Combined scheme—Order of local authority—Alteration—No order—Drain a sewer.*—Certain houses in B. street in 1853 were drained by a combined scheme under the order of the local authority.

In 1889 No. 85, B.-street was disconnected from No. 83, and connected to its adjoining house on the other side, No. 87. No order was made by the authority for this, but it was superintended by their officers.

In 1900 the owner of No. 85 erected a workshop on the garden, and the drainage from that, including an additional w.c., was connected with the drain of No. 87. This was superintended by the respondents' officers, and, although a plan had been approved by the respondents, the work was not in fact carried out in accordance with that plan.

Held, that the drain of No. 87 did not become a sewer.—GORRINGE *v.* SHOREDITCH CORPORATION, *K.B.D.*; 86 L. T. 592.

3. *Hackney carriage—Negligence of driver—Liability of proprietor—Licence taken out in name of one partner—London Hackney Carriages Acts,* 1831 (1 & 2 *Will.* 4, *c.* 22) *and* 1843 (6 & 7 *Vict. c.* 86).—The proprietor of a hackney carriage is liable, as a master, under the London Hackney Carriages Act, 1843, so far as regards the members of the public, for the acts of the driver, though the licence for the carriage is not taken out in his name.—GATES *v.* BILL, *C.A.*, 546; [1902] 2 K. B. 38.

4. *Highway—Agreement as to signpost on highway—Not under seal—Statute of Frauds—Obstruction to highway.*—The proprietor of a public-house with a "draw-up" in front of it which also belonged to him offered by letter to the corporation of the borough to permit such draw-up to be thrown into the public road on condition that his signpost was allowed to continue at a convenient spot on the widened highway, and that certain front gardens belonging to other frontagers were also thrown into the road. The corporation did not reply to this letter, but subsequently it did throw the said gardens and the draw-up into the public road. The proprietor of the public-house thereupon erected his signpost in the highway some forty-five feet from the site of the draw-up. The corporation threatened to have it removed.

Held, that the proprietor was entitled to restrain such removal, as the facts constituted an agreement between him and the corporation in the terms of his letter, and that such agreement was part performed by the action of the corporation and was not an illegal agreement as sanctioning the erection of an obstruction in the highway, but was within the powers conferred on the corporation by section 144 of the Metropolis Management Act, 1855.—HOARE & CO. *v.* MAYOR, &C., OF LEWISHAM, *K.B.D.*; 85 L. T. 281.

5. *Management Acts—Street—"New street"—Sewering—Expenses—New buildings on one side of old*

street—Sewer put in on new side—Liability of frontagers—Highway forming boundary of metropolis—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53.—An old highway which formed the boundary between the parish of Hornsey, in the county of Middlesex, and the parish of Clerkenwell, in the County of London, had buildings erected on the Hornsey side of it for almost its whole length before 1856, when the Metropolis Management Act, 1855, came into operation. On the Clerkenwell side there were then only a few houses. Recently the Clerkenwell side also had been covered with buildings, and in 1898 the Clerkenwell Vestry laid down a sewer under their part of the highway to receive the drainage of the houses on their side. It was found as a fact that the road, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation.

Held, that, for the purpose of determining whether the frontagers on the Clerkenwell side of the road were liable under sections 52 and 53 of the Metropolis Management Act, 1862, to contribute to the expense of making the sewer as for the drainage of a "new street," the road must be treated as a whole, and the Clerkenwell side could not be treated as being by itself a new street.

Judgment of Lord Alverstone, L.C.J., and Kennedy, J. (49 W. R. 171, [1901] 1 K. B. 264), affirmed.—CLERKENWELL VESTRY *v.* EDMONDSON, *C.A.*, 345; [1902] 1 K. B. 336; 71 L. J. K. B. 198; 86 L. T. 137.

6. *Paving apportionment—Dismissal of summons on ground of street not being a new street — Fresh apportionment—Res judicata—Metropolis Management Acts*, 1855-1890.—On the 9th of November, 1898, the H. Vestry resolved that R.-street be paved as a new street, and apportioned the sum of £37 16*s.* 8*d.* on the respondent, which he refused to pay.

On the 15th of September, 1899, the H. Vestry summoned the respondent for that sum, but the summons was dismissed on the ground that R.-street was not a new street within the Metropolis Management Acts.

On the 13th of June, 1900, a resolution was passed by the H. Vestry rescinding the above apportionment, and on the 14th of March, 1901, the H. Borough Council resolved that R.-street be paved as a new street, and apportioned on the respondent the sum of £32 16*s.* 1*d.*, which he refused to pay, and thereupon the present summons was issued.

The magistrate held that the adjudication of the 15th of September, 1899, was conclusive, and he dismissed the summons.

Held, on the authority of *Reg.* v. *Hutchins*, 44 L. T. Rep. 364, and *Wakefield Corporation* v. *Cooke*, 86 L. T. Rep. 198, that the decision of the 15th of September, 1899, was not conclusive, and the present case should be heard on its merits.—SCOTT *v.* LOWE, *K.B.D.*; 86 L T. 421.

7. *Public health—Public convenience—Approaches—Subway—Trespass—Subsoil of roadway and footway—Injunction—Public Health (Metropolis) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.—Section 44 of the Public Health (Metropolis) Act, 1891, vests the subsoil of the roadway in the sanitary authority for the purpose of making public conveniences; in making these it is within their power to make subways from either side on the street as a means of approach. The fact that the public may use these subways as a means of passing from one side of the street to the other without availing themselves of the conveniences does not make the construction of these subways *ultra vires*.

It is, however, a trespass upon the lands of the adjoining owner to take any portion of the footway as a site for such convenience or the approaches thereto, for though section 44 of the Act vests the subsoil of the roadway in the sanitary authority for that purpose, the subsoil of the footways is expressly excepted, and the rule that the land *usque ad medium filum viæ* belongs to the adjoining owner still applies up to the line of the kerb.

The fact that the footway has been recently widened makes no difference to this rule.—LONDON AND NORTH-WESTERN RAILWAY CO *v.* WESTMINSTER (MAYOR), *Ch.D. Joyce, J*, 268; [1902] 1 Ch. 269; 71 L.J. Ch. 34; 85 L. T. 544.

8. *Rating—Deficiency in rates—Distress warrant—Company to pay all consolidated and other rates on lands and buildings during construction of railway—Buildings partially pulled down when company acquired land—Jurisdiction to rate—Appeal—Great Northern and City Railway Act*, 1892. *s.* 69.—The respondents, on the 1st of January, 1900, acquired under their private Act land upon which buildings formerly known as 30, Finsbury-pavement had previously existed but did not take actual physical occupation until October, 1900. The buildings had been pulled down about May, 1899, at which time the respondents had no interest therein.

In the valuation list in force in January, 1900, being the quinquennial list made in 1895, these premises were assessed at £292 rateable value. In 1899 a supplemental valuation list was made for the parish by which this property was proposed to be taken out of rating, as it was then vacant land. The list was duly confirmed on the 24th of November, 1899, but did not come into operation until the 6th of April, 1900. On the 4th of April, 1900, a provisional list continuing the property in the valuation list was made and duly confirmed. A poor rate was duly made on the 8th of May, 1900, and another on the 5th of November, 1900, and the respondents were rated upon the rateable value at which the premises were assessed in the provisional list—viz., £292.

Upon the respondents being summoned to show cause why they had not paid, and refused to pay, the rates, the respondents objected that at the time the rates were made the land was vacant land not built upon. The justices dismissed the summons.

Held, that the justices were right, the question of non-liability having been properly raised before them, the point raised involving a question of jurisdiction to rate, and not merely a matter of appeal.—ST. STEPHEN'S (CHURCHWARDENS) *v.* GREAT NORTHERN AND CITY RAILWAY CO., *K.B.D.*, 395; 86 L. T. 390.

9. *Rating—Poor rate—Valuation list—Omission to give notice of increase of valuation—Refusal to pay increased rate—Application for distress warrant—Objection to issue of warrant—Appeal against valuation list—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 9, 45.—Where the overseers of a parish raise the gross or rateable value of a hereditament, and no notice of such alteration, as required by section 9 of the Valuation (Metropolis) Act, 1869, has been served upon the occupier of the hereditament, the occupier cannot, on the application for a distress warrant to recover the balance of the rate, raise the objection that no such notice had been served upon him, that objection being one that could only be raised by an appeal against the valuation list or against the rate.—WESTMINSTER CORPORATION *v.* ARMY AND NAVY AUXILIARY

SUPPLY (LIMITED), *K.B.D.*, 631; [1902] 2 K. B. 125; 71 L. J. K. B. 546.

10. *Street—"New street"—Widening of old street—Paving expenses—Liability of frontagers—Metropolis Management Acts*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105; 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 9, 215.—Where an old street repairable by the inhabitants at large, and having houses upon one side of it, is widened by the addition of a longitudinal strip of land of a substantial width upon the opposite side, the strip so added becomes itself a new street, and the expenses of paving the added strip, whether under the Metropolis Management Acts, 1855 and 1862, or the Public Health Act, 1875, must be apportioned solely among the owners of property abutting upon that strip, and not upon the owners of property abutting upon the old street.

Richards v. *Kessick*, (1888) 57 L. J. M. C. 48, and *White* v. *Fulham Vestry* (1896) 74 L. T. 425, approved. — PROPERTY EXCHANGE (LIMITED) *v.* WANDSWORTH BOARD OF WORKS, *C.A.*; [1902] 2 K. B. 61; 71 L. J. K. B. 515; 86 L. T. 481.

See also Local Government, 7, 8, 9, 12; Vendor and Purchaser, 12.

MINES:—

1. *Clay—Mines and other minerals—Railway company—Purchase of surface—"Mineral"—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77, 78.—The principles governing cases like *Hext* v. *Gill*, (1872) L. R. 7 Ch. 699, which deal with a reservation of minerals by virtue of a grant or contract, are not applicable to the determination of cases arising out of a statutory reservation of minerals, like that contained in section 77 of the Railways Clauses Consolidation Act, 1845.

Though a mineral *primâ facie* includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted only by virtue of a statutory reservation. Clay forming the surface or subsoil and constituting "the land" purchased for the purposes of the undertaking is not a "mineral" within section 77 of the Railways Clauses Consolidation Act, 1845, as interpreted by *Lord Provost and Magistrates of Glasgow* v. *Farie*, (1888) 13 App. Cas. 657.

Semble, the same clay may be a mineral in one district and not in another.—GREAT WESTERN RAILWAY CO. *v.* BLADES, *Ch.D. Buckley, J.*; [1901] 2 Ch. 624; 70 L. J. Ch. 847; 85 L. T. 308.

2. *Coal mine—Rules—Enforcement by agent—Breach—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict c.* 58), *s.* 49, *r.* 1; *s.* 50—*Inspector of mines—Dismissal of information — "Person aggrieved" — "Either party"—Summary Jurisdiction Acts*, 1857 (20 & 21 *Vict. c.* 43, *s.* 2) *and* 1897 (42 & 43 *Vict. c.* 49, *s.* 33).—An information laid by an inspector of coal mines against the agent of a certain coal mine for an offence against the Coal Mines Regulation Act, 1887, was dismissed, and on his application the justices stated a case, which purported to be stated under section 33 of the Summary Jurisdiction Act, 1879.

When the case came up for argument a preliminary objection was taken by the respondent that the inspector was not a "person aggrieved" within the meaning of section 33.

Held, that a case must be taken to have been stated under section 2 of the Summary Jurisdiction Act, 1857, and under section 33 of the Act of 1879, read together, the earlier of which Acts provides that "either party" may apply to have a case stated.

Held, also, that the justices were right in refusing to convict the agent of the mine for failing to cause adequate ventilation to be provided in the mine.—STOKES *v.* MITCHESON, *K.B.D.*, 553; [1902] 1 K. B. 857; 71 L. J. K. B. 677; 86 L. T. 767.

3. *Payment of miners according to amount excavated—New South Wales Coal Mines Regulation Act*, 1896 (60 *Vict. No.* 12), *s.* 38, *sub-section* 1—*Construction.*—The respondent having been convicted of contravening section 38, sub-section 1, of the New South Wales Coal Mines Regulation Act of 1896 by not paying his miners according to the actual weight gotten by them of the mineral contracted to be gotten,

Held, that on the true construction of the section, as it appeared that by the contract of employment the miners were to be paid according to the yardage of excavation, which had no necessary or constant relation to the amount of mineral gotten, the Act was inapplicable and the conviction was erroneous.—HUMBLE *v.* HUMPHREYS, *P.C.*; [1902] A. C. 207; 71 L. J. P. C. 18; 85 L. T. 563.

See also Lands Clauses Acts, 2; Settled Land, 10; Vendor and Purchaser, 14.

MISTAKE.—See Company, 1, 37; Vendor and Purchaser, 11, 15.

MORTGAGE:—

1. *Agreement to execute a legal mortgage—Provisions of legal mortgage—Construction of agreement—Consolidation—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 17.—An agreement in a memorandum of equitable mortgage that the mortgagor will execute a legal mortgage of the property "with such powers and provisions and in such form as" the mortgagee "may require for further securing the said principal moneys and interest," does not enable the mortgagee to insist upon the insertion in the legal mortgage of a clause excluding section 17 of the Conveyancing and Law of Property Act, 1881; and consequently the mortgagee cannot consolidate the equitable mortgage with another mortgage from the same mortgagor, upon the latter seeking to redeem that other mortgage alone.—FARMER *v.* PITT, *Ch.D. Byrne, J.*, 453; [1902] 1 Ch. 954; 71 L. J. Ch. 560.

2. *Costs—Price of redemption—Costs of preparing mortgage deed—Costs of application.*—The costs of preparing a mortgage deed, investigating title, and paying stamp duty and survey fees, which are not paid at the time of the completion of the mortgage, are not mortgagee's costs which can be added to the price of redemption. They form a simple contract debt between the mortgagor and the mortgage.—WALES *v.* CARR, *Ch.D. Farwell, J.*, 313; [1902] 1 Ch. 860; 71 L. J. Ch. 483; 86 L. T. 288.

3. *Priority — Portion — Mortgage pursuant to order of court to raise two out of three portions charged on real estate.* — Under the will of a testator who died in 1851 three sums of £5,000 for children's portions were charged on his real estate. In 1880 two of the portions had become raisable, and in an action brought for the purpose of clearing the estate from charges an order was made in 1882 directing that the two portions should be raised by a mortgage of the estate to a person who was willing to lend the money, such mortgage to be settled by the judge. The mortgage as settled contained recitals

of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid by the mortgagee into court, and was afterwards distributed among the persons interested. In an action by the mortgagee claiming priority over the persons interested in the remaining portion,

Held, that the court, in fulfilling the testator's directions, which was its only duty, could not have intended to place two of the portions in a better position than the third, or to give the mortgagee a charge for the two in priority to the third, which was from the first equally entitled to a like charge under the will:

Held, therefore, that, notwithstanding that the third portion was at present only charged in equity by virtue of the will, whereas the plaintiff had a legal mortgage sanctioned by the court, the plaintiff was only entitled to a charge on the estate for the two sums of £5,000 *pari passu* with the third sum of like amount.—NIGHTINGALE *v.* REYNOLDS, *Ch.D. Kekewich, J.*; [1902] 2 Ch. 117; 71 L. J. Ch. 586; 86 L. T. 703.

4. *Redemption—Option to lender to enter into partnership with the mortgagor upon terms affecting the mortgaged property—Option to be exercised within time limited for redemption—Independent agreement.*—Prior to July, 1898, the plaintiffs advanced to the defendant £5,000 upon the security of a ship and other property, upon the terms of an agreement made between them on the 23rd of April, 1896, whereby the money was not to be called in or paid for two years, and the plaintiffs might at any time within the two years elect to enter into partnership with the defendant upon the terms of their releasing the mortgage debt, and the ship and other property becoming partnership assets.

On the 27th of June, 1898, the defendant mortgaged to the plaintiffs certain wharves at Norwich to secure £2,000, part of the £5,000 then owing. The mortgage deed gave time for payment of this sum of £2,000 until the 27th of December, 1898.

On the 9th of July, 1898, another agreement was entered into between the plaintiffs and the defendant. It recited the agreement of 1896; that the plaintiffs had not entered into partnership; that the plaintiffs had applied for and the defendant was unable to pay the £5,000, and had requested the plaintiffs to extend the term of two years for a further period of five years; and it was thereby agreed (1) that the plaintiffs might, within five years, elect to enter into partnership with the defendant; (2) that the plaintiffs should in that event release the defendant from the payment of the £5,000, and transfer the mortgaged property for the purposes of the partnership; (3) that the capital of the partnership property should belong to defendant and plaintiffs in equal shares.

In February, 1900, the plaintiffs exercised their option and communicated to the defendant their intention to enter into partnership with him. The defendant refused to comply, alleging that the effect of the agreement was to render the property irredeemable, and that it was an illegal clog on the equity of redemption.

Held, that the agreement of the 9th of July, 1898, was subsequent to and independent of the original mortgage bargain; and that there being nothing unconscionable or unfair in the agreement in itself, the fact that the parties to it stood at the time in the relation to each other of mortgagor and mortgagee, did not prevent the agreement being enforceable.

Decision of Buckley, J. (49 W. R. 188), affirmed on different grounds.—LISLE *v.* REEVE, *C.A.*, 231; [1902] 1 Ch. 53; 71 L. J. Ch. 42; 85 L. T. 464.

5. *Redemption—Public-house—"Tied house"—Clogging redemption—"Once a mortgage always a mortgage"—Covenant to continue after redemption.*—A covenant in a mortgage of a leasehold public-house that the mortgagor shall during the continuance of the term, whether or not any principal money or interest is still owing on the security, buy his beer only from the mortgagees, is a clog on the equity of redemption, as it prevents the mortgagor getting back the property unimpaired after payment of principal moneys and interest due on the security.

He is therefore entitled on redemption to an assignment of the premises free from the covenant.

Decision of the Court of Appeal (48 W. R. 629, [1900] 2 Ch. 445) affirmed.

Santley v. *Wilde*, 48 W. R. 90, [1899] 2 Ch. 474, disapproved by Lord Macnaghten and Lord Davey.—NOAKES *v.* RICE, *H.L.*, 305; [1902] A. C. 24; 71 L. J. Ch. 139; 86 L. T. 62.

6. *Redemption action—Option to purchase—Stipulation that mortgagee may purchase mortgaged security at fixed price within definite time—Clog on equity of redemption.*—A stipulation in a mortgage that the mortgagee shall have the option to purchase the whole or any part of the mortgaged security at a fixed price within a definite time is invalid as a clog on the equity of redemption.—JARRAH TIMBER AND WOOD PAVING CORPORATION *v.* SAMUEL, *Ch.D. Kekewich, J.*, 601.

7. *Shares—Fluctuating security—No day fixed for payment—Sale by mortgagee.*—The defendants, who were stockbrokers, bought certain shares on behalf of the plaintiff. In pursuance of an arrangement between the plaintiff and the defendants the shares were entered on the register in the name of the defendants, and held by them as security for the purchase-money. The defendants made repeated applications to the plaintiff for payment of the purchase-money, but never received more than a portion of it. The company announcing a scheme of reconstruction, the defendants wrote to the plaintiff for instructions and for payment of his debt. Receiving no reply they applied for shares in the new company in their own names. They subsequently sold these shares in the belief that they were rightful owners. The plaintiff now alleged that the sale was improper and claimed redemption of the shares, or in the alternative damages for improper conversion.

Held (by Stirling and Cozens-Hardy, L.JJ., Vaughan Williams, L.J., *dissentiente*), that the defendants, as mortgagees of the shares with no fixed time for payment, were entitled to sell them on giving reasonable notice to the mortgagor; that their letters to the plaintiff demanding payment constituted such notice; and that they were not precluded from exercising their power of sale by the fact that they sold in the belief that they were absolute owners; consequently the sale was good, and the defendants were only liable to account for the proceeds as mortgagees.

Decision of Farwell, J. (49 W. R. 167, [1901] 1 Ch. 70), affirmed.—DEVERGES *v.* SANDEMAN, CLARK, & Co., *C.A.*, 404; [1902] 1 Ch. 579; 71 L. J. Ch. 328; 86 L. T. 269.

See also Infant, 1; Covenant, 1; Limitations, Statute of, 3; Principal and Surety, 2; Settled Land, 11; Solicitor, 4; Vendor and Purchaser, 8.

NATAL, LAW of:—

1. *Fraud — Prescription — Roman-Dutch law.*—Where the same fraud which has induced a con-

tract has also operated to deprive a plaintiff of his other remedies, the *actio doli* is still open to him, and under the Roman-Dutch law for the general period of prescription, which is thirty years.—DOUGLAS *v.* SANDER, *P.C.*, 676; [1902] A. C. 437; 86 L. T. 633.

2. *Practice—Appeal—Special leave—Conviction by special court—Acting judge—Colonial Laws Validity Act—Construction.*—The obvious meaning of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) is to preserve to the Imperial Parliament a right to legislate for a colony to which a local legislature has been assigned, and to forbid the local legislature to enact anything repugnant to Imperial legislation so effected, but not otherwise to derogate from the general powers of Colonial legislatures.

An acting judge of the Supreme Court is a judge thereof within the meaning of Natal Special Court Act, No. 14 of 1900.

Special leave to appeal from a conviction by a Special Court of Natal (constituted under the said Act) refused.—THE QUEEN *v.* MARAIS, MARAIS, EX PARTE, *P.C.*; [1902] A. C. 51; 71 L. J. P. C. 32; 85 L. T. 363.

NEGLIGENCE :—

1 *Breach of duty—Contractual relation—Reckless misrepresentation apart from fraud — Cause of action.*—The defendant, a professional water-finder, undertook for reward to indicate a spot upon the plaintiff's land where a supply of water might be found. He marked out a spot where he stated definitely water would be found at a particular depth from the surface. The plaintiff on the faith of this statement bored to a depth exceeding that named by the defendant, but found no water. The plaintiff brought an action in the county court to recover the expense of boring. The county court judge found that the defendant made the statement recklessly but did not find that he made it fraudulently.

Held, that the contractual relation between the parties imposed on the defendant the duty to refrain from making reckless statements; that the defendant had committed a breach of this duty, and was therefore liable in an action for damages.—PRITTY *v.* CHILD, *K.B.D.*; 71 L. J. K. B. 512.

2. *Breach of duty—False evidence — Wrongful conviction—Conviction unreversed—Cause of action.* — An action to recover damages for a breach of duty whereby the plaintiff was wrongfully convicted of an offence, or for negligently giving untrue evidence whereby the plaintiff was so convicted, cannot be maintained while the conviction stands. — BYNOE *v.* BANK OF ENGLAND, *C.A.*, 359; [1902] 1 K. B. 467; 71 L. J. K. B. 208; 86 L. T. 140.

3. *Negligence—Damage by electricity—Statutory powers.*—The respondent companies were authorized by statute to work tramways by electric power, and provision was made that in the event of any electric leak taking place and damage being caused by electrolysis or otherwise, that the companies should make good the damage, &c., and also that the tram rails were not to be used for the return of the electric current without consent, which was obtained upon conditions as to reversing the direction of the current, &c., and removing the danger. A short part of the tramway was not authorized by statute. Certain disturbances in the working of the appellants' submarine telegraph took place, caused by electricity which had been stored by respondents and used in propelling their cars on the above lines. This was brought about by a part of the electricity which escaped from the tram rails and reached the appellants' cable. It was afterwards discovered that the disturbances might be effectively provided against. The result was pecuniary loss to the appellants.

Held, (1) that the respondents were not liable at common law within the principle of *Fletcher* v. *Rylands*, L. R. 3 H. L 330, 17 W. R. Dig. 17, there being no tangible injury caused by any unlawful use of their tramway by the respondents; (2) nor under the statutes.—EASTERN AND SOUTH AFRICAN TELEGRAPH CO. *v.* CAPE TOWN TRAMWAY CO., *P.C.*, 657; [1902] A. C. 381; 86 L. T. 457.

4. *Injury—Nervous shock resulting from fright—Damages—Remoteness.*—Damages for injuries which result from a nervous shock occasioned by fright, although unaccompanied by any actual physical impact, may be recovered in an action for negligence if such fright is followed by consequent physical damage to the plaintiff. Such damages are not too remote.

Victorian Railway Commissioners v. *Coultas* (37 W. R. 129, 13 App. Cas. 222) considered, and not followed.—DULIEU *v.* WHITE, *K.B.D.*, 76; [1902] 2 K. B. 669; 70 L. J. K. B. 837; 85 L. T. 126

5. *Third party, intervening act of—Liability—Effective cause of damage.*—The defendants' servants shunted some vehicles on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch-point which would have prevented the vehicles if set loose from running down the incline, but, for the convenience of their shunting operations, the defendants' servants did not place the vehicles beyond the catch-point, but screwed down their brakes and left them in a position in which they would not have caused any damage if not interfered with. Some boys, however, trespassing on the siding, unscrewed the brakes and detached a vehicle, which ran down the incline and injured the plaintiff, who was lawfully passing along the highway over the level crossing. The defendants were aware that boys were in the habit of trespassing on the siding and meddling with vehicles placed upon it.

Held, that the defendants were liable for the damage sustained by the plaintiff, since they were aware of the danger of interference with the vehicles, and negligently omitted to take reasonable precautions to prevent the consequences of that interference.—MCDOWALL *v.* GREAT WESTERN RAILWAY CO., *K.B.D.*; [1902] 1 K. B. 618; 71 L. J. K. B. 330; 86 L. T. 558.

See also Bailment, 1; Master and Servant, 31, 32; Railway, 3; Ship, 2, 9, 15.

NEW SOUTH WALES, LAW of :—

1. *Income tax—Deduction of fair rent in respect of Crown lease.*—Held, under New South Wales Land and Income Tax Assessment Act, 1895, that respondent, who carried on the business of a grazier on land held under a Crown lease (and therefore exempt from land tax), was not entitled to deduct from the taxable amount of his income in 1899 a sum representing the fair rental value of the leasehold premises and improvements thereon for that year. The deduction is not authorized by section 28, the rental value not being an outgoing, loss, or expense within the meaning of that section.—COMMISSIONERS OF TAXATION *v.* ANTILL, *P.C.*; [1902] A. C. 422; 86 L. T. 783.

2. *Land Tax—Glebe lands let on leases—User and occupation—Exemption from tax.*—Held, that under the New South Wales Land and Income Tax Assessment Act, 1895, s. 11, glebe lands by Crown

grant vested in the respondents for parochial church purposes in connection with the Church of England but let on building leases or sub-divided for that purpose were not exempt from assessment for land tax as being lands occupied or used exclusively in connection with public charitable purposes or a church.—COMMISSIONERS OF TAXATION *v.* ST. MARK'S GLEBE, *P.C.*; [1902] A. C. 416; 86 L. T. 629.

3. *Lease—Suspension of pastoral lease—Compensation—New South Wales Mining Act*, 1874 (37 *Vict. No.* 13), *ss.* 13, 25—*Construction.*—Held, that section 13 of the New South Wales Mining Act of 1874 is plain and unambiguous. It confers on the Governor power to suspend a pastoral lease so far as may be necessary for certain defined purposes relating to the public safety and welfare. That power is not confined to land uncultivated or unimproved, or to water flowing in a natural watercourse. The effect of suspension is that while it lasts, and so far as it extends, all the rights of the lessee derived from the lessor are in abeyance, and the lessor is in the same position as if the lease had never been granted, and accordingly can resume possession. The compensation to which the lessee is entitled is limited to the return or remission of rent, no provision being made for cases where compensation so restricted is inadequate:

Held, further, that the construction of section 13 cannot be controlled by section 25 which relates to a different subject.—COOK *v.* RICKETSON, *P.C.*; [1901] A. C. 588; 70 L. J. P. C. 113; 85 L. T. 1.

4. *Practice—Appealable value—Issue as to appealable value to be decided by Court of Appeal—Admissibility of affidavits—New South Wales Mining Act*, 1874 (37 *Vict. No.* 13), *s.* 115.—Section 115 of the New South Wales Mining Act, 1874, gives a right of appeal to the Supreme Court in mining cases where the amount involved is not less than £500.

Held, that the Supreme Court was wrong in refusing to hear an appeal on the ground that the value should be found and stated by the court appealed from, and could not be ascertained by themselves on affidavit.

Scully v. *Murn*, (1893) 14 N. S. W. R. 289, overruled. — FALKNERS GOLD MINING CO. *v.* MCKINNERY, *P.C.*; [1901] A. C. 581; 70 L. J. P. C. 116; 85 L. T. 361.

5. *Railway—Agreement to construct a railway jointly — Construction — Rights of joint owners.*—Where two colliery companies agreed to construct a railway between their respective collieries and the Government railway, and by the New South Wales Act which empowered the same it was provided that the new railway should be open to the public upon payment of a toll to the two companies for every ton of goods carried for the public, and that owners and occupiers of lands traversed by the railway might construct branch railways communicating therewith,

Held, that, in the absence of prohibitive words in the agreement, either colliery company was at liberty to construct a branch railway and have its coal thence brought to the joint railway carried over it free of the toll, which was chargeable only to the public.—CALEDONIAN COAL CO. *v.* SEAHAM COLLIERY CO., *P.C.*; [1901] A. C. 554; 70 L. J. P. C. 105; 84 L. T. 785.

NEW ZEALAND, LAW of:—

1. *Confiscation—Regrant of native lands—Trust—Construction of regrant.*—The expression "to be held in trust" for a definite class of persons is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings.

Kinloch v. *Secretary of State for India in Council*, [1882] 7 App. Cas. 625, referred to.

By an agreement in 1870 between the Government of New Zealand and certain natives whose names were scheduled thereto (which agreement was afterwards incorporated in the Mohaka and Waikare District Act, 1870), it was provided that the blocks of lands in suit, over which the Government had by force of a proclamation in 1867 issued under the New Zealand Settlement Act, 1863 an absolute power of disposition, native titles having been thereby extinguished, should be allotted to T., a Maori chief, and held in trust by him "in the manner provided or hereinafter to be provided by the General Assembly for native lands held under trust." In a suit by the appellants against T.'s devisees thereof to declare that the said block was held by T. as a trustee for the loyal owners thereof according to native custom and usage the natives beneficially entitled thereto.

Held, that, under all the circumstances and notwithstanding the words of trust in the agreement, T. took absolutely and beneficially; and that the respondents were not affected by any trusts in favour of the appellants. The allottees of each block comprised in the agreement or their successors were the only persons beneficially entitled thereto. —TE TEIRA TE PAEA *v.* TE ROERA TAREHA, *P.C.*; [1902] A. C. 56; 71 L. J. P. C. 11; 85 L. T. 558.

2. *Public Works Act*, 1894—*Land taken for public purposes — Compensation — Omission to challenge amount of claim—Power of court to grant relief.*—Under the New Zealand Public Works Act, 1894 (58 Vict. No. 42), if land is required for public purposes, the Governor may, after the preliminary requirements of the Act have been complied with, declare by proclamation that the land is taken for the public work therein named, and the land thereupon becomes absolutely vested in the local authority. Any person claiming compensation may serve a notice of the claim upon the local authority, and "if the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it the claimant may file a copy of his claim . . . in the Supreme Court; and such claim when so filed shall be deemed to be, and shall have the effect of, an award filed in the Supreme Court, and may be enforced in the manner provided": section 44. In a case in which the local authority had by inadvertence omitted to challenge a claim within the period prescribed by the Act,

Held, that the court had no power to give them relief against the statutory consequences of such omission.—MAYOR OF WELLINGTON *v* JOHNSTON; SAME *v.* LLOYD, *P.C.*; [1902] A. C. 396; 86 L. T. 538.

PARTNERSHIP:—

1. *Action—Dissolution—Receiver—Judgment order in subsequent action against firm—Charging order.*—By a judgment in an action in the Chancery Division the partnership carried on under the name of S. & Co. was dissolved, and a receiver and manager was appointed. Subsequently D., a creditor, without knowledge of these proceedings, sued the firm in the King's Bench Division on certain bills of exchange accepted by the firm for partnership purposes, and served one partner only, who entered an appearance, and obtained judgment for the sum due and costs. D. then having become aware of this action applied in it for leave to issue

execution, notwithstanding the possession of the receiver, which leave was accordingly granted, and a charging order obtained. On a motion on behalf of the partner not served with the writ in the action in the King's Bench Division to discharge the charging order for irregularity,

Held, that the motion was, in effect, to obtain a declaration that the judgment of the King's Bench Division was void, and that there was no jurisdiction to so hold; that ord. 48A, rr. 1 and 3, were intended for the protection of the individual partner, and not of the assets of the firm; that, therefore, the order previously made in chambers would stand, and the motion be refused with costs. —BRAND *v.* SANDGROUND, *Ch.D. Farwell, J.*; 85 L. T. 517.

2. *Articles—Partnership continued after period fixed for determination—Dissolution—Pre-emption clause—Whether applicable to partnership at will—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 27.—In an action for a declaration that the partnership between the plaintiff and defendant was dissolved by the issue of the writ, and that the plaintiff was entitled to exercise the rights conferred by clause 25 of the partnership articles for the purchase of the interest of the defendant, it appeared that by the articles the partnership was fixed for ten years from the 1st of January, 1889, unless sooner determined as therein provided. By clause 25 the plaintiff was to be at liberty to determine the partnership by giving the defendant six months' notice, and whether so determined or by effluxion of time she should have the right to purchase the share of the defendant at a valuation. Since the 1st of January, 1889, the partnership had been carried on on the like terms, as a partnership at will. At the hearing the defendant contended that the continued partnership was not a partnership at will, and that in any event clause 25 was now inapplicable.

Held, (1) that such continued partnership was a partnership at will, under section 27 of the Partnership Act, 1890; and (2) that having regard to the observations of Lord Watson in *Neilson* v. *Mossend Iron Co.*, 11 App. Cas. 298, and the judgment of Stirling, L.J., in *Daw* v. *Herring*, 65 L. T. Rep. 782, clause 25 was not inconsistent with a partnership at will, and that accordingly the plaintiff was entitled to the declaration as asked.—BROOKS *v.* BROOKS, *Ch.D. Farwell, J.*; 85 L. T. 453.

3. *Contract with partner before partnership—Fraud of co-partner — Novation of original contract — Election—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 10, 11 (a).—Where A. has entered into a contract with B., and B. and C. subsequently become partners, but A. elects to stand by the original contract with B., he cannot, by issuing a writ against B. and C., make an election to novate and render C. liable, it being, under the circumstances, unjust.—BRITISH HOMES ASSURANCE CORPORATION *v.* PATTERSON, *Ch.D. Farwell, J.*, 612; 86 L. T. 826.

4. *Solicitors—Profits—How ascertained.*—In ascertaining the "profits" of a partnership, in the absence of special agreement to the contrary, the net profits of each year must be ascertained upon the footing of the moneys actually received and paid in that year without reference to when the work is done in respect of which the moneys are received.—BADHAM *v.* WILLIAMS, *Ch.D. Kekewich, J.*; 86 L. T. 191.

5. *Vendor's right to indemnity on sale of share—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.—The purchaser of a share in a partnership business must indemnify the vendor against the liabilities of the business.—DODSON *v.* DOWNEY, *Ch D. Farwell, J.*, 57; [1901] 2 Ch. 620; 70 L. J. Ch. 854; 85 L. T. 273.

PATENT :—

1. *Invention previously patented abroad—International convention—Patent not ante-dated—Publication between date of foreign patent and English patent—Certificate as to particulars of objections—Particulars of document not an anticipation—Certificate as to validity—Invalid patent—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 29, 31, 103.—A patentee of an invention already patented in a foreign country (which is a party to the international convention), desiring to ante-date his English patent under section 103 of the Patents, &c, Act, 1883, must apply for that purpose within the seven months limited by the section, and subsequent application to ante-date is too late, even although the English patent is applied for within the seven months. If the patentee does not get his grant ante-dated, the court will treat its actual date as conclusive upon the question, and consequently publications prior to its date, though subsequent to the date of the foreign patent, may be proved as anticipations.

In a patent action a certificate that particulars of objections have been proven, or are reasonable and proper, will not be given as to particulars of documents which are used to prove common knowledge and not as anticipations.

Semble, particulars of documents which relate to the common knowledge before the patent, and which are not relied upon as anticipations, need not be given by the defendant.

In an action for infringement, which has failed, and in which the patent has been declared invalid, a certificate that the validity of the patent has come in question will not be given.

Haslam & Co v. *Hall*, 5 Rep. Pat. Cas. 1, not followed.—ACETYLENE ILLUMINATING CO. v. UNITED ALKALI CO., *Ch.D. Buckley, J.*, 361; [1902], 1 Ch. 494; 71 L. J. Ch. 301.

2. *Prolongation—Petition of assignees—Account of inventor's profits.*—Petition by assignees of a patent for its extension dismissed, no means of judging whether the inventor had been remunerated having been given. An application for adjournment was refused as unprecedented. — PEACH'S PATENT, *P.C.*; [1902] A. C. 414.

3. *Prolongation—Petition by assignees—Expiration of foreign patents.*—Where the petitioners were assignees and purchasers of a British patent as a commercial speculation, and their accounts did not disclose with any clearness the extent of the profits made either by the inventors or the petitioners,

Held, that prolongation must be refused, although the invention was one of great merit and worthy of exceptional consideration.

Hopkinson's Patent, [1897] A. C. 249, followed.

Saxby's Patent, (1870) L. R. 3 P. C. 292, followed.

Held, further, that the expiration of the foreign patents for the same invention and the failure of the British patentee to push the invention in this country for the first seven years of the life of the patent were serious, though not in themselves objections to a prolongation.

Semet and Solvay's Patent. [1895] A. C. 78, followed.—HENDERSON'S PATENT, RE, *P.C.*; [1901] A. C. 616; 70 L. J. P. C. 119; 85 L. T. 358.

See also Practice, 42.

PAYMENT OUT.—See Practice, 15, 43-45.

PEER:—

Title or dignity of honour acquired by marriage—Re-marriage to a commoner—Damage—Injunction.—The High Court has no jurisdiction to entertain questions of dignity.

A peer's wife obtained a divorce and then married a commoner, but continued, on a *bonâ fide* claim of right, to use her title as a peer's wife.

Held, (1) such questions are vested in the House of Lords, not as an appellate court from a court of law, but in its own inherent jurisdiction as the Committee for Privileges; (2) no legal wrong was committed by the lady so continuing to use her former title.

Decision of Court of Appeal (49 W. R. 19, [1900] P. 305) affirmed.—COWLEY *v.* COWLEY *H.L.*, 81; [1901] A. C. 450; 70 L. J. P. 83; 85 L. T. 254.

POLICE:—

Pension—"Annual pay"—Free rooms and fuel—Police Act, 1890 (53 & 54 *Vict. c.* 45), *Schedule I., rr.* 1, 11.—By the Police Act, 1890, a constable, after a certain number of years' approved service, is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A divisional inspector of police with his family resided free of rent at the police station, and had the free use of fuel, gas, and water,

Held, that the value of the free residence and fuel, gas, and water was not part of his "pay" for the purpose of calculating his pension.

When a constable appeals to quarter sessions, under section 11 of the Police Act, 1890, from the decision of the watch committee as to the amount of his pension, a case may be stated for the opinion of the King's Bench Division on a question of law.—GOODWIN *v.* SHEFFIELD CORPORATION, *K.B.D.*; [1902] 1 K. B. 629; 71 L. J. K B. 492; 86 L. T. 682.

POOR LAW:—

1. *Rating—Appeal—Valuation list—Appeal against subsequent rate—Second notice of objection to assessment committee—Union Assessment Committee Amendment Act,* 1864 (27 & 28 *Vict. c.* 39), *s.* 1.—By 27 & 28 Vict. c. 39, s. 1, it is enacted that before any appeal shall be heard by any special or quarter sessions against a poor rate, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee: provided, that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by the committee, unless he shall have given the committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just.

The appellants, having been assessed in May, 1900, to a poor rate in conformity with a valuation list, gave notice of their objection to the list, and the committee reduced the assessment but refused to do so to the extent claimed by the appellants. The appellants then appealed to special sessions, when the assessment was still further reduced, but not to the extent claimed by the appellants. A subsequent rate was made in October, 1900, which was not appealed against. In May, 1901, another poor rate was made, under which the appellants were assessed on the valuation decided by the justices in special sessions. The appellants appealed to quarter sessions against this rate, but gave no fresh notice to the committee, of objection to the valuation list upon which this rate was made. The justices refused to hear the appeal, on the ground that no proper notice had been given to the committee.

Held, on a rule for a *mandamus* to the justices, that no proper notice of objection to the valuation list had been given to the assessment committee before the second appeal was brought, and therefore such appeal could not be heard. Under section 1 of the Act of 1864 it is a condition precedent to an appeal that the appellant shall make an objection before the committee to the valuation list.

Where there is a second rate and a second appeal a second notice of objection to the valuation list must be given.

Reg. v. *Great Western Railway Co*, 17 W. R 670 L. R 4 Q B. 323, followed.—REX *v.* ESSEX JUSTICES, *K.B.D.*, 188; [1902] 1 K. B. 180; 71 L J. K. B. 148; 85 L. J. 678.

2. *Settlement—Amalgamation of part of parish with another parish—Divided Parishes and Poor Law Amendment Act,* 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act,* 1879 (42 & 43 *Vict. c.* 54).—Where a pauper has acquired a settlement in a parish, and subsequently by an order of the Local Government Board made under the Divided Parishes and Poor Law Amendment Act, 1876, as amended by the Poor Law Act, 1879, part of another parish has been amalgamated with the former parish, the parish does not thereby cease to exist, and the pauper's settlement is not lost.

Judgment of the Divisional Court (49 W. R. 443, [1901] 1 K. B. 720) affirmed.—WEST HAM UNION *v.* LONDON COUNTY COUNCIL, *C.A.*, 275; [1902] 1 K. B. 562; 71 L. J. K. B. 299; 86 L. T. 134.

3. *Settlement—Capacity of deserted wife to acquire a settlement—Poor Law (Scotland) Act,* 1898 (61 & 62 *Vict. c.* 21), *s.* 1.—The House reversed the decision of the majority of the seven judges of the Court of Sessions, (1901) 3 F. 705, holding that a wife when deserted by her husband has no capacity to acquire a parochial settlement.—RUTHERGLEN PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL, *H.L*; [1902] A. C. 366; 86 L. T. 607.

POWER:—

1. *Appointment—General power—Exercise by will—Residuary gift—Lapse—Blending of funds.*—A testatrix having, under her marriage settlement, a general testamentary power over certain securities, appointed by her will that the trustees of the settlement should hold the securities for certain appointees. She empowered the trustees to appropriate any security or investment subject to her power of appointment or belonging to her at the time of her decease towards payment of legacies, and as to the residue of her real and personal property she devised, bequeathed, and appointed the same, subject to payment of debts, to H. S., one of the said appointees, absolutely. H. S. died in the life-time of the testatrix

Held (Vaughan Williams, L.J., dissenting), that the testatrix intended to blend the settlement fund with her own property for all purposes, and that the lapsed share in the appointed fund passed under the gift of residue in her will.—MARTEN, RE, SHAW *v.* MARTEN, *C.A.*, 209; [1902] 1 Ch. 314; 71 L. J. Ch. 203; 85 L. T. 704.

2. *Appointment—"Give, devise, bequeath, and appoint"—Exercise by will—Subsequent will—No clause of revocation—No reference to power—Power held to be exercised—First will excluded from probate.*—Where a testator, having made a will reciting a power of appointment and exercising or purporting to exercise that power,

4, c. 21, s. 6, or the Rules of the Supreme Court.—REX v. CANTERBURY (ARCHBISHOP), GORE, RE, (No. 2), *K.B.D.*, 476; 86 L. T. 450.

15. *Costs—Land compulsorily acquired—Payment into court—Default of vendor—Petition for payment out—Jurisdiction of court—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 80—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict.* c. 44), *s.* 5.—The mere absence of jurisdiction in the court to confer costs under a particular statute does not amount to an express prohibition by the Legislature so as to deprive the court of the discretion as to costs conferred by section 5 of the Judicature Act, 1890. The Lands Clauses Consolidation Act, 1845, s. 80, provides that the costs of all proceedings for the payment out of court of the purchase-money of lands compulsorily acquired shall be borne by the promoters of the undertaking, except where the payment into court has been rendered necessary by the wilful default of the vendor.

Held, that the court has jurisdiction to order the costs of a petition for payment out presented by the incumbrancers of a vendor, who had neglected to make a good title, to be paid by the promoters of the undertaking.—SCHMARR, RE, *C.A.*, 245; [1902] 1 Ch. 326; 71 L. J. Ch. 219; 86 L. T. 71.

16. *Costs—Lease—Forfeiture of lease—Vesting of property in underlessee—Inquiry—Conveyancing Act*, 1892 (55 & 56 *Vict.* c. 13). *s.* 4.—Where a lease became forfeited by virtue of a proviso contained therein, and the court, acting under section 4 of the Conveyancing Act, 1892, made an order vesting the property in the underlessee, the underlessee was ordered to pay the costs of the inquiry that was necessary to determine the new rent.—EWART v. FRYER, *Ch.D. Joyce, J.*; 86 L. T. 676.

17. *Costs—Payment into court with denial of liability—Recovery of less than amount paid in—Costs of issues found for plaintiff—R. S. C.*, 1883, *ord.* 22, *rr.* 1, 6.—In an action to recover damages for injuries arising from the negligence of the defendants, they denied the negligence and paid a sum of money into court with a denial of liability. The plaintiffs did not accept the money paid into court in satisfaction of their claim, and the action went to trial and resulted in a verdict for a less amount. The judge who tried the case ordered judgment to be entered for the defendants with the general costs of the action, and that the plaintiffs should have the costs of the issues found in their favour.

Held, that the questions, raised by the pleadings, whether the defendants had been guilty of negligence, and, if so, whether the money paid into court was sufficient, were distinct issues, and that the plaintiffs were entitled to their costs on the issue of negligence on which they had succeeded.—WAGSTAFFE v. BENTLEY, *C.A.*; [1902] 1 K. B. 124; 71 L. J. K. B. 55; 85 L. T. 744.

18. *Costs—Security for costs—Insolvent company—Prosecution of company's appeal by receiver in debenture-holders' action—Security for costs of appeal—Reversal of judgment and order for payment out of security to receiver—Appeal to the House of Lords—Reversal of judgment of Court of Appeal—Repayment of security.*—In June, 1898, H. & Co. obtained an order in the Court of Appeal against the cycle corporation for security for the costs of the appeal, and £100 was paid into court by the receiver as security, he having obtained leave in the debenture-holders' action to give security. Shortly afterwards H & Co. applied to the Court of Appeal that the receiver or the plaintiffs in the debenture-holders' action might be added as parties. The Court of Appeal refused this application, but ordered the security for costs to be increased by £100, and this sum was paid into court by the receiver, making £200 in all.

The appeal was heard in July, 1899, and was allowed with costs, and the £200 paid into court as security was ordered to be paid out to the receiver. H. & Co. appealed to the House of Lords, when the judgment of the Court of Appeal was reversed and the judgment of Phillimore, J., restored, and the cycle corporation were ordered to pay the costs of the proceedings in the Court of Appeal and in the House of Lords.

H. & Co., who held debentures in the cycle corporation and had liberty to attend the proceedings, took out a summons in this action asking that the receiver might be ordered to pay the costs recoverable by them under the order of the House of Lords, or in the alternative to pay to them the £200 paid out to him under the order of the Court of Appeal.

The court dismissed the appeal, and held (1) that the court had no jurisdiction to make the order; (2) that, assuming the court had jurisdiction, it was doubtful whether the court ought to exercise it.—GRIFFITHS CYCLE CORPORATION (LIMITED), RE, *C.A.*; 85 L. T. 776.

19. *Costs—Security for—Insolvent plaintiff—Assignment for benefit of creditors—Assignment of cause of action—Nominal plaintiff.*—The plaintiff, being insolvent and having brought an action against the defendants, executed a deed whereby he assigned to a trustee for the benefit of his creditors all his property, estate, and effects (with one insignificant exception), consisting of the goodwill and assets of his business of a tile and mosaic merchant, including the stock and book debts of the business, and also all the beneficial interest and property in the action brought by him against the defendants, but the right, property, or interest of the trustee therein was not to arise until judgment had been obtained or the plaintiff had effected terms of settlement. The plaintiff covenanted with the trustee to prosecute the action diligently against the defendants and not to arrange terms of settlement without the trustee's consent in writing and also to settle the action, if occasion should arise, upon such terms as the trustee should consider fair and reasonable.

Held, that the plaintiff was merely a nominal plaintiff suing for the benefit of third persons, and, therefore, that he must give security for the defendants' costs of the action.—LLOYD v. HATHERN STATION BRICK CO., *C.A.*; 85 L. T. 158.

20. *Costs—Solicitor and client—Taxation—Disbursement—Estate duty—Solicitors Act*, 1843 (6 & 7 *Vict.* c. 73), *s.* 37.—A payment for estate duty made by a solicitor on behalf of his client is not a "disbursement" within the meaning of section 37 of the Solicitors Act, 1843, and ought not to be included in his bill of costs.

In re Lamb, 37 W. R. 306, 23 Q. B. D. 5, overruled.—KINGDON AND WILSON, RE, *C.A.*, 533; [1902] 2 Ch. 242; 71 L. J. Ch. 604; 86 L. T. 639.

21. *Costs—Taxation—Co-defendants—Judgment against one defendant—Liability of one defendant for all plaintiffs' costs.*—In an action against two defendants to restrain an infringement of copyright, the plaintiffs obtained an injunction with costs against one defendant, G., but failed to obtain any order against the other defendant, to whom, however, no costs were given. By the order, as drawn up, the defendant G. was directed to pay to the plaintiffs "their costs of this action"; the taxing-

master allowed the plaintiffs all the costs of the action, including those incurred against the second defendant; the defendant G. objected that in this way he was unfairly made to pay the costs of the plaintiffs' unsuccessful attempt to fix his co-defendant with liability. The taxing-master overruled this objection, on the ground that the order did not direct him to make any deduction on account of the joinder of the second defendant. On a summons to review,

Held, that the order was clear, that the taxing-master's view was correct, and that the defendant G. must pay all the plaintiffs' costs of the action — KELLY'S DIRECTORIES (LIMITED) *v.* GAVIN AND LLOYDS, *Ch.D. Byrne, J.*; [1901] 2 Ch. 763; 70 L. J. Ch. 786; 85 L. T. 399.

22. *Costs—Taxation — "Disbursement" — Money paid to "Security for costs account"—Solicitors Act,* 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—Moneys paid by solicitors in conducting an action to the "Security for costs account" for discovery and interrogatories are "disbursements" within the meaning of the Solicitors Act, 1843, and are properly entered as such in a bill of costs.

In re Remnant, 11 Beav. 603, explained and followed.—BUCKWELL & BERKELEY, RE, *Ch.D. Kekewich, J.*, 629.

23. *Costs—Taxation—Examination of witness in London—Attendance of country solicitor—R. S. C.,* 1883, *ord.* 65, *r.* 27 (29); *Appendix N. Item* 147—*R. S. C., January*, 1902, *r.* 10.—By rule 10 of the R. S. C., January, 1902, regulation 29 of ord. 65, r. 27, was annulled, and the following regulation was substituted for it: "On every taxation the master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party."

Upon taxation of costs as between party and party the taxing-master allowed a sum of £12 12s. for the costs of the attendance of a country solicitor on the examination of a witness in London before the trial.

Held, that, under rule 10 of the Rules of January, 1902, the taxing-master had a discretion to allow this sum, though it exceeded the maximum authorized by the scale of fees in Appendix N, Item No. 147, to the R. S. C., 1883.—MCIVER & Co. *v.* TATE STEAMERS (LIMITED), *C.A.*, 642; [1902] 2 K. B. 184.

24. *Costs—Taxation—Order for payment of costs to successful party except so far as increased by certain issues—Affidavit relating both to general and to excepted issues.*—The Registrar of Trade-Marks having granted an application by W., C., & Co. for the registration of their trade-mark, an appeal was brought by the R. Co., which was allowed by Bryne, J. (83 L T. Rep. 150, [1900] 2 Ch. 218). His lordship gave the costs of the appeal to the R. Co. except so far as they had been increased by certain issues, the costs of which were to be paid to W., C., & Co. Upon taxation of the costs, the taxing-master disallowed the costs of a witness who had filed an affidavit upon which he had been cross-examined. The R. Co. objected (*inter alia*) to the disallowance of these costs on the ground that the affidavit did not relate solely to the excepted issues. In his answer to objections the taxing-master overruled the objections. The R. Co. took out a summons to review taxation. Byrne, J. affirmed the decision of the taxing-master upon the ground that the evidence in question was unnecessary in any view of the case. The R. Co. appealed upon the ground that this evidence did not relate solely to the excepted issues; and that consequently the whole costs of the witness went to the appellants, the successful parties, on the principle of *Brown* v. *Houston*, 85 L. T. Rep. 160, [1901] 2 K. B. 855.

Held, that the decision of the taxing-master was perfectly right; and that the case of *Brown* v. *Houston* did not apply, because that was a common law action and the order in no way separated the issues, whereas in the present case the learned judge had distinctly separated the issues. — WRIGHT, CROSSLEY, & Co., RE, *C.A.*; 86 L. T. 280.

25. *Costs—Taxation—Order to tax costs and to include therein remuneration of receiver—Separate certificate as to costs only—R. S C*, 1883, *ord.* 45, *r.* 27, *sub-rule* 25.—Under an order directing the taxing-master to tax the plaintiffs' costs of an action, including the remuneration of the receivers and managers appointed in the action, and to certify the balance after deducting certain costs of the defendants, the taxing-master has no power to make a separate certificate for the costs alone.—SILKSTONE AND HAIGH MOOR COAL CO. *v.* EDEY, *C.A.*; [1901] 2 Ch. 652; 70 L. J. Ch. 774; 85 L. T. 300.

26. *Costs—Taxation—Solicitor and client scale.*—The taxation of the costs of parties as between solicitor and client should still in a proper case be expressly directed by the court, notwithstanding the provisions of the new regulation in the Rules of the Supreme Court, 1883, ord. 45, r. 27 (29) (January, 1902, r. 10).—BRADSHAW, RE, BRADSHAW *v.* BRADSHAW, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 436; 71 L. J. Ch. 230; 86 L. T. 253.

27. *Discovery—Interrogatories—Slander—Privilege —Question as to information inducing belief—Question as to steps taken to ascertain truth.*—Where in an action for slander imputing to the plaintiff that he had received a bribe in respect of a vote given by him as a vestryman, the defendant pleaded privilege, an interrogatory proposed to be administered by the plaintiff, asking the defendant what information, if any, he had that induced him to believe that the words were true, and what steps, if any, he had taken before speaking the words to ascertain whether they were true or not, was allowed.—ELLIOTT *v.* GARRETT, *K.B.D.*, 504; [1902] 1 K. B. 870; 71 L. J. K. B. 415; 86 L. T. 441.

28. *Discovery—Particulars—Directors' liability—Statements in prospectus—"Reasonable ground to believe" truth of statements — Practice — Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*R. S. C.*, 1883, *ord.* 19, *r* 6.—In an action against directors of a company claiming compensation under the Directors' Liability Act, 1890, in respect of untrue statements in the prospectus, the defendants by their defence said that they *bonâ fide* believed the statements to be true, and that they had reasonable grounds for their belief.

Held, that the defendants must deliver particulars of the grounds of their belief.—ALMAN *v.* OPPERT, *C.A.*; [1901] 2 K. B. 576; 70 L. J. Q. B. 745; 84 L. T. 828.

29. *Discovery — Privilege — Solicitor and client— Evasion of statute.*—Confidential communications between solicitor and client, which are not in themselves parts of a criminal or illegal proceeding, are privileged from disclosure, and this is not displaced by a mere allegation that certain documents were prepared "with intent to evade" the payment of duty. The word "evade" is ambiguous, and to displace such privilege there must be some definite charge.

Decision of Court of Appeal ([1900] 2 Q. B. 163) reversed.—BULLIVANT *v.* ATTORNEY-GENERAL FOR VICTORIA, *H.L.*, 1; [1901] A. C. 196.

30. *Divorce — Security for costs — Claim for damages—Bankrupt petitioner—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85). *s.* 33.—The court will not order security for costs to be given by a petitioner in a divorce action merely because he is an undischarged bankrupt, though he claims damages against the co-respondent

Smith v. *Smith*, 31 W. R 124, 7 P. D. 227, overruled.—BLACKETT *v* BLACKETT AND FRAIL, *C.A.*, 516; [1902] P. 170; 71 L. J. P. 69; 86 L. T. 669.

31. *Foreign judgment, action to enforce—Claim founded on alleged breach of agreement—Judgment signed in default of appearance against a British subject not resident in the country—Condition of agreement that all disputes should be submitted to foreign jurisdiction.*—By a contract made in Belgium between the plaintiffs and the defendant, who was a British subject neither domiciled nor resident in in Belgium, it was agreed that all disputes should be submitted to Belgian jurisdiction. Disputes having arisen, the plaintiffs sued the defendant in in the Tribunal of Commerce, Ghent, the citation or summons being duly sent by registered post to the defendant's address in England, and recovered judgment in default of appearance.

Held, that, as the defendant had agreed to submit disputes arising out of the contract to Belgian jurisdiction, he was bound by the judgment of the foreign court.

Held, also, that whether in fact he received the citation by post was immaterial, as the proceedings were regular, and even if by some accident the citation did not reach the defendant, as he alleged was the case, it would be no answer to the action.

Copin v. *Adamson*, 22 W. R. 658, L. R 9 Ex 345, and *Rousillon* v. *Rousillon*, 28 W. R. 623 14 Ch. D. 351, considered and followed. — FEYERICKS *v.* HUBBARD, *K.B.D.*, 557; 71 L. J. K. B. 509; 86 L. T. 829.

32. Formâ pauperis, *leave to appeal in—Order granting leave discharged—Appeal from the royal court of St. Lucia.*—Leave to appeal to the King in Council in *formâ pauperis* is not of course, and ought not to be granted where it is made apparent that the proposed appeal is idle and frivolous. An order to that effect discharged when on the application of the respondent it appeared that there was no substantial question to be tried, and where the order would not have been made if all the materials had been before their lordships.—QUINLAN *v.* QUINLAN, *P.C.*; [1901] A. C. 612; 70 L. J. P. C. 122; 85 L. T. 360.

33. *Inspection—Action for interference with water supply—Interlocutory application for an order for plaintiffs to enter upon and make excavations in defendant's land—Application refused for an action to restrain interference with the plaintiffs' water supply.*—The plaintiffs applied by motion for an order permitting them to enter upon the defendant's land in order to inspect a certain shaft, and if necessary sink other shafts for the purpose of ascertaining whether water which came to the surface at a certain spring flowed underground in a known and defined channel.

Held, without deciding whether the plaintiffs might or might not be entitled to make the necessary inspection and excavations at some time, that there was no sufficient evidence to justify the court in making any order on the motion.—BRADFORD CORPORATION *v.* FERRAND, *Ch.D. Farwell, J.*; 86 L. T. 497.

34. *Inspection—Joint owners—Trade secret—Secret recipe—"Liberty to apply"—R. S. C.*, 1883, *ord.* 31, *r.* 14.—Where A. and B., each claiming under assignments from C., had been held at the trial of an action between A. and B. to be joint owners of a secret remedy, and each entitled to make and sell the remedy, but the paper upon which the secret recipe was written had been destroyed,

Held, that A., to whom the recipe had never been communicated, was not entitled, upon an application made under the liberty to apply given at the trial, to demand from B. either a copy or inspection of the secret recipe.

Decision of Joyce, J. (*ante*, p. 186). affirmed.—POISSON *v.* ROBERTSON, *C.A.*, 260; 86 L. T. 302.

35. *Interpleader—Goods seized in execution—Claim under an absolute bill of sale—Order for sale of the goods—Jurisdiction—R. S. C.*, 1883, *ord.* 57.—Where a person claims as absolute owner goods which have been seized in execution, and the sheriff interpleads, the court or a judge has jurisdiction to order a sale of the goods and payment of the proceeds into court, if it seems just and reasonable to make that order.—PAQUIN *v.* ROBINSON, *C.A.*; 85 L. T. 5.

36. *Leave to defend—R. S. C.*, 1883, *ord.* 14.—Unless the court is satisfied that the defendant has no defence, the plaintiff is not entitled to judgment under order 14. The merits of the case are not to be gone into upon an application under this order, and a defence is not to be shut out where on the disclosed facts a triable issue arises —JACOBS *v.* BOOTH'S DISTILLERY, *H.L.*, 49; 85 L. T. 262.

37. *New trial refused—No application for discovery —Cancelment of security by married woman for her husband's debts.*—Held that the appellants could not enforce a charge on the respondent's share in her father's estate, obtained through their agent, who was also executor and trustee for her under her father's will, by pressure through her husband, whose debts were to be thereby secured, concealment of material facts, and without independent advice.

Held, further, that the appellants, who before the trial had made no application for discovery of documents, were not entitled to a new trial on the ground of an important document shown to have been accessible at the trial, if called for, having since come to their knowledge.—TURNBULL *v.* DUVAL, *P.C.*; [1902] A. C. 429.

38. *Parties—Adding defendant—R. S. C.*, 1883, *ord.* 16, *r.* 11 —In an action where the defendant is sued in respect of a matter for which he is jointly and severally liable with another person, ord. 16, r. 11, does not enable the court, upon the application of the defendant, to add that other person as a party to the action in order that the defendant may claim contribution from him. — MCCHEANE *v.* GYLES (No. 2), *Ch.D. Buckley, J.*, 387; [1902] 1 Ch. 911; 71 L. J. Ch. 446; 86 L. T. 217.

39. *Parties — Joinder of defendants — Separate causes of action—R S. C.*, 1883, *ord.* 16, *r.* 4.—The plaintiff was engaged by H. to act at a theatre of which D. was lessee and manager. In an action brought by him against H. and D. in respect of an alleged slander spoken by one defendant on one occasion and by the other defendant on another occasion, and also in respect of an alleged conspiracy between them wrongfully to dismiss him from his employment,

Held, that these claims could not be joined in one action.—POPE *v.* HAWTREY, *C.A.*; 85 L. T. 263.

40. *Parties—Substitution of plaintiff—Bonâ fide mistake—R. S. C.*, 1883, *ord.* 16, *r.* 2.—The plaintiff

in an action to recover a balance due under a building contract had executed an assignment of all moneys due or to become due to him under the contract. On the trial of the preliminary question whether the assignment was such as to bar the plaintiff's right of action, the judge held that it was not an absolute assignment, and that the action might proceed, but the Court of Appeal held that it was an absolute assignment, and that therefore the plaintiff had no cause of action. In an application to substitute the assignees as plaintiffs in the action,

Held, that, as it was clear that there had been a *bonâ fide* mistake of law, there was jurisdiction under ord. 16, r. 2, to substitute the assignees as plaintiffs.—HUGHES *v.* PUMP HOUSE HOTEL CO. (No. 2), *C.A.*, 677.

41. *Parties—Third party—Counterclaim—Plaintiff serving third-party notice—Jurisdiction—R. S. C.*, 1883, *ord.* 16, *r.* 48.—Where a defendant in an action counterclaims against the plaintiff, the latter can serve a third-party notice, under ord. 16 r. 48, on a person against whom he claims contribution or indemnity in respect of the defendant's counterclaim.—LEVI *v.* ANGLO-CONTINENTAL GOLD REEFS OF RHODESIA, *C.A.*, 625.

42. *Patent—Action for infringement—Certificate as to particulars of objections—Costs—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-section* 6.—When in an action for infringement of a patent the plaintiffs offer no evidence and the action is dismissed with costs, the court will not hear evidence that the defendants' particulars of objections were reasonable and proper, and will not grant a certificate under section 29, sub-section 6, of the Patents Designs, and Trade-Marks Act, 1883, to that effect.—AMERICAN STEEL AND WIRE CO. *v.* GLOVER, *Ch.D. Farwell, J.*, 284.

43. *Payment out—Costs—Brokerage—Compulsory purchase—Payment out of court—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80.—The proceeds of land compulsorily sold were paid into court and invested. On application for the sale of the investments and payment out of the money by the party absolutely entitled,

Held, that the party who paid the money into court must pay the brokerage on the sale of the investments.—MAGDALEN COLLEGE, OXFORD, RE, *Ch.D. Cozens-Hardy, J.*, 90; [1901] 2 Ch. 786; 70 L. J. Ch. 821; 85 L. T. 479.

44. *Payment out—Fund in court—Person entitled to take out letters of administration—Fund under £20.*—Where a person entitled to a fund in court has died intestate, the court will not allow the fund to be paid out to the person entitled to take out letters of administration to the estate of the intestate, but who has not done so, even although the fund is under £20.

Hinnings v. *Hinnings*, 2 Hem. & M. 32. 12 W. R. Ch. Dig. 3, not followed.—FROGLEY *v.* PHILLIPS, *Ch.D. Byrne, J.*, 184.

45. *Payment out—Fund in court—Stop order—Agreement vesting "all property" of a bankrupt in trustees—Existence of fund not known at date of agreement—Vesting order.*—"All the property" of a bankrupt was by an agreement, confirmed by an order of the court, vested in a company and the bankruptcy annulled. The agreement contained a list of the bankrupt's properties, which did not, however, include a fund in court, to which the bankrupt, unknown to any of the parties to the agreement or their solicitors, was then absolutely entitled. The late bankrupt subsequently obtained an order of the court for payment out to him of the fund upon affidavits that he had not incumbered. No stop order was ever obtained against the fund.

Held, that the agreement operated as a complete *cessio bonorum* of the bankrupt, and that he was liable to pay the amount of the fund to the company.

Decision of Kekewich, J. (49 W. R. 341, [1901] 1 Ch. 460), affirmed.—BATH *v.* BATH, *C.A.*, 535; 71 L. J. Ch. 500; 86 L. T. 435.

46. *Rule against justices—Applicant moving in person—Justices' Protection Act*, 1848 (11 & 12 *Vict. c.* 44), *s.* 5.—A motion for a rule against justices under section 5 of the Justices' Protection Act, 1848, must be made by counsel.—WALLACE, EX PARTE, *C.A.*, 678.

47. *Set off—Equitable deduction—Vendor and purchaser—Specific performance—Costs—Debt en autre droit.*—A purchaser obtained judgment for specific performance of a contract of sale against his vendor with costs. The vendor could only make title as administratrix of an intestate. The vendor was entitled beneficially as next-of-kin of the intestate to a portion of the proceeds of sale.

Held, on motion to retain the costs of the action out of the vendor's beneficial interest in the purchase-money, that the court having no power in this case to administer the estate of the intestate, the plaintiff purchaser could not bring into account all or any part of an unascertained sum to which the defendant might be beneficially entitled in the administration of her intestate's estate as against the purchase-money which was due to the defendant in her representative capacity.—PHILLIPS *v.* HOWELL, *Ch.D. Byrne, J.*, 73; [1901] 2 Ch. 773; 71 L. J. Ch. 13; 85 L. T. 777.

48. *Setting aside judgment—Allegation of fraud—Res judicata—Probate suit—Evidence.*—A judgment obtained in a probate action may be set aside if it has been procured by the fraud of a party to the action, notwithstanding the innocence of other parties to the action having the same interest. But a party seeking to set aside a judgment on the ground of fraud must, in order to succeed, adduce evidence to show that there is a reasonable probability of the alleged fraud being established. Accordingly, where an action was brought to set aside a judgment granting probate of a will on the ground that since the judgment a document, which, however, could not have been put into evidence, had come into the hands of the police confessing that the will was a forgery.

Held, that the action ought to be dismissed, on the ground that the matter was *res judicata*.

Decision of Barnes, J. (*ante*, p. 192), reversed.—BIRCH *v.* BIRCH, *C.A.*, 437; [1902] P. 130; 71 L. J. P. 58; 86 L. T. 364.

49. *Stay of execution pending appeal—Jurisdiction of Court of Appeal—R. S. C.*, 1883, *ord.* 58, *rr.* 16, 17.—The Court of Appeal has jurisdiction to hear an application for a stay of execution in a cause in which an appeal has been entered in that court, although no application for a stay has previously been made to the judge who tried the cause.—BROWN *v.* BROOK, *C.A.*; 86 L. T. 373.

50 *Summons for directions—Interlocutory order to dismiss action—R. S. C.*, 1893, *ord.* 30, *rr.* 1, 2, 4, 5.—An order may be made in chambers on an application under the summons for directions to strike out a statement of claim as disclosing no reasonable cause of action and as frivolous.

An application so made to strike out a statement of claim is an interlocutory matter within the

meaning of ord. 30, r. 5.—PEPPERELL *v.* HIRD, *Ch.D. Byrne, J.*, 491; [1902] 1 Ch. 477; 71 L. J. Ch. 282.

51. *Third-party notice—Service—Third party out of jurisdiction—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24—*R. S. C.*, 1883, *ord.* 11, *r.* 1 (g); *ord.* 16, *r.* 48.—To enable a third-party notice to be served out of the jurisdiction it must be such that if it were a writ it would be capable of being served out of the jurisdiction, and in determining whether the notice could be so served if it were a writ, the court will not have regard to the claim made by the plaintiff in the action, but will only consider the claim actually made by the defendant in the third-party notice.

In an action against the surviving trustee of a settlement leave was refused to the defendant to serve a third-party notice out of the jurisdiction on the executrix and residuary legatee of a former trustee, on the ground that, treating the third-party notice as an original writ, there was no action brought by the defendant against some other person properly served within the jurisdiction, so as to bring the case within ord. 11, r. 1 (*g*).—MCCHEANE *v.* GYLES (No. 1), *C.A.*, 376; [1902] 1 Ch. 287; 71 L. J. Ch. 183; 86 L. T. 1.

52. *Writ—Service—Foreign corporation carrying on business within the jurisdiction—Stand at an exhibition—Head officer—R. S. C.*, 1883, *ord.* 9, *r.* 8.—A foreign corporation, who were manufacturers of motor-cars, rented for their exclusive use a stand at an exhibition in England for nine days for the purpose of exhibiting their goods, and sent over a person in their employment as their representative to look after the exhibits and to take orders for their goods.

Held, that the foreign corporation carried on business at the stand at the exhibition so as to be resident within the jurisdiction, and they could be sued in this country and the writ could be served on their head officer here.—DUNLOP PNEUMATIC TYRE CO. *v.* ACTIEN GESELLSCHAFT FUR MOTOR FAHRZEUGBAU. &c., *C.A.*, 225; [1902] 1 K. B. 342; 71 L. J. K. B. 284; 86 L. T. 472.

53. *Writ—Service out of jurisdiction—"Breach of contract within jurisdiction"—Action for wrongful dismissal—Letter posted abroad to plaintiff in England—R. S C.*, 1883, *ord.* 11, *r.* 1 (e)—The plaintiff was employed by the defendant, who was a foreigner residing abroad, as the London correspondent of a newspaper, of which the defendant was the proprietor. The defendant wrote and posted abroad a letter addressed to and received by the plaintiff in England giving him two weeks' notice to terminate the employment. In an action for breach of contract and wrongful dismissal,

Held, that the alleged breach occurred abroad and not within the jurisdiction, and that therefore leave could not be given under ord. 11, r. 1 (*e*), to serve notice of the writ on the defendant out of the jurisdiction.

Cherry v. *Thompson*, 20 W. R. 1029, L. R. 7 Q. B. 573, and *Hamilton* v. *Barr*, 18 L R. Ir. 297, 35 W. R. Dig. 163, followed.—HOLLAND *v.* BENNETT, *C.A.*, 401; [1902] 1 K. B. 867; 71 L. J. K. B. 490; 86 L. T. 485.

54. *Writ—Service out of jurisdiction—Debenture deed—Foreign assets—Necessary or proper party to an action—R. S. C.*, 1883, *ord.* 11, *r.* 1 (g).—In an action where the court has jurisdiction to grant the relief asked, service of the writ on persons outside the jurisdiction who are necessary and proper parties to the action will be allowed.—DUDER *v.* AMSTERDAMSCH TRUSTEES KANTOOR, *Ch.D. Byrne, J.*, 551; [1902] 2 Ch. 132; 71 L. J. Ch. 618.

See also Probate, 10, 11, 12.

PRESCRIPTION.—See Easement, 1, 3, 4, 5; Inclosure, 2; Natal, Law of, 1.

PRINCIPAL AND AGENT:—

1. *Authority of agent—Ostensible authority—Holding out—Authority to pledge credit—Master and coachman—Authority of coachman to order forage.*—The defendant employed a coachman under an arrangement whereby the coachman was to be paid a weekly sum, including the cost of foraging the defendant's horses. The coachman ordered forage for the defendant's horses from the plaintiff without mentioning the arrangement, and the plaintiff supplied forage accordingly for several months, giving credit to the defendant. The defendant duly paid the agreed weekly sums to his coachman, and did not know from whom he ordered forage.

Held, that the mere relation of master and coachman did not of itself involve as a matter of law ostensible authority on the part of the coachman to pledge the master's credit for forage supplied for the master's horses, and that there was no evidence of a holding out by the defendant of his coachman as having such authority.—WRIGHT *v.* GLYN, *K.B.D*, 402; [1902] 1 K. B. 745; 71 L. J. K. B. 497; 86 L. T. 373.

2. *Commission—Agreement to pay commission on properties purchased—Property introduced to principal—Promotion by principal of company to purchase property—Liability of principal to pay commission.*—The defendant brewery desired to acquire some public-houses in a particular district and agreed to pay the plaintiff commission on all licensed property they might purchase through his introduction. Subsequently the defendants abandoned that idea, and instead promoted a new company, which ultimately acquired certain licensed property originally brought to the notice of the defendants by the plaintiff.

Held, that as the new company was merely ancillary to the old, the commission was payable by the defendants.—GUNN *v.* SHOWELL'S BREWERY CO., *C.A.*, 659.

3. *Contract—Agreement by agent not to interfere with business after ceasing to be employed—Breaches—Liquidated damages—Injunction—Election.*—The plaintiffs, an assurance company, appointed the defendant their agent under an agreement, in which it was provided that in the event of the defendant ceasing to act as such agent he should in no way give information about the company's connections or interfere either directly or indirectly with the company's business, or represent any other company doing a similar business within a radius of fifty miles from the headquarters of his agency within one year from the date of his ceasing to act for the plaintiff company, and that in case of the breach of the agreement in that behalf he should forfeit and pay to the plaintiffs a sum of £100 by way of ascertained and liquidated damages.

The defendant having committed breaches of the agreement, the plaintiffs brought an action against him and claimed the £100 liquidated damages and an injunction to restrain him from interfering with their business.

Held, that the plaintiffs were not entitled to an injunction as well as to the liquidated damages, but must elect between the two remedies.—GENERAL ACCIDENT ASSURANCE CORPORATION *v.* NOEL, *K.B.D.*, 381; [1902] 1 K. B. 377; 71 L. J. K. B. 236; 86 L. T. 555.

4. *Power of attorney—Forged signature—Transfer of stock—Stockbroker—Implied authority—Liability—Indemnity.*—Any person who, by representing himself as having the authority of the principal, induces another person to enter into any transaction, into which he would not have entered but for the representation, is liable personally for the damage that occurs if the representation turns out to be untrue to the injury of the person to whom it was made. Thus a stockbroker who executes a transfer of stock as attorney under a power is liable for any loss occasioned by the fact that a signature on the power has been forged, though it has been forged without his knowledge and he honestly believed it to be genuine.

Collen v. *Wright*, 5 W. R. 265, 7 E. & B. 301, 6 W. R. 123, 8 E. & B. 647, and *Firbank's Executors* v. *Humphreys*, 35 W. R. 92, 18 Q. B. D. 54, followed.

Decision of Kekewich, J. (49 W. R 391, [1901] 1 Ch. 652), affirmed.—OLIVER *v.* BANK OF ENGLAND, *C.A.*, 340; [1902] 1 Ch. 610; 71 L J. Ch. 388; 86 L. T. 248.

5. *Power of attorney—Power to borrow—Loan to agent—Money paid into principal's banking account—Misapplication by agent—Money had and received to use of lender.*—A power of attorney authorizing an agent to purchase goods in connection with the business of his principal, and where necessary in connection with any purchases made on behalf of the principal or in connection with his said business, to draw and accept bills of exchange and sign the name of his principal to cheques on the banking account of the principal, does not confer on the agent a general power to borrow.

Money borrowed by the agent under such a power in the name of his principal and paid into the principal's banking account, and then drawn out by the agent and applied to his own purposes, cannot be recovered by the lender from the principal, as money had and received to the use of the lender, unless the principal knew, or could in the ordinary course of business have known, of the transaction, or unless the principal had the benefit of the money so paid into his account.

Marsh v. *Keating*, 1 Bing. N. C. 198. considered.

Decision of Farwell, J. (49 W. R. 365, [1901] 1 Ch. 261), affirmed.—JACOBS *v.* MORRIS, *C.A.*, 371; [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275.

See also Insurance, 1.

PRINCIPAL AND SURETY:—

1. *Guarantee—Bond to secure fidelity of employee—Death of surety—Notice—Determination of liability.*—Where a bond is given by a surety for the integrity of a person, in consideration of that person's being employed by the obligee of the bond, the liability of the surety will not, unless it be expressly so stipulated in the bond, be either determinable upon notice, or determined by his death.—CRACE, RE, BALFOUR *v.* CRACE, *Ch.D. Joyce, J.*; [1902] 1 Ch. 733; 71 L. J. Ch. 358; 86 L. T. 144.

2. *Mortgage—Collateral security.*—A surety has rights with regard to collateral security, even before he pays or is called upon to pay the debt.—DIXON *v.* STEEL, *Ch.D. Cozens-Hardy, J.*, 132; [1901] 2 Ch. 602; 70 L. J. Ch. 794; 85 L. T. 404.

See also Guarantee, 1.

PRISONERS:—

Legal custody of, during trial—Illegal detention by warder after acquittal—Liability of governor of prison.—The legal custody of prisoners during trial is in the governor of the gaol from which they have come or would have come if they had not been bailed; and consequently if after a prisoner has been acquitted and ordered to be discharged the warders unlawfully detain him, the governor is responsible for the illegal act although he may not have been present in court or ordered it.—MEE *v.* CRUICKSHANK, *K.B.D.*; 86 L. T. 708.

PROBATE:—

1. *Administration bond—Intestate estates—Duchy of Lancaster—Death of holder of title—Death of administrator appointed by her—Nominee of her executors—Form of grant—Sureties dispensed with.*—The court allowed the executors appointed under the will of her late Majesty Queen Victoria to nominate a person to take a number of grants for their use in the estates of persons who had died domiciled in the County Palatine of Lancaster, and which had been either wholly or partially unadministered.

The court, however, while consenting to dispense with sureties, required that, inasmuch as the administrator was not to take for the use of the sovereign, but for the use of the late sovereign's executors, he should enter into the usual administration bond.—BEST, IN THE GOODS OF, *P.D. & Ad.D.*; [1901] P. 333; 71 L. J. P. 9; 85 L. T. 640.

2. *Administration—Bond—Signature of one surety—Substitution of name of second surety—Cancellation.*—One surety to an administration bond executed the same on being assured that the other person named in it as co-surety would execute it. The latter refused to do so. The name of another surety was inserted in the bond, and this person executed it. The first surety did not assent to the alteration.

Held, that the bond was void and must be cancelled.—COWARDIN, IN THE GOODS OF, *P.D. & Ad.D.*; 86 L. T. 261.

3. *Codicil — Mistaken reference to will already destroyed—Revival.* — Where a testator refers by mistake in a codicil to a will, which has not only been revoked but actually destroyed at the time of the execution of such codicil, the court may, if satisfied that such reference is a pure mistake and that the testator intended to refer to an existing will, grant probate of the codicil, omitting the words of reference which have been inserted by mistake. But it is otherwise if the will referred to by mistake is in existence at the time of the execution of the codicil.—READE, IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 75; 71 L. J. P. 45; 86 L. T. 258.

4. *Executors according to the tenor — Trustees — Directions for advancement and maintenance.* — A testator directed payment of his debts and funeral and testamentary expenses by his executors hereinafter named, but failed to name any persons as executors. The will contained an expression of the testator's wishes as to the education and advancement of his children, and appointed the testator's widow and two of his sons as trustees.

Held, that the trustees were executors according to the tenor and entitled to probate.—KIRBY, IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 188

5. *Grant of administration—Executor, appointment of—Practice—Will of domiciled Italian—Probate refused—Administration with will annexed granted.*—Even where the husband consents, the court will refuse to grant probate to the executor named in the will of a married woman, who dies domiciled abroad; but, with such consent, will make a general grant of administration with the will annexed.

In the Goods of Hallyburton, (1866) L. R. 1 P. & M. 90, and *In the Goods of Tréfond*, [1899] P. 247,

commented on and explained.—VANNINI, IN THE GOODS OF, *P.D. & Ad.D.*; [1901] P. 330; 71 L. J. P. 7; 85 L. T. 639.

6. *Informal document—Execution—Witnesses dead—No attestation clause—No evidence of handwriting*—Omnia præsumuntur rite esse acta.—The court extended the presumption of law—*omnia præsumuntur rite esse acta*—to the case of an informal holograph document containing no attestation clause and in regard to which there was no evidence to prove the handwriting of one of the persons, both of whom were dead, whose names appeared near the signature of the testatrix at the foot or end of the document.—PEVERETT, IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 205.

7. *Intervener—Probate action—Married woman—"Proceeding instituted"—Independent interest—Separate estate—Restraint on anticipation—Costs of opposite party—Form of order—R. S. C.*, 1883, *ord.* 12, *r.* 23—*Probate Court Rules*, 1862 (*Contentious Business*), *r.* 6—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.—A summons by a married woman under R. S. C., 1883, ord. 12, r. 23, and Probate Court Rules, 1862, r. 6, for leave to intervene in a pending probate action for the purpose of asserting her independent interest in the subject-matter, is a "proceeding instituted" by her within section 2 of the Married Women's Property Act, 1893, and therefore the court has jurisdiction to order, if it thinks fit, the costs of the action, as from the date of the summons to intervene, to be paid out of her separate property, including property which is subject to a restraint on anticipation.

The fact that the married woman may have obtained an order giving her leave to intervene in the action "as a plaintiff," followed by a delivery to the defendant of a pleading whereby she "adopts the pleadings of the plaintiff," does not the less render her intervention a "proceeding instituted" by her within the section.—CRICKITT *v.* CRICKITT (CRICKITT INTERVENING), *C.A.*; [1902] P. 177; 71 L. J. P. 65; 86 L. T. 635.

8. *Marriage—Foreign marriage—Ceremony performed by minister not of the same religious community as one of the contracting parties.*—Although by the common and civil law of Western Europe a marriage *per verba de præsenti* was valid without the presence of a minister of religion, yet, notwithstanding that, municipal law has superadded the necessity of the presence of a minister as a witness,

Quære, whether such a marriage may or may not be considered valid according to the laws and rites of the Church of England, for

Quære, whether the decision in *Reg.* v. *Millis*, 10 Cl. & Fin. 534, applies where the presence of an ordained minister of the Church of England cannot be procured.—LIGHTBODY *v.* WEST, *P.D. & Ad.D.*, 494.

9. *Mobilization—Wills Act* (1 *Vict. c.* 26), *s.* 11.—Mobilization may be fairly taken as a commencement of that which, in Roman law, was understood by the words *in expeditione*. If the order to mobilize has been received, although any particular member of the force may himself have taken no step under it, yet the order itself so affects his position, as a unit of the whole force, as to place him *in expeditione*.

On the 7th of September, 1899, a battalion stationed in India was "warned" for service, and two days later was "ordered to mobilize" for active service in South Africa, and embarked on the 19th of September, 1899. The deceased, a private soldier in that battalion, wrote, between the 8th of September and the 19th of September, an undated letter, which was received by the plaintiff in England on the 2nd of October, 1899. The writer died of fever during the siege of Ladysmith on the 9th of February, 1900.

The letter contained (*inter alia*) the expression: "If you have a letter to say that I am killed, then the lot is for you." . . . "You will receive the lot if I am killed in action, for I shall make out my will in your favour."

No other document in the nature of a will was ever received or discovered, and the father of the deceased, the latter being unmarried, took out letters of administration.

The plaintiff having propounded the letter as the will of the deceased soldier, claimed revocation of the grant of administration:

Held, that the document was testamentary, and that it was a soldier's will within the meaning of section 11 of the Wills Act.—GATTWARD *v.* KNEE, *P.D. & Ad.D.*; [1902] P. 99; 71 L. J. P. 34; 86 L. T. 113.

10. *Practice—Costs—Executors.*—Executors, who are also residuary legatees, are in the same position, as to costs, as any other party who unsuccessfully propounds a will.

Where executors, who were also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of the deceased, and, acting upon their opinion, propounded a will or wills, which, in the result were pronounced against, after verdict of a jury, on the ground of testamentary incapacity and want of knowledge and approval of the contents,

Held, that not only was this a case in which their costs should not be allowed out of the estate, but that, following the general rule that costs follow the event, they should pay the costs of the defendant; but not of any of the parties cited, whose interests were practically identical with those of the defendant.

Boughton v. *Knight*, (1873) L. R. 3 P. & M. 64, distinguished. — TWIST *v.* TYE, *P.D. & Ad D.*; [1902] P. 92; 71 L. J. P. 47; 86 L. T. 259.

11. *Practice — Costs — Probate suit.* — Where a principal beneficiary takes instructions himself and causes a will to be prepared by a solicitor upon those instructions, but the solicitor does not see the testator, the circumstances so far invite inquiry as to justify the court in refusing to condemn in costs a party opposing probate of the will.—AYLWIN *v.* AYLWIN, *P.D. & Ad.D.*; [1902] P. 203.

12. *Practice—Will torn in pieces and pasted together again—Persons not* sui juris *interested in intestacy—Probate, on motion, to executrix.*—The court, upon motion by the sole executrix, granted probate of a will which had been torn up and afterwards pasted together again, notwithstanding the fact that the persons interested under an intestacy were not *sui juris* and no guardian *ad litem* had been appointed by the court to represent them.—BRASSINGTON, IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 1; 71 L. J. P. 9; 85 L. T. 644.

See also Administration, 2, 6.

PUBLIC HEALTH. — See Landlord and Tenant, 2, 8; Local Government, 1, 6, 10, 12, 14, 17; Metropolis, 7, 10; Water, 8.

RAILWAY:—

1 *Compulsory powers—Right of way—Obstruction — Injunction — Compensation — Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.—Motion by plaintiff to restrain defendants from obstructing or interfering

with the plaintiff's right of way over an occupation road and from permitting any railway to continue upon and from running trains or locomotives along the road. The defendants had laid down a line which passed along the occupation road and ran trains thereon for the purposes of carrying the plant and material necessary for the construction of the authorized new line.

Held, that the plaintiff was not entitled to an injunction, but that he had his remedy by compensation under the Lands Clauses Act, 1845, s. 68. —BARNARD *v.* GREAT WESTERN RAILWAY CO., *Ch.D. Kekewich, J.*; 86 L. T. 798

2. *Dock company—Railway lines and sidings on docks — Communication with railway company — Through rates—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 25.—The London and India Docks Co., constituted under powers conferred by various Acts of Parliament, had, under the provisions contained in such Acts, laid down lines of railway within ther docks, forming a junction with the lines of the Great Eastern Railway Co., and extending for a distance of about three miles to the various warehouses and quays of the docks, for the purpose of the carriage of goods in the trucks and wagons of the railway company to and from the railway company and the warehouses and quays, and had also constructed a group of sidings for the accommodation of the trucks, wagons, and engines used in such traffic.

The Acts under which the dock company was constituted did not, in respect of such lines and sidings, incorporate the provisions of the Railways Clauses Consolidation Acts or contain any of the usual statutory provisions relating to railways.

The dock company applied under section 25 of the Railway and Canal Traffic Act, 1888, to have through rates fixed by the Railway Commissioners in respect of the traffic from their warehouses and quays to certain places on the Midland Railway Co.'s system, *viâ* the Great Eastern Railway Co.'s lines.

Held, reversing the decision of the majority of the Railway Commissioners, that the dock company under the provisions of their Acts of Parliament were not a "railway company" nor were their lines and sidings part of a continuous line of railway communication within the meaning of the Railway and Canal Traffic Act, 1888, and, therefore, the dock company were not entitled to through rates under section 25 of that Act.

Semble, a railway company entitled to demand a through rate under section 25 must be a railway company constituted by statutory authority and owning a line which forms part of a continuous route, that section presupposing that the demanding company has itself a line which is to form a substantial part of the route.—LONDON AND INDIA DOCKS CO. *v.* GREAT EASTERN RAILWAY CO., *C.A.*, 461; [1902] 1 K. B. 568; 71 L. J. K. B. 369; 86 L. T. 339.

3. *Negligence—Tort—Act authorized by statute—Canada (Quebec) Law of.*—In the absence of negligence or misconduct, a corporation authorized by statute to carry on a particular business, is not responsible for any damage caused by its doing so in a normal and reasonable manner; for when the Legislature has legalized the acts contemplated and carried out, they cannot constitute an actionable wrong.—CANADIAN PACIFIC RAILWAY CO. *v.* ROY. *P.C.*, 415; [1902] A. C. 220; 71 L. J. P. C. 51; 86 L. T. 127.

4. *Sidings and collateral branches—Connection—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 76—*Construction—Adjoining owners—Private branch railways—Private sidings—Openings for communication with railways—Railways Regulation Act*, 1842 (5 & 6 *Vict. c.* 35), *s* 12.—Section 76 of the Railways Clauses Consolidation Act, 1845, applies to the user of the railway by the owners of branch railways with their own engines and carriages, and does not entitle an adjoining owner, who makes a siding, to demand communication with the railway for the purpose of establishing a claim to facilities for his traffic.

Held, also, that the limitation of the right of communication between a railway and a private branch railway to places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon, does not relate solely to the structural difficulties of making an opening, but has reference also to difficulties arising from working the traffic on the railway.

Decision of the Railway Commissioners, [1902] 1 K. B. 381, reversed.—LANCASHIRE BRICK AND TERRA-COTTA CO. *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *C.A.*; [1902] 1 K. B. 651; 71 L. J. K. B. 431; 86 L. T. 176.

5. *Undue preference*—Ultra vires—*Rights of shareholder—Injunction—Jurisdiction—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 90—*Railand Canal Traffic Act* 1854 (17 & 18 *Vict. c.* 31), *s.* 2.—A shareholder of a railway company cannot have an injunction to prevent the company carrying goods for a customer at a lower rate than the ordinary scale, upon the ground that it is *ultra vires*, and enables other customers to claim reductions, and thus diminishes the profits of the company.

Semble, such an act, even if an undue preference, is not *ultra vires* the railway company.

Whatever rights a railway company may have against a customer who has delivered goods to them for consignment under an alleged erroneous description bearing a lower rate of charge than the proper description, a shareholder in the railway company has none against the customer.—ANDERSON *v.* MIDLAND RAILWAY CO., *Ch.D. Buckley, J.*, 40; [1902] 1 Ch. 369; 71 L. J. Ch. 89; 85 L. T. 408.

See also Vendor and Purchaser, 14.

RATING.—See Local Government, 10-13; Metropolis, 8, 9.

RECEIVER:—

Practice—Public-house — Licences in jeopardy — Recovery of possession—Disputed title—Receiver of licences and of rents and profits—Landlord and tenant—Breach of covenant—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c* 41), *s.* 14.—The defendant was tenant of a public-house under an agreement, dated in 1893, whereby the plaintiffs agreed to let and the defendant agreed to take the premises for one year certain. Under the agreement the defendant was not to do, or cause or suffer to be done, any act, deed, or thing whereby the licence might be jeopardized, suspended, forfeited or lost; he was, upon quitting the premises, to assign over the licences to the plaintiffs; and he was to reside on the premises, and not to shut them up, or cause or suffer the same to be shut up, or the trading thereon to be suspended. It was thereby also agreed that if the tenant should commit any breach of the agreement, or the licences should be jeopardized, the tenancy should cease, and the landlords should have power at once, without notice or legal proceedings, to re-enter upon the premises and resume possession thereof. The defendant con-

tinued tenant upon the terms of the agreement until November, 1901, when he closed the house and went away.

In an action for recovery of possession and for a receiver, the court appointed a receiver of the licences and of the rents and profits, ordered the licences to be handed over to the receiver, and gave him possession of the premises so far as was necessary for the purposes of preserving the licences. —CHARRINGTON & Co. *v.* CAMP, *Ch.D. Joyce, J.*; [1902] 1 Ch. 386; 71 L. J. Ch. 196; 86 L. T. 15.

REVENUE.—See Inland Revenue.

RIVER.—See Water.

SALE OF GOODS:—

1. *Goods stolen by servant—Title of purchaser—Conduct of master alleged as cause of fraud—Estoppel.* —The appellants gave a written authority to a dock company to honour transfer or delivery orders of timber signed by their confidential clerk. The clerk assumed a false name, took an office, and obtained transfers of timber to himself under the assumed name. This timber he sold to the respondents, representing himself as the agent of another firm. In an action by the appellants for the value of the timber,

Held, that as the timber was stolen the respondents had no better title than the thief from whom they bought, and the appellants were not estopped from recovering the value on the ground that the clerk was invested with the powers of an owner, as there had been no representation made to the respondents by or on behalf of the appellants, the respondents never having dealt with the clerk in his own name and having no knowledge of the appellants' connection with the transactions.—FARQUHARSON *v.* KING, *H.L.*; [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810.

2. *Stipulation—Condition precedent—"Specification to be given at the beginning of May"—Delay—Repudiation.*—The defendants agreed to sell and deliver to the plaintiffs 1,000 tons of iron.

By the sale note it was provided: "Delivered . . . cost and freight Japan, direct port, specification to be given in the beginning of May. Time of shipping May and June from Antwerp."

It was known by both parties that the specification had to be sent from Japan, and, in fact, the specification was given in various parts between the 12th and 15th of May.

All the iron could be manufactured by the defendants in eight days, and opportunities of shipment in May and June were frequent from Antwerp to Japan.

Held, that "specification to be given in the beginning of May" was not a condition precedent, a breach of which entitled the defendants to repudiate the contract, but that, even if it was, the giving of the specification between the 12th and the 15th of May was sufficient compliance.

Whether or not a term of a contract is a condition precedent must be collected from the provisions of the instrument creating the contract and the circumstances legally admissible in evidence with reference to which it is to be construed.—KIDSTON *v.* MONCEAU IRONWORKS Co., *K.B.D.*; 86 L. T. 556.

SEDUCTION:—

Master and servant—Evidence of service—Employment by defendant—Weekly leave of absence—Visits to the father's home—Assistance in household duties. —The plaintiff's daughter, who was in the service of the defendant, was permitted to go out once a week for an afternoon and evening. On such occasions she went to her father's house and assisted in household duties. In an action by the plaintiff for the seduction of his daughter by the defendant while she was in the latter's service,

Held, that there was no evidence of the relation of master and servant between the plaintiff and his daughter to support the action.—WHITBOURNE *v.* WILLIAMS, *C.A.*; [1901] 2 K. B. 722; 70 L. J. K. B. 933; 85 L. T. 271.

SET-OFF.—See Practice, 47.

SETTLED LAND:—

1. *Capital money—Improvements in leasehold houses with a view of letting—Electric light installation—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (*ii.*). — An electric light installation may, under special circumstances, be so necessary to enable a house to be let as to be payable out of capital moneys under the Settled Land Acts.—FREAKE'S SETTLEMENT, RE, KINNAIRD *v.* FREAKE, *Ch.D. Joyce, J.*, 237; [1902] 1 Ch. 97; 71 L. J. Ch. 20; 85 L. T. 454.

2. *Capital money—Investment—Powers of a tenant for life—Choice of brokers—Duties of trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-sections* 1, 10; *s.* 22, *sub-section* 2; *s.* 31 (vi.).—A tenant for life has no power under the Settled Land Acts to direct the trustees to employ a particular broker nominated by him. The choice of a broker lies with the trustees.

After a sale of settled estates a tenant for life entered into negotiations with a firm of brokers for the investment of the proceeds of sale. The trustees refused to employ the broker nominated by the tenant for life, and desired the transaction to be carried through by their bankers, who would employ their own brokers. The tenant for life then asked that the trustees might be directed to apply the capital moneys in their hands in the purchase, through the brokers nominated by the tenant for life, of such investments, authorized by the Act, as the tenant for life might direct.

Held, that the trustees, and not the tenant for life, were the proper persons to select and employ a broker, just as they were the proper persons to select and employ a solicitor or banker.—CLEVELAND'S (DUKE) SETTLED ESTATES AND SETTLED LAND ACTS, 1882-1890 *Ch.D. Joyce, J.*, 508; [1902] 2 Ch. 350; 86 L. T. 678.

3. *Capital money—Leasehold house—Additions with a view to letting—Electric light installation—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (*ii.*).—The word "additions" in section 13 (ii.) of the Settled Land Act, 1890, means structural additions.

The installation of the electric light in a leasehold house, although reasonably necessary to enable the house to be let, is not a structural addition within the meaning of the section, and cannot, therefore, be paid for out of capital moneys.

In re Freake's Settlement, ante, p. 237, [1902] 1 Ch. 97, not followed.

In re Gaskell's Settled Estates, 42 W. R. 219, [1894] 1 Ch. 485, followed.—CLARKE'S SETTLEMENT, RE, *Ch.D. Buckley, J.*, 585; [1902] 2 Ch. 327; 71 L. J. Ch. 593; 86 L. T. 653.

4. *Conflict between provisions of will and provisions of Settled Land Acts—Consent—Undivided shares—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 56 (2)—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6 (2). —If lands are settled in undivided shares, a power of sale of the whole given to the trustees will con-

flict with the powers of sale of their shares possessed by the tenants for life under the Settled Land Acts, and cannot be exercised without the consent of all the tenants for life of undivided shares. Each of such persons is merely tenant for life of his undivided share, so that the consent of one of them would not be sufficient under section 6 (2) of the Settled Land Act, 1884, to enable the trustees to sell the entirety.—OSBORNE & BRIGHT'S (LIMITED), RE, *Ch.D. Kekewich, J.*, 468; [1902] 1 Ch. 335; 71 L. J. Ch. 285; 86 L. T. 178.

5. *Equitable tenant for life—Condition requiring residence—Power of sale — Trustee—Compromise—Settled Land Act*, 1882, *s.* 51—*Trustee Act*, 1893, *s.* 21.—Where there was an equitable tenant for life of a house, valued at £320 a year, subject to a condition requiring residence, and some of the remaindermen were infants, the court being of opinion that the condition was not void under section 51 of the Settled Land Act, 1882,

Held, that the court could sanction an agreement between the tenant for life and the trustees whereby the tenant for life should release to the trustees her life estate in the house in consideration of their paying to her out of the general trust estate an annuity of £275.

In re Eastman's Settlement, 43 SOLICITORS' JOURNAL 114, [1898] W. N. 170, considered.—TRENCHARD *v.* TRENCHARD, *Ch.D Buckley, J.*, 266; [1902] 1 Ch. 378; 71 L. J. Ch. 178; 86 L. T. 196.

6. *Investment of capital moneys—Tenant for life—Trustees for purposes of Settled Land Acts—Duty of trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22 (2).—When a tenant for life under section 22 (2) of the Settled Land Act, 1882, directs trustees for the purposes of the Settled Land Act to invest capital money upon a mortgage, the trustees must be satisfied that such direction has been given upon a proper report as to the value of the property proposed to be mortgaged, or that a proper investigation of the title has been made and proper advice given as to the form of the conveyance, but on being so satisfied they are bound to comply with the direction.

Order of Cozens-Hardy, J. (*ante*, p. 150), varied.—HOTHAM, RE, HOTHAM *v.* DOUGHTY, *C.A.*, 692.

7. *Lease—Fine on surrender of lease—Tenant for life and remainderman—Capital or income.*—In the absence of *mala fides*, money paid to a legal life tenant as the consideration for accepting the surrender of a lease, granted without recourse to the powers of the Settled Land Acts, belongs to him as a casual profit.—HUNLOKE'S SETTLED ESTATES, RE, FITZROY *v.* HUNLOKE, *Ch.D. Swinfen Eady, J.*; [1902] 1 Ch. 941; 71 L. J. Ch. 530; 86 L. T. 829.

8. *Lease—Void or voidable—"Best rent"—Collusive bargain for reduction of rent—Purchaser for value without notice—Doubtful title—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 7, *sub-section* 2; *s.* 54.—A tenant for life, purporting to act under the powers of the Settled Land Act, 1882, granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, and the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, and the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, and the purchaser objected that, having regard to the amount of the price, it must be shown that the rent reserved by the lease was the best that could reasonably be obtained within section 7, sub-section 2 of the Settled Land Act. The vendor had no knowledge of the arrangement between the lessor and the lessee as to the reduction of the rent, and he insisted that, as purchaser for value without notice, he could make a good title to the purchaser.

Held, by Buckley, J., that, inasmuch as the lease did not comply with the statutory requirements as to rent, and the lessee did not act in good faith within section 54, it was bad, and could be set aside as against a purchaser for value without notice.

Held, by the Court of Appeal, on the authority of *Freer* v. *Hesse*, [1853] 4 De G. M. & G 495, that, assuming that the lease was voidable only and not void, the title was not such as ought to be forced upon the purchaser, since it depended on a doubtful question of fact, namely, whether his predecessor in title, the vendor, purchased without notice of the defect in the title.—HANDMAN AND WILCOX'S CONTRACT, RE, *C.A.*; [1902] 1 Ch. 599; 86 L. T. 246.

9. *Leasehold houses—Repairs which are improvements—Capital or income—Discretion of the court—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22 (2)—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 15. — As between the tenant for life equitably entitled to the rents and profits of leasehold houses subject to the performance of the covenants in the leases under which they are held, and the persons equitably entitled in remainder thereto, the cost of "improvements" which are also repairs within the covenants contained in the leases, must be borne by the tenant for life.

Clarke v. *Thornton*, 35 W. R. 603, 35 Ch. D. 307, distinguished.

In the exercise of its discretion under section 15 of the Settled Land Act, 1890, the court will not direct such repairs to be paid out of capital if the settlor has provided that they should be paid out of income.

Cardigan v. *Curzon-Howe*, 9 Times L. R. 244, followed.—PARTINGTON, RE, REIGH *v.* KANE, *Ch.D. Buckley, J.*, 388; [1902] 1 Ch. 711; 71 L. J. Ch. 472; 86 L. T. 194.

10. *Mining lease—Varying minimum rent—Way-leave—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7, 9, 53.—The object of the Settled Land Acts is to remove restrictions in dealing with settled land, and though the interests of the remaindermen are to be considered, a possible disadvantage to the remaindermen ought not to be allowed to put a stop to the development of the estate. There is nothing in the Settled Land Acts which makes it necessary that the minimum rent reserved in a mining lease should be uniform or that it should be reserved from the commencement of the term, consequently a mining lease may be granted reserving a minimum rent which does not commence in the first year of the term, and which gradually increases year by year.

A mining lease may also contain a grant of a way-leave, for which no separate rent is reserved, and which is to continue after the rent has ceased on the working out of the coal.

Decision of Byrne, J. (reported *ante*, p. 199), reversed.—ALDAM'S SETTLED ESTATES, RE, *C.A.*, 500; [1902] 2 Ch. 46; 71 L. J. Ch. 552; 86 L. T. 510.

11. *Power of tenant for life to mortgage—Costs of consolidating mortgage—"Where money is required"—Settled Land Act*, 1890, *s.* 11.—Section 11 of the Settled Land Act, 1890, must be read as if it meant

"where money is reasonably required having regard to the circumstances of the settled land."

Where land was settled subject to several mortgages, all bearing interest at 4 per cent., and the tenant for life had a right under the settlement to resort to capital in the event of the income payable to her falling below a certain figure, and one of the mortgages was called in, and it was found that that mortgage could not be readily transferred, but that a consolidating mortgage for the whole amount due under all the mortgages could be got at 3½ per cent. interest.

Held, that the tenant for life was empowered by the 11th section of the Act of 1890 and was justified in raising the amount by which the costs of the consolidating mortgage exceeded the costs of the transfer of the mortgage called in by a mortgage of the settled land for that amount.—CLIFFORD, RE, SCOTT *v.* CLIFFORD, *Ch.D Buckley, J.*, 58; [1902] 1 Ch. 87; 71 L. J. Ch. 10; 85 L. T. 410.

12. *Tenant for life—Capital moneys—Expenses of improvement and development of building estate—Rebuilding of mansion-house—Dry-rot—Salvage—Settled Land Act*, 1882 (45 & 46 *Vict c.* 38) *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-section* 4.—Where the principal mansion-house on settled land had been rebuilt owing to dry-rot, and additions and improvements had at the same time been made to the house, and the gross expenses (being more than one-half the annual rental of the settled estates) had been paid by the tenant for life.

Held, on a summons by him for recoupment, that such part of the expenditure as was not in excess of one-half the annual rental of the estates was payable out of capital under the Settled Land Act, 1890, section 13, but that no part of the excess could be allowed by way of salvage.—LEGH'S SETTLED ESTATES, RE, *Ch.D. Kekewich, J.*, 570; [1902] 2 Ch. 274; 71 L. J. Ch. 668; 86 L. T. 884.

13. *Tenant for life—Sale of option—Unauthorised by Settled Land Acts*, 1882 *to* 1890.—In 1887 a water company entered into a contract with a tenant for life, acting under the powers conferred by the Settled Land Acts, 1882 to 1890, for the purchase of a plot of settled land with the object of erecting thereon certain buildings for the purposes of their undertaking, and agreed to enter into a covenant not to build thereon or let it for building otherwise than for the purpose of their undertaking. They promoted a Bill in Parliament for power to erect the proposed buildings, which was thrown out before the conveyance was executed, and thereupon requested the vendor to agree to the omission from the conveyance of the covenant restrictive of building on the plot sold. The vendor, however, insisted on a conveyance in accordance with the contract, but entered into an agreement with the company, to which the trustees of the settlement were parties, to the effect that if the company should not require the land for the purposes of their undertaking and should desire to erect other buildings thereon or to sell or let the same and thereof should give notice to the vendor, then the vendor would on payment of £10 consent to the company building upon or selling the land without the restriction as to building contained in the conveyance, which agreement, although dated the day after the conveyance, was executed simultaneously and formed one transaction with it. The vendor died, and was succeeded by his son as tenant in tail of the settled land, who possessed lands adjoining the plot sold. The company then gave the notice and tendered to him £10 in accordance with the agreement, but he declined to give his consent, alleging that he was not bound thereby. On a special case stated by consent of the parties under ord. 34, r. 1,

Held, that the vendor as tenant for life of the settled land had no power under the Settled Land Acts, 1882 to 1890, to enter into such an agreement with the company, which therefore was not binding on his successors in title.—PALMER *v.* GRAND JUNCTION WATERWORKS CO., *Ch D. Swinfen Eady, J.*; 86 L. T. 352.

14. *Will—Future trust for sale—Trust arising after death of trustee—Trustee tenant for life—Trustees for the purposes of the Settled Land Acts*, 1882 *to* 1890—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69) *s.* 16 (*ii*).—Trustees for the time being of a "settlement" with a future trust for sale are trustees for the purposes of the Settled Land Acts, 1882 to 1890, under section 16, sub-section (ii.) of the Act of 1890, and it is immaterial that one of them is a person who cannot in fact ever exercise the trust for sale by reason that he will necessarily be dead before the trust takes effect.

One of two trustees of a "settlement" with a future trust for sale is a trustee for the purposes of the Settled Land Acts, notwithstanding that he is tenant for life of the "settlement."

A. and B. were trustees of settled land with a trust for sale to take effect after the death of A., who was the tenant for life.

Held, that under section 16 (ii.) of the Settled Land Act, 1890, A. and B. were trustees for the purposes of the Settled Land Acts, 1882 to 1890.—JACKSON'S SETTLED ESTATE RE, *Ch.D. Buckley, J.*, 235; [1902] 1 Ch. 258; 71 L. J. Ch. 154; 85 L. T. 625.

See also Administration, 8.

SETTLEMENT:—

1. *Covenant to settle after-acquired property—"Usual" clauses—Married woman—Agreement for a settlement—Reversionary interest in personalty subject to power of appointment—Exercise of power.*—By the marriage settlement of *M.*, dated in 1854, property was settled upon trust, after the deaths of himself and his wife, for the children of the marriage as M. and his wife should jointly appoint, and in default of such appointment, as the survivor should appoint; and in default of any appointment, in trust for all the children who should attain twenty-one in equal shares. There were only two children who attained twenty-one. One of them, C., by an ante-nuptial agreement, agreed to settle "all her half or other share and interest whatsoever" in the property subject to the trusts of the original settlement. The agreement provided that the settlement should contain certain specified provisions, and generally such other agreements, clauses, and provisions as were "usually inserted in settlements of a like kind." M. and his wife, who predeceased him, made no joint appointment under the deed of 1854, but by his will, in exercise of his power, he appointed the sum of £2,000 to C. absolutely:—

Held, that a covenant to settle after-acquired property was not a "usual" clause in settlements of a like kind with that to be executed in accordance with the agreement for a settlement, and that the £2,000 was not bound by the agreement.—MADDY'S ESTATE, RE, MADDY *v.* MADDY, *Ch.D. Joyce, J.*; [1901] 2 Ch. 820; 71 L. J. Ch. 18; 85 L. T. 341.

2. "*Die without having been married*"—*Wife's property—Ultimate trust for next-of-kin—Construction of settlement.*—By a marriage settlement in 1847, certain funds were settled on usual trusts for the husband and wife and the children of the marriage, and as to one moiety, in the event (which happened) of the wife dying in the lifetime of the husband, and after the determination of his interest therein, upon such trusts as the wife should by will or codicil appoint, and in default of appointment "upon trust for such person or persons as under the Statute for the Distribution of Intestate's Effects should or would have been entitled to her personal estate" in case she had died intestate without having been married." The wife died intestate in the lifetime of the husband, leaving an only son, who died an infant.

Held, that the case was governed by *Wilson* v. *Atkinson*, [1864] 4 D. J. & S. 455; that in conformity with that decision the words referring to death "without having been married" must be construed as intended to exclude the husband, and not as intended to exclude a child, and that therefore on the death of the wife intestate her infant son became entitled as her sole next-of-kin.—MARE, RE, MARE *v.* HOWEY, *Ch.D. Kekewich, J.*; [1902] 2 Ch. 112; 71 L. J. Ch. 649.

3. *House — Repairs — Salvage — Jurisdiction to sanction expenditure out of capital.*—The jurisdiction of the court to sanction expenditure in the repair of settled property out of capital is to be exercised, if at all, only where a case of salvage is clearly made out.

Observations of Chitty, J., in *In re De Teissier's Settled Estates*, 41 W. R. 186. [1893] 1 Ch. 165, approved.—WILLIS, RE, WILLIS *v.* WILLIS, *C.A.*, 70; [1902] 1 Ch. 15; 71 L. J. Ch. 73; 85 L. T. 436.

4. *Husband entitled* jure mariti *to wife's reversionary personalty* — Ante-*nuptial agreement for settlement*—Post-*nuptial settlement—Recital of agreement — Husband's interest made determinable on bankruptcy—Fraud on creditors—Trustee in bankruptcy—Statute* 13 *Eliz. c.* 5—*Statute of Frauds.*—A reservation, in a *post*-nuptial settlement of a wife's reversionary property, of a life interest to the husband, determinable on his bankruptcy, does not avoid the settlement *in toto* against his trustee in bankruptcy, in the absence of evidence that he was in embarrassed circumstances at the date of the settlement or contemplated entering on a speculative business. A recital in a *post*-nuptial settlement of an *ante*-nuptial agreement for settlement is evidence of such agreement sufficient to satisfy the Statute of Frauds.

Barkworth v. *Young*, 5 W. R. 156, 4 Drew. 1, approved.

In re Pearson, 25 W. R. 126, 3 Ch. D. 807, disapproved.

Decision of Farwell, J. (49 W. R. 476., [1901] 2 Ch. 145), reversed.—HOLLAND, RE, GREGG *v.* HOLLAND, *C.A.*, 575; 71 L. J. Ch. 518; 86 L. T. 542.

5. *Investment—Proceeds of realization of insufficient security—Tenant for life and remainderman—Apportionment.*—Funds subject to the trusts of a settlement comprised a mortgage security which, pursuant to the trusts, was transferred to the trustees. The interest was irregularly paid, and ultimately the security was realized at a considerable loss.

Held, that the sum realized ought to be apportioned between the tenant for life and remaindermen under the settlement in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal.

The principle of *In re Moore*, (1885) 54 L. J. (Ch.) 432; 33 W. R. 447. preferred to that of *In re Foster*, (1890) 45 Ch. D. 629.—ALSTON, RE, ALSTON *v.* HOUSTON, *Ch.D. Kekewich, J.*; [1901] 2 Ch. 584; 70 L. J. Ch. 869.

6. *Several estates comprised in same devise—Tenant for life—Remaindermen—Interest on charges—Current rents and profits—Insufficiency—Arrears of interest—Subsequent rents—Payment off of charges*—Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life are applicable to liquidate arrears accruing during the same life tenancy: *Revel* v. *Watkinson*, (1748) 1 Ves. Sen. 93; *Tracy* v. *Viscountess of Hereford*, (1786) 2 Bro. C. C. 128; *Caulfield* v. *Maguire*, (1845) 2 J. & Lat. 141.

Where several estates are includeded in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates: *Frewen* v. *Law Life Assurance Society*; [1896] 2 Ch. 511; *In re Hotchkys* 1886) 32 Ch. D. 408.

Upon principle, therefore, a tenant for life of several estates included in the same devise is liable, as between himself and the remaindermen, to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property.—HONYWOOD *v.* HONYWOOD, *Ch.D. Byrne, J.*; [1902] 1 Ch. 347; 71 L. J. Ch. 174; 86 L. T. 215.

7. *Tenant for life—Covenant to settle after-acquired property—Reversionary interest—Conversion for benefit of persons entitled in succession*—The rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137; 6 R. R. 96, does not apply in the case of a settlement by deed and apparently only applies where there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession.—VAN STRAUBENZEE, RE, BOUSTEAD *v.* COOPER, *Ch.D. Cozens-Hardy, J.*; [1901] 2 Ch. 779; 70 L. J. Ch. 825; 85 L T. 541.

See also Divorce, 21-25.

SEWERS:—

Power to carry through or under street or lands—Pumping-station — Compensation or purchase — Disposal of sewage—"Sewer"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 15, 16, 27.—An engine-house with pump and machinery, erected partly above and partly below the level of the ground, for lifting and forcing along a rising main the sewage of a district to a common outfall for treatment, is not a "sewer" within the meaning of section 16 of the Public Health Act, 1875, which a local authority is thereby empowered to carry through or under any street, or any land within its district on making compensation to the owner, but is a work for the purpose of "receiving or otherwise disposing of sewage" within section 27, for which the necessary land must be purchased or leased.—KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL DISTRICT COUNCIL, *Ch.D. Byrne, J.*, [1901] 2 Ch. 768; 70 L. J. Ch. 844; 85 L. T. 303.

See also Local Government, 14.

amount of remuneration payable for service rendered by one of the insured vessels to another shall be determined by a committee of the associations so concerned, if such agreement is to bind the master and crew of the salving vessel,

The court will require cogent proof that the salvors did in fact agree to be bound by such agreement.

Quære, whether such a contract might not be contrary to the provisions of the Merchant Shipping Act, 1894.—"MARGERY," THE, *P.D. & Ad.D.*, 654; [1902] P. 157; 71 L. J. P. 83.

19. *Salvage—Injury to salving vessel—Compensation*—Onus probandi—*Appeal from Constantinople.*—Where the vessel of a salvor has without default on his part been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained and damages consequent thereon; or the salvage may be assessed on a liberal scale, so as to cover the loss and afford an adequate reward for the services rendered.

Held, also, that the presumption is that the injury is caused by the necessities of the services, and that the *onus probandi* is on those who allege default by the salvors. The amount of compensation awarded by the court below will not be reduced unless it appears to be grossly in excess of what is right.—MASTER AND OWNERS OF STEAMSHIP "BAKU STANDARD" *v.* MASTER AND OWNERS OF STEAMSHIP "ANGÈLE," *P.C.*; [1901] A. C. 549; 70 L. J. P. C. 98; 84 L. T. 788.

20. *Salvage—Lifeboat crew—Assistance taken by salvors against consent of master of salved vessel.*—Where it was the duty of a tug to tow a lifeboat out to vessels in distress, and the tug assisted in salving such a vessel with the lifeboat made fast to the distressed vessel,

The court held that the crew of the lifeboat were entitled to be treated in regard to the salvage award as though they formed part of the crew of the tug.—"AUGUSTE LEGEMBRE," THE, *P.D. & Ad.D.* 622; [1902] P. 123; 71 L. J. P. 53; 86 L. T. 358.

21. *Salvage—Subsequent damage—Maritime liens—Priority of claims.*—Maritime liens are either liens arising *ex delicto* or liens arising *ex contractu* or *quasi ex contractu*. Liens arising *ex delicto* take precedence over prior liens arising *ex contractu*. Liens arising *ex contractu* must, in general, rank in the inverse order of the attachment of the *res*. The right of salvage may, but does not necessarily, arise out of contract. Salvors, from the time of rendering salvage services, are practically in the same relative position as a creditor who has obtained a lien strictly *ex contractu*, but while taking precedence over prior claims *ex contractu* and prior salvages, yet their claims ought to be postponed to subsequent damage claims, and even if the damage may not have given rise to a maritime lien, but only to a right to proceed *in rem*, nevertheless that right is enforceable in priority to salvage claims and for all practical purposes in cases where damage comes last the position of the injured party, so far as regards claims arising prior to the damage, is much the same whether one has a lien or only a right of process. Moreover, the right to arrest a ship to obtain reparation for damage done by her is not affected by prior claims against her from hypothecation which create interests in her along with those of her owners. A salvage claim is but, as it were, a hypothecation to secure the reward to the salvors for services rendered, and that reward ought not to be recovered against the *res* to the detriment of a claimant in respect of subsequent damage—"VERITAS," THE *P.D. & Ad.D.*, 30; [1901] P. 304; 70 L. J. P. 75; 85 L. T. 136.

22. *Seamen—Accommodation for seamen—Lascars—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 210.—The provisions of section 210 of the Merchant Shipping Act, 1894, which require that a certain amount of space shall be provided for seamen on board any British ship, apply to Lascars serving on board such ships.—PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. *v.* REX, *K.B.D.*; [1901] 2 K. B. 686; 70 L. J. K. B. 845; 85 L. T. 71.

23. *Seamen—Merchant Shipping Acts—Offences—Persuading seaman to desert from foreign ship—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 236, *sub-section* 1.—By section 236, sub-section 1, of the Merchant Shipping Act, 1894, it is provided that "if a person by any means whatsoever persuades, or attempts to persuade, a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding ten pounds."

Held, that the above sub-section applies only to British ships, and does not make it an offence to persuade a seaman to desert from a foreign ship.—POLL *v.* DAMBE, *K.B.D.*, 28; [1901] 2 K. B. 579; 70 L. J. K. B. 721; 84 L. T. 870.

24. *Seamen—Obligation of seaman under articles—Agreement with crew to pay increased wages—Action to enforce agreement.*—In an action by seamen to enforce an agreement made by the master with them abroad, while under articles, to pay additional remuneration in consideration of their remaining on board and working the vessel home after an accident, which had, in fact, not rendered the vessel unseaworthy.

Held, that in the absence of evidence that the risk of navigating the vessel in her then state was such as would have justified the crew breaking their articles abroad, the agreement was not one that could be enforced.—HOPKINS *v.* MCBRIDE, *K.B.D.*, 255.

See also Insurance, 7-16.

SOLICITOR:—

1. *Breach of trust—Mortgage—Transfer of solicitor's own security—Insufficient security.*—In July, 1892, the trustees of an indenture of settlement, dated the 3rd of September, 1890, had a fund of £1,100 for investment. By an indenture dated the 15th of February, 1877, a sum of £2,100 had been secured, but part of the mortgaged premises had been sold for £1,000. The balance consisted of three brick and stucco houses, held for ninety-nine years at a ground rent of £9 2s. 6d. S., the solicitor of the trustees, transferred this mortgage to the trustees and received the £1,100, without explaining what he was doing. It was alleged that at this time the property, which was in one of the worst districts in the town, was only worth £200, and the evidence for the defence did not prove that it was worth more than £600 in 1892. S. paid interest until his death, and this action was brought by the trustees claiming that the security should be realized and the balance made good by S.'s executor. The Trustee Act did not apply, it was said, as S. retained the money and converted it to his own use. For the defendant it was said the claim was one for negligence, and was barred by the Statute of Limitations. The money was not still held by a trustee. Even if S.

ought to have had a valuation made, his omission to do so was a mere common law tort.

Held, that the property was now, and also at the date of the transfer, an insufficient security for £1,100, and that the solicitor had transferred a security belonging to himself with knowledge that to take the security involved a breach of trust; that the trustees never knew the facts, and that S. had received the £1,100 as cash, and that the defendant, admitting assets, an order must be made for the realization of the security, and that the defendant must make up the deficiency and pay the costs of the action.—MITCHINSON *v.* SPENCER, *Ch.D. Swinfen Eady, J.*; 86 L. T. 618.

2. *Certificate—Registrar of Solicitors—Discretion cretion of registrar to refuse certificate—Discretion of judge—Undischarged bankrupt—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 23, 24.—The Registrar of Solicitors has no discretion to refuse to issue an annual practising certificate under section 23 of the Solicitors Act, 1843, on the ground that the solicitor applying for it is an undischarged bankrupt. Neither has the judge such a discretion under section 24 of that Act.

In re An Application under the Solicitors Act, 1843, 47 W. R. 575, overruled.—SOLICITOR, A, RE, *C.A.*, 196; [1902] 1 K. B. 128; 71 L. J. K. B. 36; 85 L. T. 619.

3. *Client—Commission received by solicitor with knowledge of client—Bargain with client—Independent advice.*—A solicitor may bargain with his client provided that the client is fully informed and duly and honestly advised, so that the solicitor and client are substantially at arm's length and on an equal footing, though he may not accept from his client, while the relation of solicitor and client exists, remuneration for his professional services beyond that to which he is legally entitled.

The vendor of a patent promised a firm of solicitors a commission on the purchase-money of the patent in the event of their finding a purchaser. The solicitors mentioned the matter to one of their clients, who eventually became the purchaser. The client knew that the solicitors were to receive a commission. The commission was paid to the solicitors by the vendor.

Held, that the client could not recover the commission from the solicitors.—HASLAM & HIER EVANS, RE, *C.A.*, 444; 86 L. T. 663.

4. *Costs—Taxation—Mortgage—Negotiating fee—General Order under Solicitors' Remuneration Act*, 1881, *Schedule I., Part I., r.* 11—*Mortgagees' Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 2.—A solicitor lent a client a sum of money on mortgage of real property. Subsequently he sent the client a bill, which included a fee for negotiating the mortgage.

Held, that the solicitor having arranged and obtained the mortgage, he was entitled to the fee. —NORRIS, RE, *Ch.D. Swinfen Eady, J.*, 316; [1902] 1 Ch. 741; 71 L. J. Ch. 187; 86 L. T. 56.

5. *Costs—Taxation—Preparing umpire's award—Award taken up by one party to the arbitration and costs of umpire paid—Right of party to an order for taxation in Chancery Division—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 38, 41.—One of the parties to a reference took up the award and paid the amount fixed by the umpire. The amount included the bill of costs of the solicitors employed by the umpire to draw up the award, and it directed that the solicitors' bill of costs should be taxed under section 38 of the Solicitors Act, 1843.

An order for taxation having been obtained in the King's Bench Division to tax the solicitors' bill, the solicitors appealed.

Held, dismissing the appeal, that the umpire being chargeable with the bill and the party who took up the award having paid it, the case came within the words of the Act, and that although the obtaining of the order to tax in the King's Bench Division was irregular, still the judge had jurisdiction to direct taxation. Following, however, the decision in *In re Pollard*, 36 W. R. 515, 20 Q. B. D. 656, the order must be varied by directing that the taxation should take place in the Chancery Division.—COLLYER-BRISTOW, RE. *C.A.*, 4; [1901] 2 K. B. 839; 70 L. J. K. B. 941; 85 L. T. 208.

6. *Lien—"Property recovered or preserved"—Charging order—Priority—Notice of solicitor's right to lien—Purchaser for value without notice—Solicitors Act.* 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—Property recovered or preserved in an action by a solicitor employed in that action is in the nature of salvage, and he is entitled to be paid for his services on that basis; and he is also entitled to a charge, not only on the property of a particular client, but also, if property of other persons is recovered or preserved in the action, upon their property or interest, for his costs, charges, and expenses, and his charge takes priority over all rights except those of a *bonâ fide* purchaser for value without notice.

An action was commenced by R. against T. for dissolution of partnership, and a receiver was appointed, and by the action certain of the assets of the partnership were recovered. Whilst the action was proceeding, certain creditors brought actions against the partners, and obtained charging orders or orders following the order made in *Kewney v. Attrill*, 35 W. R. 191, 34 Ch. D. 345. The solicitor for the plaintiff R. claimed that his charge or lien for costs, charges, and expenses in the action took priority over the charging orders obtained by the creditors.

Held, following *Cole* v. *Eley*, 42 W. R. 505, 561, [1894] 2 Q. B. 180, 350, that the creditors, being aware of the existence of the partnership action, must also be taken to have notice of the solicitor's right to a lien on the property recovered, and that consequently they were not purchasers for value without notice, and that the solicitor's lien had priority over the charging orders.

Solicitors Act, 1860, s. 28, considered.—RIDD *v.* THORNE, *Ch.D. Joyce, J.*, 542; [1902] 2 Ch. 344; 71 L. J. Ch. 624; 86 L. T. 655.

7. *Officer of court—Loan of trust money—Jurisdiction—Summary order.*—A solicitor's clerk who was trustee under the will of A. lent trust moneys belonging to A.'s estate to his employer, the solicitor, who was aware that the money belonged to the trust. Notice for the payment up of the money was given to the solicitor, but the money was not received. In an action for the administration of A.'s estate,

Held, that the court, in exercise of its jurisdiction over its officers, had power, on motion in the action, to order the solicitor, although he was not a party to the action, to bring the money into court.—CARROLL, RE, BRICE *v.* CARROLL, *Ch.D. Farwell, J.*, 650; [1902] 2 Ch. 175; 71 L. J. Ch. 596.

See also Bill of Exchange, 3; Company, 46; Local Government, 15; Undue Influence, 1.

SPECIFIC PERFORMANCE.—See Contract, 2; Vendor and Purchaser, 15.

STAMPS.—See Inland Revenue, 14-19.

STOCK EXCHANGE:—

1. *Broker in default — Liquidation — Completion by jobber with broker's clients—Right of jobber to sue broker for difference.*—A broker and member of the Stock Exchange was declared a defaulter, there being then due from him to a firm of jobbers £986. A further sum of £281 became due on the closing at the hammer price. The jobbers completed with the broker's clients and were paid the differences due from them, but by the rules of the Stock Exchange the jobbers had to account for £281 of the amount so received to the official assignee of the Stock Exchange, who was carrying out the liquidation of the broker's estate. The jobbers brought an action against the broker to recover £986 and £281. At the date of trial the liquidation was still proceeding, and the jobbers had paid an *interim* dividend.

Held, that the action could be maintained, and that the jobbers were entitled to recover the amount claimed, less the amount of the dividend received.—RATCLIFF *v.* MENDELSSOHN, *K.B.D.*, 106; [1901] 2 K. B. 844; 70 L. J. K B. 969; 85 L. T. 426.

2. *Damages—Measure of—Closing account—Breach of contract.*—Defendants, who were brokers on the London Stock Exchange, agreed with the plaintiff, for whom they had bought certain shares for a particular settlement, to carry over the shares to the next settlement, and entered into the necessary arrangements with jobbers for that purpose. Before the settlement the defendants, in breach of their agreement, closed the account by selling the shares against him, and gave him notice thereof, the plaintiff insisting upon the defendants performing the contract upon the day fixed for its performance. In an action to recover damages for the breach of contract,

Held, that the plaintiff was not bound to treat the contract as finally determined on the day the account was closed, and to measure his damages upon the prices of the shares ruling on that day, but that he was entitled to have his damages assessed upon the prices ruling on the next settling day, the day fixed for the performance of the contract.

Quære, whether, as held by Wills, J. (*ante*, p. 154, [1901] 2 K. B. 867), the damages should be assessed upon the highest prices ruling between the date when the account was wrongfully closed and the settling day.—MICHAEL *v.* HART, *C.A.*, 308; [1902] 1 K. B. 482; 71 L. J. K. B. 265; 86 L. T. 474.

3. *Principal and agent—Broker including several orders in one contract—Privity of contract between jobber and broker's customer—Custom.*—A broker and member of the Stock Exchange was instructed by the defendant to purchase for him 225 shares in a certain undertaking for the next account. The broker having orders from other customers also to purchase similar shares entered into one contract with the plaintiffs, jobbers on the Stock Exchange, for the purchase of the whole number of shares, 925 in all, and appropriated them in his books to the orders of his various customers. Before the account day the broker was declared a defaulter. The defendant having repudiated the transaction as regards the plaintiffs, they sold 225 of the shares, and, the price having fallen, claimed the difference in an action for breach of contract to buy 225 shares.

Held, that apart from any custom or usage of the Stock Exchange, privity of contract had been created between the plaintiffs and the defendant, and that the defendant was liable to the plaintiffs in damages.—SCOTT *v.* GODFREY, *K.B.D.*, 61; [1901] 2 K. B. 726; 70 L. J. K. B. 954; 85 L. T. 415.

4. *Usage of Stock Exchange—Closing of client's account by broker—Sale and repurchase of shares by broker—Profit made by broker on transaction in fiduciary capacity.*—Stockbrokers had on behalf of clients made a contract for the purchase of shares on the Stock Exchange. The clients having failed to provide the money for the price of the shares, the brokers, for the purpose of closing the client's account, went into the market, and sold a like amount of shares to a jobber, and, as part of the same transaction, repurchased the shares from him on their own account. By reason of the sale and repurchase being effected by one transaction, the brokers were enabled to repurchase the shares at a lower price than they would have had to pay if they had purchased them in the market in the ordinary way. The brokers in their account with the clients charged them commission on the sale of the shares to the jobber.

Held, that, the brokers having acted in a fiduciary capacity in the sale of the shares, and having, by reason of that sale and the repurchase being effected as one transaction, obtained a profit for themselves, they were bound to account for that profit to their principals, the clients.—ERSKINE, OXENFORD, & Co. *v.* SACHS, *C.A.*; [1901] 2 K. B. 504; 70 L. J. K. B. 978; 85 L. T. 385.

5. *Usage of Stock Exchange—Closing of client's account by broker—Sale and repurchase of shares by broker—Validity of closing.*—The defendants, who were stockbrokers, by the plaintiff's instructions effected on his behalf contracts on the Stock Exchange for the purchase of shares, upon which they incurred liability to a considerable amount. The plaintiff not providing the defendants with funds to meet that liability, the defendants became entitled to close the account, which they did in respect of the various contracts in the following manner. They got a jobber in the market to make a price for the shares, and, the jobber naming a fair market price, a bargain was made by the defendants with the jobber for the sale of the shares to him at the price fixed and for the repurchase of the shares by them from him for the next account. The plaintiff sued the defendants for wrongfully selling the shares in contravention of an alleged agreement by them to keep the account open. The defendants counterclaimed the difference between the amount of the prices at which the shares were sold to the different jobbers as aforesaid and the amount of the prices at which they were purchased for the plaintiff. The jury at the trial found that the defendants had agreed to keep the account open only on condition that the plaintiff would provide them with money to meet the liability incurred, and that the plaintiff had not done so. Thereupon the judge gave judgment for the defendants for the amount claimed by them on their counterclaim. On application to the Court of Appeal for judgment or a new trial, the plaintiff contended that the closing of the account was not valid, on the ground that the sale of the shares was a mere form, and the defendants, acting in a fiduciary capacity, were not entitled to repurchase the shares on closing the account.

Held, that the defendants were entitled to retain their judgment.

By A. L. Smith, M.R. and Romer, L.J.: There was nothing on the facts to show that the transaction by which the account was closed was otherwise than valid.

By Vaughan Williams and Romer, L.JJ.: Having

regard to the manner in which the plaintiff's case had been shaped at the trial, it was not open to him to raise in the Court of Appeal the point that the transaction between the defendants and the jobbers as aforesaid was not a valid mode of closing the account.—MACOUN *v.* ERSKINE, OXENFORD, & CO., *C.A.*; [1901] 2 K. B. 493; 70 L. J. K. B. 973; 85 L. T. 372.

See also Bond, 1; Principal and Agent, 4.

STREET:—

Paving — Making up — Landowner — Frontager — Notice to pave — Back roads — Cross roads — Mistake in notice — Blackburn Improvement Act, 1882.—Certain frontagers having failed to comply with a notice under the local Act to pave a street in the borough, the corporation, acting under their powers, themselves paved the street, and in July, 1898, served the frontagers with notice of apportionment of the expenses and demand for payment. The frontagers made default in payment, whereupon the corporation, in February, 1900, commenced an action against them in the Queen's Bench Division for the recovery of the apportioned expenses. The defendants resisted the plaintiffs' claim on the ground that, upon the construction of section 232 of the local Act, the claim was too late, inasmuch as the six months' limitation under section 11 of the Summary Jurisdiction Act, 1848, applied to proceedings whether under the summary jurisdiction or otherwise.

Held, that under section 232 the corporation had an option to proceed for the recovery of paving expenses either by complaint before justices under the summary jurisdiction or, alternatively, by action in the superior courts or in any court of competent jurisdiction; that the six months' limitation applied only to a proceeding under the summary jurisdiction, and not to any of the alternative proceedings, and that the action was therefore not out of time.

West Ham Local Board v. *Maddams*, (1876) 40 J. P. 470; and *Tottenham Local Board* v. *Rowell*, (1876) 1 Ex. D. 514, distinguished.

Vestry of Hammersmith v. *Lowenfeld*, [1896] 2 Q. B. 278, overruled.

The local Act contained separate and distinctive definitions of a "back road" and a "cross road." The corporation served a paving notice under the Act upon frontagers in a back road and two cross roads by reference to a plan deposited for inspection at the office of the borough surveyor, but the notice by mistake described all the three roads upon which the work was to be done as "back roads" only.

Held, affirming Mathew, J., on this point, that the mistake in the description could not have misled the frontagers, and that, therefore, the notice was a good foundation for an action brought by the corporation under the Act for expenses incurred by them in executing the work themselves in the cross roads as well as the back road.—BLACKBURN CORPORATION *v.* SANDERSON, *C.A.*; [1902] 1 K. B. 794; 71 L J. K. B. 590; 86 L. T. 304.

SUNDAY TRADING:—

Bakers Act — Consent in writing of chief constable — Sunday Observance Act, 1871—*Lord's Day Act* (*Car.* 2, 1663)—*London Bread Act* (3 *Geo.* 4, *c.* 106), *s.* 16.—The provision in the Sunday Observance Act, 1871, requiring the consent in writing of the chief constable to any prosecution is not applicable to the London Bread Acts regulating the sale of bread, which form a special code by themselves.—REX *v.* MEAD, WREBITZKY, EX PARTE, *K.B.D.*, 589; [1902] 2 K. B. 212.

TRADE-MARK:—

1. *Disclaimer — "Addition" — Label, Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.—On the registration under the Patents, Designs, and Trade-Marks Act, 1888, a disclaimer of any right to the exclusive use of such portion of a label as constitutes "added matter" must be made.—ROYAL BAKING POWDER CO.'S TRADE-MARK, RE, *Ch.D. Farwell, J.*, 454.

2. *Infringement — Rectification of register — Mark common to the trade — Improper use of words "trade-mark" — Deceptive mark.*—In an action by the plaintiffs, a firm of brewers, the owners of two registered trade-marks, each consisting solely of a plain diamond, to restrain the defendants, also a brewing firm, from using in their trade a plain rectilinear ten-sided figure,

Held, that the defendants' device did not so nearly resemble a diamond as to be calculated to deceive, and that the plaintiffs' trade-marks had not been infringed.

Upon motion by the defendants to remove the above marks from the register, and also certain registered labels of the plaintiffs, all of which bore *inter alia* the device of a diamond with the words trade-mark on the diamond, and all of which, as well as the two above-mentioned, had been registered as old marks,

Held, that all the marks must be removed from the register on the ground (*a*) that the device of a diamond was at their respective dates of registration common to the trade; and (*b*) as to the labels, that the words trade-mark being on the diamond alone rendered them deceptive. There is no difference between marks used before 1875 and marks not used before 1875, where they are rendered deceptive by the improper insertion of the words "trade-mark."—BASS, RATCLIFF, & GRETTON (LIMITED) *v* DAVENPORT & SON'S BREWERY, *Ch.D. Kekewich, J.*; 86 L. T. 186.

3. *Old mark — Invented word — Invented article — "Special and distinctive word" — Word distinctive of manufacturer — Exclusive user — Patented invention — Expiration of patent — Rectification of register — Motion to expunge trade-mark — User before* 1875 — *Onus of proof — Appeal — Further evidence — Trade-Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.—In 1877 a chemical manufacturer registered, under the Trade-Marks Registration Act, 1875, the word "Vaseline," which had been invented by him to denote a product of his manufacture, the word being registered as an old mark used by him for six years before 1877.

Upon an application made in 1900 by a rival manufacturer for the removal of the mark from the register,

Held, by Vaughan Williams and Stirling, L JJ., Cozens-Hardy, L.J., dissenting, that the word had been properly registered as a "special and distinctive word" within section 10 of the Act of 1875, since the applicant failed to show that the word had not been used by itself as a trade-mark before the Act, whereas the evidence showed that the word had always been used before and since the passing of the Act to denote, not an article manufactured by a particular process, but an article identified with the name of the particular manufacturer.

Whether, when an inventor invents a new article, and at the same time invents a word to designate it, he can claim the exclusive use of that word to denote his own manufacture, *quære.*

Where a person is seeking to remove a trade-

mark from the register, the onus is upon him to prove that it ought to be taken off, not upon the party registered to make out his right to retain it on the register; and especially so where the mark has been on the register for many years.

Linoleum Manufacturing Co. v. *Nairn*, (1878) 7 Ch. D. 834, distinguished.

Decision of Buckley, J., reversed upon further evidence adduced, by leave, on the appeal.—CHESEBROUGH'S TRADE-MARK "VASELINE," RE, *C.A.*; [1902] 2 Ch. 1; 71 L. J. Ch. 427; 86 L. T. 665.

4. *Registration—"Distinctive word"—"Addition" to trade-mark—Addition registered as part of trade-mark—"Disentitled to protection"—Disclaimer—Disclaimer subsequent to application for registration Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 73, 74.—In 1887 the F. Co. registered, in connection with jams, a trade-mark consisting of the word "Silverpan" in large type with their signature underneath, and subsequently the word by itself became identified in the market with their goods. In 1900 the R. Co., rival jam manufacturers, applied that the entire trade-mark might be removed from the register as "being calculated to deceive or otherwise disentitle to protection," within section 73 of the Patents, Designs, and Trade-Marks Act, 1883, or, in the alternative, that the word "Silverpan" might be disclaimed under section 74 as being a "distinctive word."

Held, by the Court of Appeal (reversing Kekewich, J.), that the word "Silverpan" was to be regarded as an "addition" to, and not part of, the trade-mark, and that at the date of registration it was a word "distinctive" of the F. Co.'s goods—that is, "*primâ facie* distinctive" (*Burland* v. *Broxburn Oil Co.*, (1889) 42 Ch. D. 274), and, therefore, ought to have been disclaimed under section 74; but, the F. Co. submitting, an order was made to remove the entire trade-mark from the register.

In re Clément & Cie's Trade-Mark, [1900] 1 Ch. 114, and *In re Smokeless Powder Co.'s Trade-Mark*, [1892] 1 Ch. 590, approved of and distinguished.

Per Romer, L.J.: "The word 'distinctive' in section 74 means something which, at the time of registration, is chosen by the applicant and is *primâ facie* suitable, when used, for the purpose of distinguishing his goods from the goods of others."

Whether a disclaimer under section 74 can be made or ordered subsequently to the application for registration of the trade-mark, *quære.*—FAULDER & Co.'s TRADE-MARK, RE, *C.A.*; [1902] 1 Ch. 125; 71 L. J. Ch. 124; 86 L. L. 66.

5. *Registration—Invented word—Non-descriptive word—"Uneeda"—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c* 57), *s.* 64—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.—The word "Uneeda," which was a mere misspelling of the words "You need a," held not to be a proper subject of registration as a trade-mark for biscuits, under either (*d*) or (*e*) of section 64 of the Patents, Designs, and Trade-Marks Act, 1883, as amended by section 10 of the Act of 1888, as not being either "an invented word" or "a word or words having no reference to the character or quality of the goods"

Decision of Cozens-Hardy, J. ([1901] 1 Ch. 550, 49 W. R. Dig. 175), affirmed.—"UNEEDA" TRADE-MARK, RE, *C.A.*, 467; [1902] 1 Ch. 783; 71 L. J. Ch. 353; 86 L. T. 439.

6. *Registration—Rectification—Combination mark—Sufficiency of description—Double registration—"User"—Registration too wide—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.—Where a trade-mark consists of a number of labels, and the labels themselves appear on the register, the description of the essential particular as a "combination of devices" is sufficient.

Where a mark essentially the same as a prior registered mark belonging to the same person has been put on the register, it will not be expunged at the instance of a rival trader.

In re Player & Sons' Trade-Mark, [1901] 1 Ch. 382, 49 W. R. Dig. 176, distinguished.

A trade-mark may consist of several pieces, all of which need not be simultaneously visible.

The fact that a mark is registered for the whole of a class, and is only used for part of the class, is not a ground for expunging it from the register.—CROMPTON'S TRADE-MARK, RE, *Ch D. Swinfen Eady, J.*, 426; [1902] 1 Ch. 758; 71 L. J. Ch. 497; 86 L. T. 657.

TRADE NAME:—

1. *Injunction—Unauthorized use of name—Holding out as partner—Misrepresentation—Reasonable probability of risk and liability.*—A dealer in cycles having advertised his goods in a manner which satisfied the court that he intended the public to believe that the proprietors of the *Times* newspaper were either the vendors, for whom he acted as manager, or partners or in some way responsibly connected with sale of "Times" cycles.

Held, that an interim injunction ought to be granted restraining the defendant from in any way holding out the *Times* to be the owners of or connected with his business.—WALTER *v.* ASHTON, *Ch D. Byrne, J.*; [1902] 2 Ch. 282.

2. *Name of company—Foreign firm—Market in United Kingdom—Registration—Imitation—Signatories to memorandum—Liability—Injunction.*—A foreign trader whose goods are in fact imported into England, although he has no English agency, has a sufficient English market to entitle him to an injunction restraining the piracy of his trade name and reputation.

The signatories of a company formed for a fraudulent purpose and duly registered are guilty of a fraudulent conspiracy to effect that purpose, and together with their company can be restrained by injunction.—PANHARD ET LEVASSOR *v.* PANHARD LEVASSOR MOTOR Co., *Ch.D. Farwell, J.*, 74; [1901] 2 Ch. 513; 70 L. J. Ch. 738; 85 L. T. 20.

3. *Same name—Goods of same class—Misleading the public—Injunction—Form of order.*—A person cannot be absolutely restrained from carrying on business in his own name, he can only be restrained from carrying on business in his own name without taking reasonable precautions to prevent his business or goods being confounded with those of another person.—CASH *v.* CASH, *C.A.*, 289; 86 L. T. 211.

See also Company, 24, 31.

TRADE UNION:—

1. *Action against trade union in registerad name—Injunction—Picketing—Trade Union Acts*, 1871 *and* 1876 (34 & 35 *Vict. c.* 31; 39 & 40 *Vict. c.* 22).—An action will lie against a trade union in its registered name.

Decision of the Court of Appeal (49 W. R. 101, [1901] 1 K. B. 170) reversed.

Observations as to the legal position of trade unions and the liability of their funds.—TAFF VALE RAILWAY Co. *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, *H.L.*, 44; [1901] A. C. 426; 70 L. J. K. B. 905; 85 L. T. 147.

2. *Inducing others to break or not to enter into contract—Coercion—Competition—Trade Union Acts,* 1871-76—*Lawful disposal of his time and labour—Injury to another without justification.*—It is an actionable wrong to induce without justification others to break or refrain from entering into contracts, when this is done for the purpose of injuring another, and damage is thereby caused to him. Legitimate trade competition, the lawful exercise of one's calling, and the lawful use of combination for the advancement of one's trade or labour are not an interference with the rights of others. Outside such opposition, any coercion of another to prevent his disposing of his labour or goods is illegal, and purposely to cause damage to a third person in this manner is likewise an injury for which an action will lie.

Allen v. *Flood,* 46 W. R. 259, [1898] A. C. 1, explained and distinguished.

Decision in *Temperton* v. *Russell,* 41 W. R. 565, [1893] 1 Q. B. 715, approved, but not *dicta* of Lord Esher therein.

Decision of Court of Appeal, Ireland ([1899] 2 I. R. 667), affirmed.—QUINN *v.* LEATHEM, *H.L.,* 139; [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289.

See also Action, 1.

TRUSTEE:—

1. *Breach of trust—Moneys employed by trustee in trade—Proper rate of interest.*—If a trustee invests trust moneys in business with a view to benefiting the trust estate, he must account for the profit made by such investment, or at the option of the *cestui que trust* he must account for trade interest—*i.e.,* 5 per cent.

Vyse v. *Foster,* L. R. 8 Ch. 309, 329, followed.—DAVIS, RE, DAVIS *v.* DAVIS, *Ch.D. Farwell, J.*; [1902] 2 Ch. 314; 71 L. J. Ch. 539; 86 L. T. 523.

2 *Business—Administration—Trustees carrying on testator's business—Defaulting trustee—Claim by creditors of the business—Indemnity.*—Where a testator's business is carried on after his death by his trustees under a power in the will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter—FRITH, RE, NEWTON *v.* ROLFE, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 342; 71 L. J. Ch. 199; 86 L. T. 212.

3. *Conflicting equities—Fraud of agent—Negligence—Apparent ownership—Estoppel—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41) *s.* 55.—R. transferred the legal title in a bond of the Tyne Commissioners to H., a stockbroker, for the purpose of enabling him to sell the bond on behalf of R. The transfer stated that H. had paid the consideration to R., but no money was in fact paid. H. executed a mortgage of the bond by deed to W. for £1,000, and W. gave notice of his mortgage to the Tyne Commissioners. H. applied the money to his own use and became a bankrupt.

Held, that whether the case was one of general authority, with no limit brought to the notice of W., the mortagees, or was to be regarded as a case of estoppel, R. was not entitled to priority or to a vendor's lien as against W.—RIMMER *v.* WEBSTER, *Ch.D. Farwell, J.,* 517; [1902] 2 Ch. 163; 71 L. J. Ch. 561; 86 L. T. 491.

4. *Executor—Merging of executorship in trusteeship—Statutes of Limitations—Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57)—*Trustee Act,* 1888, *s.* 8 (1) (b)—*Property retained by the trustee.*—Where the executors of the will of a testator who died in 1857, under which part of the property became divisible in 1873 and the remainder in 1892, were also appointed trustees of the will; in an action by a beneficiary for an account,

Held, that the office of executor had merged in that of trustee, and that, therefore, the Trustee Act, 1888, *s.* 8, applied, and not the Real Property Limitation Act, 1874, *s.* 8

Held, also, that the exception to section 8 of the Trustee Act, 1888, excluding from the benefit thereof cases in which the proceeds of the trust property are still retained by the trustee, does not apply to cases in which no moral liability attaches to the trustee.—TIMMIS RE, NIXON *v.* SMITH, *Ch.D. Kekewich, J.,* 164; [1902] 1 Ch. 176; 71 L. J. Ch. 118; 85 L. T. 672.

5. *Investment—Excessive advance from trust funds on mortgage security—Honestly and not unreasonably—Relief.*—The trustees of a settlement invested the sum of £4,500, forming part of the funds subject to the settlement, by way of mortgage. When the mortgage was taken no actual valuation of the property comprised in the security was made; but the greater part of the property (which was adjacent to the remainder) had been bought at public auction in the previous year by the mortgagor at a rate which would have given to the property comprised in the security the value of £7,167. The true value of the property at the time of the mortgage was, however, £6,394, so that the sum actually advanced by the trustees exceeded the two-thirds value by £237 6s. 8d. The trustees acted under the advice of the solicitors to the trust. In an action against the surviving trustee for the payment of this sum of £237 6s. 8d. and interest thereon, the trustee sought relief under section 3 of the Judicial Trustees Act, 1896. The court found that the trustee had acted honestly and not unreasonably but refused to excuse him altogether; and directed him to make good the sum of £237 6s. 8d., no order being made as to the costs of the action.—WAITE *v.* PARKINSON, *Ch.D. Joyce, J.*; 85 L. T. 456.

6. *Investment—Improper investments by trustees—Breach of trust—Power to invest on real security in Ireland—Puisne mortgage—Relief under Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—The trustees of a marriage settlement were thereby directed to invest the trust funds in (among other alternative modes of investment) Government securities of India, or on freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland, and were empowered to vary investments with the consent of the husband and wife during their joint lives. Lands in Ireland, which were already subject to mortgages for £4,700 and £2,460 were further mortgaged for a sum of £17,900, which was by subsequent payments reduced to £12,150. There were three sub-mortgages of the last-mentioned mortgage for the sums of £4,000, £2,153, and £5,000 respectively. The trustees of the marriage settlement, without the consent of the wife, sold out India Stock forming part of the trust funds, and invested the proceeds thereof on a transfer of the third sub-mortgage for £5,000. They took no legal advice as to the propriety of this investment before making it. In an action against the surviving trustee of the settlement for breach of trust,

Held, without deciding whether a puisne mortgage on land in Ireland is of necessity and in all cases an improper investment for trust funds, that

an investment of such a nature as the trustees had made in the case before the court was a breach of trust, and that, under the circumstances, the defendant ought not to be relieved from liability in respect thereof under the Judicial Trustees Act, 1896, s. 3.—CHAPMAN *v.* BROWNE, *C.A.*; [1902] 1 Ch. 785; 71 L. J. Ch. 465; 86 L. T. 744.

7. *Loss to estate—Fraud by solicitor's clerk—Trustees acting reasonably and honestly—Liability of trustee.*—A trustee living in the country employed her London solicitors to act as her agents in the trust, the trust account being kept at a London bank. The solicitors kept the cheque and pass books, drawing cheques, and sending them to the trustee for her signature as required. A clerk to the solicitors by fraud obtained the trustee's signature to cheques for £129, inducing her to initial alterations of two of the cheques from order to bearer. He then cashed the cheques and absconded. Upon summons to make the trustee reimburse the £129 to the trust estate.

Held, that under the circumstances the trustee had acted reasonably, and was not liable to make good the loss to the estate.—SMITH, RE, SMITH *v.* THOMPSON, *Ch.D. Kekewich, J.*; 71 L. J. Ch. 411; 86 L. T. 401.

8. *Purchase from beneficiary by trustee—Fiduciary position — Non-disclosure — Valuation in hands of trustee.*—By the law of Scotland, as well as by the law of England, although there is no rule of law that a trustee shall not buy trust property from his *cestui que trust*, still, if a transaction of that kind is challenged in proper time, a court of equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the *cestui que trust* when it was sold (following Lord Cairns' opinion in *Thomson* v. *Eastwood*, 2 App. Cas. 215, 236).

Where, therefore, a trustee purchased his *cestui que trust's* share in trust funds, the transaction was set aside on account of the non-disclosure of a valuation which the trustee had previously obtained. —DOUGAN *v.* MACPHERSON, *H.L.*, 689; [1902] A. C. 197; 71 L. J. P. C. 62; 86 L. T. 361.

9. *Shares in company—Proposed reconstruction of company—Exchange of shares in old company for shares in proposed company—Unauthorized investment—Jurisdiction of court to authorize trustees to hold unauthorized investment.*—Although as a rule the court has no jurisdiction to sanction the performance by trustees of acts not expressly authorized by the terms of the trust instrument, yet if it is desirable or essential to the interests of all parties that the trustees, in the case of an emergency which may reasonably be supposed not to have been foreseen or anticipated by the author of the trust, should do some act not ordinarily within their powers, then (especially where the trust estate consists of a business or shares in a mercantile company) the court has jurisdiction in a proper case to sanction such acts on behalf of all concerned.—NEW, RE, LANGHAM *v.* LANGHAM, *C.A.*, 17; [1901] 2 Ch. 534; 70 L. J. Ch. 710; 85 L. T. 174.

10. *Settlement—Discharge of one trustee without appointing a substitute—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 11, 25.—The court has power, under its inherent jurisdiction in administering the trusts of a settlement, to discharge a trustee, when there are other trustees remaining, without appointing a trustee in the place of the retiring one, but it has not such power under the Trustee Act, 1893.—CHETWYND'S SETTLEMENT, RE, SCARISBRICK *v.* NEVINSON, *Ch.D. Farwell, J.*, 361; [1902] 1 Ch. 692; 71 L. J. Ch. 352; 86 L. T. 216.

11. *Trust for sale—Retirement of trustee—Purchase by him of property subject to trust.*—Where a trustee of an instrument containing a power of sale has retired from the trust, he is entitled to purchase property subject to the trust, provided there is nothing to show that at the time of his retirement a sale was contemplated or that he is taking advantage of any information which he might have obtained when he was a trustee.—BOLES AND BRITISH LAND CO.'S CONTRACT, RE, *Ch.D. Buckley, J.*, 185; [1902] 1 Ch. 244; 71 L. J. Ch. 130; 85 L. T. 607.

See also Vendor and Purchaser, 16, 17.

UNDUE INFLUENCE:—

Solicitor and client — Gift — Bargain — Deeds — Validity—Competent and independent advice.—On the 15th of May, 1900, the plaintiff W. executed two deeds, by the first of which some real estate and other property was settled upon trust for W. for life, and after his death as to part, in trust for his son and daughter, and as to one-tenth of the ultimate residue upon trust for the defendant C., his solicitor. By the second deed certain furniture and chattels were vested in trustees for sale, and out of the proceeds thereof the defendant C. was to receive £500. The deeds were prepared in the office of the defendant C., but were submitted by the plaintiff to A., an independent solicitor.

Held, that the plaintiff under the circumstances did not have the competent and independent advice required, and the deeds were voidable.—WRIGHT *v.* CARTER, *Ch.D. Kekewich, J.*; 86 L. T. 110.

See also Contract, 8; Deed, 2.

VACCINATION:—

1. *Neglect to cause child to be vaccinated—Guardians direct their officer not to prosecute—Proceedings nevertheless instituted by him—Visit of public vaccinator at parent's house not a condition precedent—Conviction—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *ss.* 16, 29, 31—*Vaccination Act*, 1871 (34 & 35 *Vict. c.* 98), *s.* 5—*Vaccination Act*, 1874 (37 & 38 *Vict. c.* 75), *s.* 1—*Vaccination Act*, 1898 (61 & 62 *Vict. c.* 49), *s.* 1.—A vaccination officer is the proper person to institute a prosecution under the Vaccination Acts.

Therefore, where a vaccination officer had prosecuted the appellant under section 29 of the Vaccination Act, 1867, without the consent and contrary to the orders he had received from the guardians,

Held, dismissing the appeal, that the prosecution had been rightly instituted.

Held, also, that it is not a condition precedent to such a prosecution for the prosecutor to duly prove that the public vaccinator had visited the home of the child, after notice, as prescribed by section 1, sub-section 3, of the Vaccination Act, 1898, and had offered to vaccinate the child.—MOORE *v.* KEYTE, *K.B.D.*, 457; [1902] 1 K. B. 768; 71 L. J. K. B. 454; 86 L. T. 532.

2. *Order for vaccination of child—Notice—Proceedings under section 29 of the Vaccination Act*, 1867 *—No further notice—Proceedings under section 31—Child under six months old.*—In December, 1900, notice was served on the appellant to have his child vaccinated, and in February, 1901, he was summoned under section 29 of the Vaccination Act, 1867, for neglecting to cause the child to be vaccinated. This summons was dismissed. No further

notice was served on the appellant. A summons was then issued under section 31 of the Act, and an order made for the child to be vaccinated. The child was then between the age of six and eighteen months. The public vaccinator had previously visited the appellant's house in accordance with section 1 (3) of the Vaccination Act, 1898, but had failed to serve notice of his intention so to do.

Held, that the order for vaccination was properly made.—BOWDEN *v.* TOLL, *K.B.D.*, 208; 85 L. T. 486.

VENDOR AND PURCHASER:—

1. *Conditions of sale—Stipulation that the "vendor's title is accepted by purchaser"—Leaseholds—Onerous and unusual covenants and provisos—Rescission—Return of deposit with interest.*—The fact that a contract for sale contains a clause, "the vendor's title is accepted by the purchaser," does not exempt the vendor from disclosing matters which it is his duty to disclose, and the purchaser will in such case, in the event of non-disclosure, be entitled to rescission and are turn of his deposit with interest.

On a sale of leaseholds it is the duty of the vendor to disclose onerous and unusual covenants in the leases under which the property is held.—HARDICKE AND LIPSKI'S CONTRACT, RE, *Ch.D. Byrne, J.*, 20; [1901] 2 Ch. 666; 70 L. J. Ch. 811; 85 L. T. 402.

2. *Conditions of sale—Wilful default—Form of conveyance—Honest mistake—Vendor in possession—Account of rent and profits not on the footing of wilful default—Occupation rent—Losses incurred by vendor in carrying on business.*—A vendor who delays the completion of a contract by attempting to insert a clause in the conveyance which he honestly, though erroneously, believes it to be his right to insert is not guilty of wilful default so as to disentitle him to interest on the unpaid balance of the purchase-money.

Where, in an action for specific performance, the decree is simply for an account of rents and profits received by the vendor or for his use while in possession, he will be charged with the rents which he actually received, but not with occupation rent in respect of land which he did not let; and he will be allowed any necessary disbursement in connection with taking over the property from an outgoing tenant, but not losses incurred by him in carrying on a farming business on the property when so taken over.—BENNETT *v.* STONE, *Ch.D. Buckley, J.*, 118; [1902] 1 Ch. 226; 71 L. J. Ch. 60; 85 L. T. 753.

3. *Conveyance — Exception to be ascertained by subsequent election—Limitation of estate to commence in futuro — Invalidity of exception — Conveyance operating at common law—Statute of Uses—Perpetuity.*—By a conveyance on sale certain freehold lands were conveyed unto and to the use of the purchaser in fee simple, with the exceptions and reservations set forth in the first schedule to the conveyance. This schedule contained the following words: "Save and except and reserving unto the vendors a piece of land not less than forty feet in width," commencing at a specified point and terminating "at the nearest road to be made by the purchaser or his assigns on the estate so as to give access to such road" from other lands of the vendors. The purchaser afterwards constructed certain roads on the estate. In an action brought to determine whether a plot of land on which a road had been commenced but not completed was excepted from the conveyance,

Held, that the conveyance operated at common law and not under the Statute of Uses, and that the exception was bad; but that even if the conveyance operated under the Statute of Uses it was equally bad as infringing the rule against perpetuities.—SAVILL BROS. (LIMITED) *v.* BETHELL, *C.A.*, 580; 71 L. J. Ch. 652.

4. *Conveyance—Real estate—Conveyance by personal representatives under the Land Transfer Act—Executors appointed for property ouside the jurisdiction—Land Transfer Act*, 1897, *ss.* 1, 2, *sub-section* 2; *s.* 24, *sub-section* 2.—A personal representative in the sense in which the expression is used in the Land Transfer Act, 1897, means a personal representative in whom, prior to the Act, a chattel real belonging to the deceased would have vested.

Executors appointed solely for the foreign property of a testator are not, under the Land Transfer Act, 1897, necessary parties to a conveyance of testator's English real estate.—COHEN'S EXECUTORS AND LONDON COUNTY COUNCIL'S CONTRACT, RE, *Ch.D. Byrne, J.*, 117; [1902] 1 Ch. 187; 71 L. J. Ch. 164; 86 L. T. 73.

5 *Covenant for title—Implied covenant—Breach—Measure of damages—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7.—If a vendor purport to convey land to a purchaser free from a right of way belonging to a third person, which in fact still exists, and is not extinguished, this existence of the right of way is a breach of the covenant for good right to convey implied by the use of the words "as beneficial owner."

The proper measure of damages in such a case is the difference between the purchase price and the value of the land as the vendor had power to convey it.—TURNER *v.* MOON, *Ch.D. Joyce, J.*, 237; [1901] 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90.

6. *Delay—Completion—"Purchaser in default"—Interest—Property sold with possession — Vendor's unreasonable delay—Damages.* — The fact that property is sold subject to a condition that the "purchaser in default" shall pay interest on the purchase-money, will not apply where the delay in completion is due to the fault of the vendor. Where the delay in completion is due to the fault of the vendor, the purchaser is entitled to reasonable damages by way of compensation.—JONES *v.* GARDINER, *Ch.D. Byrne, J.*, 265; [1902] 1 Ch. 191; 71 L. J. Ch. 93; 86 L. T. 74.

7. *Deposit—Vendor's lien—Rescission of contract by purchaser under clause in contract—No default by vendor.*—The lien that a purchaser of land has on the land for such of the purchase-money as is paid by way of deposit exists so long as, and in every case in which the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. It continues to be operative therefore in a case in which the purchaser himself rescinds the contract under a clause thereof which enables him so to do.

Decision of Farwell, J. (49 W. R. 534. [1901] 1 Ch. 911), affirmed.—WHITBREAD & Co. *v.* WATT, *C.A.*, 442; [1902] 1 Ch 835; 71 L. J. Ch. 424; 86 L. T. 395.

8. *Equitable mortgage—Notice—Forged signature—Legal estate—Title deeds.*—A purchaser who had notice of an equitable mortgage on a property, paid the purchase-money for the same upon a receipt for what was due on the equitable mortgage being handed to her solicitors. The purchaser acquired also the legal estate and the title deeds. The signature to the receipt was forged.

Held, in an action brought by the equitable

mortgagee, that the equitable mortgage must be enforced against the purchaser. — JARRED *v.* CLEMENTS, *Ch.D. Byrne, J.*, 611; 86 L. T. 887.

9. *Leaseholds — Conditions of sale — Title — Requisition out of time—Imperfect abstract—Outstanding legal estate—Costs.*—Property stated to be held on leases was contracted to be sold subject to a condition requiring the purchaser to deliver requisitions and objections on or to the title within fourteen days after receiving his abstract, and in this respect time was to be deemed of the essence of the contract. The abstract showed only an equitable beneficial title in the vendors, and the legal estate was outstanding owing to the non-execution by a company (which had since been dissolved), through whom the vendors made title, of any legal assignment of the leases. Upon the purchaser raising an objection upon this point out of the time prescribed by the condition.

Held, that, as the purchaser got a perfect equitable title and could get the legal estate by application to the Crown, his objection did not so go to the root of the title as to free him from the condition limiting the time for delivery of objections and requisitions, and must therefore be deemed waived, and could not be insisted upon.—PRYCE-JONES *v.* WILLIAMS, *Ch D. Joyce, J.*, 586.

10. *Leaseholds—Contract for sale of lease.—Underlease—Outstanding day—Declaration of trust*—By an indenture made in 1865 a lease was granted to J. G. P. for a term of ninety-nine years from the 25th of March, 1865, at a rent of £3 16s. 4d. The lease became vested in H., who on the 6th of August, 1885, granted S. H. an underlease for the whole of the term, less eleven days, at a rent of £12. H. then mortgaged for the whole term, less one day, of which there was a declaration of trust, and on the 29th of September, 1896, the mortgagees sold to W. S. The vendors were the legal personal representatives of W. S., and the purchaser had entered into a contract to buy what was described in the particulars as "an improved leasehold ground-rent of £8 3s. 8d. arising out of a ground-rent of £12 amply secured on property held on lease . . . having fifty-three years unexpired in March, and subject to an original ground-rent of £3 16s. 4d." The conditions provided that the title should commence with an indenture of underlease dated the 6th of August, 1885, and that the purchaser should not question the validity of the underlease, but should assume a good title was vested in W. S. for the residue of the term. The purchaser contended that he was entitled to an assignment of the original lease, and that, as there was an outstanding day, he was entitled to a declaration that the vendor had not made out a good title, and to the return of his deposit. The vendor said that he had only contracted to sell the term for which the ground-rent of £12 was payable. The purchaser, moreover, had delivered no requisitions, and it was submitted that the objection was out of time

Held, (1) that the objection was not out of time, as the objection was one of conveyance and not of title; (2) that what was contracted to be sold was the improved ground-rent for the whole term during which it was payable.

Semble, even if the contract had been to assign the whole of the original term, the vendor could have enforced the contract, as there was a declaration of trust of the last day of the term.—SCOTT AND EAVE'S CONTRACT, RE, *Ch.D. Swinfen Eady, J.*; 86 L. T. 617.

11. *Misdescription — Land sold for building purposes—Underground culvert for water unknown to both parties.*—A builder and contractor entered into a contract with the trustees of a will for the purchase of a property described as possessing an important frontage with a valuable prospective building element. A condition in the contract provided that, the property being open for inspection, the purchaser should be deemed to buy with full knowledge of its actual quantities and condition, and that any error in the particulars should not annul the sale nor be the subject of compensation. The purchaser inspected the property but did not discover then or till after the completion of the contract that there was a culvert for the passage of water under it, the existence of which was not shown on the plans, and was in fact unknown to the vendors.

Held, on the evidence, that the purchaser could not have discovered it by any reasonable care, and that in view of the fact that the land was sold to the knowledge of both parties for building purposes, the existence of the culvert involved such a misdescription affecting the subject-matter of the contract in a material and substantial point as to bring the case within the rule laid down in *Flight* v. *Booth*, 1 Bing. N. C. 370, and that a good title had not been shown.

In re Brewer and Hankin's Contract, 80 L. T. Rep. 227, 47 W. R. Dig. 203, distinguished.

Decision of Kekewich. J., affirmed.—PUCKETT AND SMITH, RE, *C A.*, 532; [1902] 2 Ch. 258; 71 L. J. Ch. 666.

12. *Open contract—Leasehold—Covenant to repair broken—Dangerous structure—London Building Acts.* 1894 *and* 1898 (57 & 58 *Vict. c.* 213; 61 & 62 *Vict. c.* 137)—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 4.—A leasehold house was sold in July, 1901, under an open contract, the lease containing a covenant to keep the building in good and substantial repair and condition. On the 1st of November, 1901, a police-court order was made under the London Building Acts, 1894 and 1898, requiring the vendor to underpin a portion of the house within fourteen days. On the 6th of November, 1901, the vendor established a good title to the premises.

Held, that the expense of complying with the police-court order for the repair of the premises in respect of which the vendor was liable under the covenant in the lease, must be borne by the vendor, and could not be thrown by him upon the purchaser.

Tubbs v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168, distinguished.—HIGHETT AND BIRD'S CONTRACT, RE, *Ch D. Swinfen Eady, J.*, 424; [1902] 2 Ch. 214; 71 L. J. Ch. 508.

13. *Possession of tenant—Notice of lessor's title—Reasonable inquiry—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.—Possession of land by a tenant affects a purchaser with knowledge only of the tenant's rights, and not with knowledge of the lessor's title.

An inquiry of the tenant to whom the rent is paid is not an inquiry which ought reasonably to be made by a purchaser, so that, by reason of his omission to make such inquiry, he is not affected either by virtue of section 3 of the Conveyancing Act, 1882, or of the law as it stood before the passing of that Act, with constructive notice of anything he might have learned if such inquiry had been made.

Decision of Farwell. J. (49 W. R 155, [1901] 1 Ch. 45), affirmed.—HUNT *v.* LUCK, *C.A.*, 291; [1902] 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68.

14. *Railway company — Mine owner — Possession of mines—Interest upon purchase-money—Construction of private Act of Parliament—"Losses."*—A railway company, owners of a canal, were empowered by a private Act of Parliament to give notice to adjacent mine owners not to work their mines within a prescribed distance of the canal. Upon such a notice being given the company were to purchase the mines affected by the notice, the amount of purchase-money and compensation was to be settled by arbitration, and the compensation was to include "all such additional expenses and losses" as should be incurred by the mine owner by the minerals being left for the support of the canal. In 1892 the company gave a notice under the Act to a mine owner. The amount of the purchase-money and compensation was settled by arbitration in 1901, and was subsequently paid by the company without prejudice to the question of the right of the mine owner to interest.

Held, that the mine owner was not entitled to interest under the Act as an "additional loss."

But, held, that the company were in possession or enjoyment of the mines in question from the date of their notice, and that upon the general principles of equity as between vendor and purchaser the mine owner was entitled to interest at 4 per cent. upon the purchase-money as from that date.—FLETCHER *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *Ch.D. Buckley, J.*, 423; [1902] 1 Ch. 901; 71 L. J. Ch. 590.

15. *Specific performance—Mistake—Bidding for different property—Hardship—Damages.*—A purchaser of freehold property at a public auction who has made a mistake, in no way induced by the vendor, in bidding for and becoming the purchaser of a different property from that which he came to buy, will not be relieved from specific performance of the contract upon the ground of such blunder where no hardship amounting to injustice is thereby inflicted upon him.—VAN PRAAGH *v.* EVERIDGE, *Ch.D. Kekewich, J.*; [1902] 2 Ch. 266; 71 L. J Ch. 598.

16. *Title—Trust for sale—Leaseholds—Trustees assignees—Sale by sub-demise—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.—It is not a proper exercise of their powers for trustees who hold leasehold property on trust for sale to sell it by way of sub-demise, as by so doing they do not get rid of the liability attaching to the lease.—WALKER AND OAKSHOTT'S CONTRACT, RE, *Ch.D. Joyce, J.*, 41; [1901] 2 Ch. 383; 70 L. J. Ch. 666; 84 L. T. 809.

17. *Will—Construction—Trust for sale—Election—Purchase by trustee for sale.*—On a contract for sale of leaseholds the purchaser objected that the vendor at the time when he bought the property was himself a trustee.

Held, on the facts, that if an appropriation had taken place it was not effectual to destroy the trust for sale; that, until the testator's son was found lunatic, there could be no election by the beneficiaries; but there had been no election to take in specie by the court on behalf of the lunatic; that the trust for sale had not come to an end at the time of the purchase by the trustee; and that the title ought not to be forced on the purchaser.—DOUGLAS AND POWELL, RE, *Ch.D. Byrne, J.*; [1902] 2 Ch. 296.

VICTORIA, LAW of:—

"*Molasses refined in bond*"—*Victoria Customs and Excise Duties Act*, 1895 (59 *Vict. No.* 1401), *Schedule—Construction.*—Molasses strained and filtered in a bonded warehouse so as to free them from impurities contracted in uncovered tanks, but not involving any chemical change or alteration in colour, taste, or smell, cannot be regarded as "molasses refined in bond" within the meaning of that expression as used in the Victoria Customs and Excise Duties Act, 1895.—COLONIAL SUGAR REFINING CO. *v.* ATTORNEY-GENERAL FOR VICTORIA, *P.C.*; [1901] A. C. 544; 70 L. J. P. C. 75; 84 L. T. 787.

WATER:—

1. *Canal—Right to support—Working of subjacent and adjacent minerals—Compensation for minerals left unworked.*—By the Act 30 Geo. 3, c. 82, the plaintiffs were incorporated as a company for carrying on a navigable canal; and it was enacted that they should for that purpose have power to purchase lands and to enter upon the lands of any person or persons, and to construct and do all other matters which the company should think necessary and convenient for making and using the canal and other works, the company doing as little damage as might be in the execution of the several powers thereby granted, and making satisfaction in manner hereinafter mentioned for all damages to be sustained by the owners of and persons interested in such lands as should be taken, used, or prejudiced in or by the execution of the Act, provided, nevertheless, that nothing in the Act should entitle the company, on purchasing any lands for making the canal or for any other the purposes aforesaid, to any mines of coal, ironstone, or other minerals which should be found in cutting or making the canal and other works aforesaid or that should be under the same, but that all such mines should appertain and belong to such person or persons as would have been entitled to the same in case the Act had not been made. The plaintiffs duly acquired the lands necessary, and constructed and completed the canal and works under the powers of the Act. The purchase-money and compensation properly payable upon taking the lands were duly ascertained, and there had been no default in payment. The defendants were the owners of a colliery which they were working, and the land under which their mines were situate was traversed for a considerable distance by the canal. The defendants, in the ordinary course of working their mines, were desirous of working the coal subjacent or adjacent to the canal.

Held, that the defendants were entitled to get so much of the coal as they could get without injuring the proper support of the canal and works; but that they were not entitled to get the coal to the injury of that support; and that the whole compensation having been assessed at once at the time of the purchase by the plaintiffs, the defendants could not now be entitled to compensation for that in respect of which they had already been compensated.—GLAMORGANSHIRE CANAL NAVIGATION CO. *v.* NIXON'S NAVIGATION CO., *C.A.*; 85 L. T. 53.

2. *Canal—Waste water—Wrongful abstraction of water.*—By a private Act of Parliament it was provided that all the "waste water" of the appellants' canal, with certain immaterial exceptions therein mentioned, should be discharged into another canal, which had since become the property of the respondents. The appellants had for many years supplied water from their canal to various manufacturing works situated near the canal.

Held, that as the appellants were a canal company, not a waterworks company, "waste water" meant all water not legitimately needed for the purposes of navigation, and that they might be restrained from so disposing of their water as to

prevent it from passing into the respondent's canal. —ROCHDALE CANAL CO. *v.* MANCHESTER SHIP CANAL, *H.L.*; 85 L. T. 585.

3. *River—Navigable non-tidal river—Public right of navigation—Power to levy tolls—Royal charter—Validity—Construction—Permissive statutory powers—Implied obligation to maintain and repair—6 Geo. 1, c. 29—Practice—Powers of Court of Appeal—Variation of judgment in favour of respondent giving no cross-notice of appeal—Rules of Supreme Court*, 1883, *ord.* 58, *r.* 4.—A royal charter ought, if possible, to be so construed that it shall not exceed the powers of the Crown.

The judgment at the trial of the action declared that the public were entitled to pass through the locks without paying any toll, and through the stanch on payment of the statutory toll, and that the defendant was not liable to maintain or work any of the locks or the stanch. The defendant appealed from the judgment, other than the latter part of the declaration. The plaintiffs gave no cross-notice of appeal.

Held, that the Court of Appeal, while allowing the appeal to the extent of declaring that the defendant was entitled to a reasonable toll for passage of boats through the locks, had power also, under ord. 58, r. 4, to vary the judgment in favour of the plaintiffs by declaring that the defendant was bound to maintain and work both the locks and the stanch, and the judgment was varied accordingly.—ATTORNEY-GENERAL *v.* SIMPSON, *C.A.*; [1901] 2 Ch. 671; 70 L. J. Ch. 828; 85 L. T. 325.

4. *Supply of water—Domestic purposes—Boarding-house—Trade or business.*—The private Act of a water company provided that the owner or occupier of any house in any street in which any pipe of the company should be laid should be entitled to demand a supply of filtered water for domestic purposes, and that the company should supply such water at certain rates not exceeding the rates specified in the Act; and it was further provided that a supply of water for domestic purposes should not include, *inter alia*, a supply of water for "any trade manufacture or business whatsoever," and that water for purposes other than domestic purposes might be supplied by agreement between the consumer and the water company. A boarding-house keeper claimed a supply of filtered water for domestic purposes, and tendered rates for the same calculated upon the annual value of his house, which contained ordinary sitting-rooms, ten bedrooms, two water-closets, but no fixed bath, and was inhabited by himself, his family, and boarders, who all used the water.

Held, that where water supplied to the boarding-house was in fact used for domestic purposes only, and not for the purposes of a trade or business, the water company could not under their Act claim to supply it by agreement.—PIDGEON *v.* GREAT YARMOUTH WATERWORKS CO., *K B.D.*; [1902] 1 K. B. 310; 17 L. J. K. B. 61; 85 L. T. 632.

5. *Thames Conservators—Upper Thames—Dredging licences—Sale of proceeds—Licensee's own profit—Riparian owner.*—The Conservators of the River Thames are not empowered by the Thames Conservancy Act, 1894, to grant dredging licences for the Upper Thames to their agents, servants, or workmen, authorizing them to dredge, and also to sell the proceeds of the dredging for their own personal profit.—PALMER *v.* THAMES CONSERVATORS, *Ch.D. Kekewich, J.*; [1902] 1 Ch. 163; 71 L. J. Ch. 212; 85 L. T. 537.

6. *Watercourse — Artificial stream — Rights of riparian proprietors.*—In determining the rights of riparian proprietors in an artificial watercourse the court will take into consideration, first, the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; thirdly, the methods of user.

The plaintiffs were owners of a mill on an artificial watercourse which had been in existence for more than 400 years. They had the right to regulate the flow of water into the channel, and the burden was cast upon them of keeping the channel clean and unincumbered. The evidence showed that in ancient times there had been another mill on the same channel, and that its water had also been used for the purposes of a tannery, on the site of which the defendants had erected a factory.

Held, that, on the evidence, it could not be inferred that the artificial watercourse in question had been created upon the conditions that the plaintiffs should be entitled to every drop of water flowing through it. Consequently the defendants were entitled to the ordinary rights of riparian owners, and could use the water for any purposes they desired so long as such user inflicted no sensible injury on the plaintiffs.—BAILEY & CO. *v.* CLARK, SON, & MORLAND (LIMITED), *C.A.*, 511; [1902] 1 Ch. 649; 71 L. J. Ch. 396; 86 L. T. 309.

7. *Watercourse—Inclosure award—Jurisdiction of commissioner—Repairing and cleansing—Highway authority — Inclosure Act* (52 *Geo.* 3, *c. xiii.*). —An Inclosure Act provided that the commissioner should set out such watercourses as he should think proper, and should order and direct by whom and at whose expense such watercourses should be repaired and cleansed. The Act further provided that the commissioner should assign land for the getting of materials for repairing public roads. The commissioner, in pursuance of such Act, by his award appointed certain roads to be set out, and awarded to the surveyor of highways land for the getting of materials for the repair of public roads. He further ordered that a watercourse should be made, and directed that such watercourse should for ever thereafter be repaired and cleansed by the surveyor of highways for the time being, the expenses attendant upon such repairing and cleansing to be paid out of a rate to be made for the repair of highways in the township.

Held, that it was within the jurisdiction of the commissioner to order the surveyor of highways to repair and cleanse the watercourse and to raise the expenses of so doing by means of a rate.—ATTORNEY-GENERAL *v.* TAMWORTH DISTRICT COUNCIL, *Ch.D. Byrne, J.*; 85 L. T. 190.

8. *Waterworks — Local government — School — Swimming bath — Domestic purposes—Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 56, 65.—The supply of water to a school for the purposes of a swimming bath by a body acting under the Public Health Act, 1875, incorporating the Waterworks Clauses Acts, 1847 and 1863, is a supply for domestic, and not for trade or business purposes, within the meaning of those Acts.—BARNARD CASTLE URBAN COUNCIL *v.* WILSON, *Ch.D. Buckley, J.*, 92; [1901] 2 Ch. 813; 70 L. J. Ch. 859; 85 L. T. 481.

WAY.—See Easement, 6, 7; Railway, 1.

WILD BIRDS:—

Exposing for sale—"Recently taken."—A wild bird is not of necessity not recently taken because it has been in the possession of a person for a period of three weeks. The offence of exposing for sale, or having possession of any wild bird recently taken, is dependent upon section 3 of the Wild Birds Protection Act, 1880, as amended by the Act of 1881, and it is incumbent upon the prosecution to show that the birds were wild birds and have been recently taken.—GREEN *v.* CARSTANG, *K.B.D.*; 85 L. T. 615.

WILL:—

1. *Administration with will annexed—Gift to charity—Residuary legatee—Court of Probate Act,* 1857, *s.* 73.—A testator, a Roman Catholic canon, bequeathed a legacy to the then Roman Catholic bishop of his diocese—by name—for the benefit of the library of a certain educational institution, the legal ownership and custody of which was vested in the said bishop *ex officio.* He also appointed the said bishop his residuary legatee, and bequeathed the residue of his estate, subject to a certain legacy, to the said bishop—again by name—for the same objects as above. The testator survived the execution of his will about eleven years, during which time there had been three successors to the said bishop, but the ownership, &c., of the institution was still vested in the bishop for the time being *ex officio.* The court granted administration with the will annexed to the bishop for the time being, under section 73 of the Court of Probate Act, 1857, but without prejudice to any rights of the next-of-kin.—LALOR, IN THE GOODS OF, *P.D. & Ad.D.*; 71 L. J. P. 17; 85 L. T. 643.

2. *Annuity—Arrears—Interest—Administration action—Certificate.*—Arrears of an annuity given by a will do not as a rule carry interest. It is not the the practice to certify the arrears of an annuity from any particular date.—HISCOE, RE, HISCOE *v.* WAITE, *Ch.D. Kekewich, J.*; 71 L. J. Ch. 347.

3. *Bequest of sum "sufficient to pay and discharge all estate duty"—Claim of limited owner to charge settled estates in respect of estate duty—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 8 (4), 9 (1) (6).—A testator, by a codicil to his will executed after the passing of the Finance Act, 1894, bequeathed to his eldest son, to whom entailed estates would pass on the testator's death, a sum of money "sufficient to pay and discharge all estate duty" which might be payable by him.

The residuary legatee claimed that the legacy was impressed with a trust to pay the estate duty, and that the legatee consequently lost his right to recoup himself by a charge on the settled estates under section 9 (6) of the Act, the object of the gift being to discharge the estate duty, and so to free the settled estates from liability. The legatee, on the other hand, claimed that the legacy was one for his own benefit, being a gift to him measured by the amount which he would have to pay for estate duty.

Held (*dissentiente* Stirling, L.J.), that, there being no words indicative of a desire on the part of the testator to give the legatee absolute property, the inference could not be drawn that he should take the legacy unfettered by any purpose of the testator; and that this was not a legacy with a motive added, but an imperative direction, the purpose here, as distinguished from a motive, being the discharge of the estate duty.—MEXBOROUGH, RE, SAVILE *v.* MEXBOROUGH, *C.A.*; 86 L. T. 331.

4. *Charitable legacy—Charity which has never existed—General charitable intention—*Cy-près*—Class of residuary legatees.*—In the case of a legacy to a charity which has never existed, the court will lean towards finding in the will indications of a general charitable intention. Such indications are furnished by (1) the interpolation of the legacy in question amongst other charitable legacies; (2) a power to the executors to determine questions as to what charities are intended to be benefited; and (3) a bequest of residue to the charitable institutions mentioned. The legacy, consequently, does not lapse, but is administered *cy-près.* The institution or authority which administers the legacy *cy-près* is included in the words "charitable institutions which are beneficiaries under this instrument," and, consequently, takes a share of a residuary bequest to such institutions.—DAVIS, RE, HANNEN *v.* HILLYER, *Ch.D. Buckley, J.*, 378; [1902] 1 Ch. 876; 71 L. J. Ch. 459; 86 L. T. 292.

5. *Charity—"Such charitable or public purposes as my trustee thinks proper"—Uncertainty.*—A testatrix bequeathed half her residue to be "applied for such charitable or public purposes as my trustee thinks proper."

Held, that such bequest was void for uncertainty.

Decision of the Court of Session in Scotland (3 Ct. Sess. Cas. 5th Ser. 274, 38 Scot. L. R. 209) affirmed.—BLAIR *v* DUNCAN, *H.L.*, 369; [1902] A. C. 37; 71 L. J. P. C. 22; 86 L. T. 157.

6. *Condition—Name—Devise of real estate—Condition that devisee should take and use testator's name—Preceding life estate—Lunacy and death of devisee during life of tenant for life—Non-performance of condition—Condition precedent or subsequent—Remainder in fee—Vesting.*—Testator by his will, dated in 1853, devised his real estate to his daughter for life, and after her death for her children; and if she should have no child the testator devised his real estate to N., on condition that he should take and use the testator's name only. The testator died in 1853. His daughter, who was now in her fifty-ninth year, was married, but had had no issue. N. died in 1855 without having taken the testator's name. For eighteen months previous to his death he had suffered from insanity, and for six months previous to his death had been in an asylum.

Held, that whether the condition were precedent or subsequent, its performance had not been rendered impossible by the act of God; and that N. having failed to perform it, the devise to him could not take effect.—GREENWOOD, RE, GOODHART *v.* WOODHEAD, *Ch.D. Joyce, J.*; [1902] 2 Ch. 198; 71 L. J. Ch. 579; 86 L. T. 500.

7. *Construction—Ambiguity—Administration of assets—Extrinsic evidence.*—A testator, after bequeathing a number of general legacies, gave and bequeathed "all the residue and remainder" of two specific mortgage funds, after payment of his just debts and funeral and testamentary expenses, to certain persons therein mentioned. There was no general residuary bequest.

The testator possessed at the date of his will no residuary property out of which to provide the general pecuniary legacies, but at his death he had obtained more than sufficient for the purpose.

Held, that the general pecuniary legacies were payable out of the residue in exoneration of the two specifically bequeathed mortgaged debts, which were only subject to the debts and funeral and testamentary expenses, and that there was no ambiguity in the will to admit extrinsic evidence.

Decision of the Court of Appeal, *sub. nom. In re Grainger, Dawson* v. *Higgins*, 48 W. R. 673, [1900]

2 Ch. 756, reversed.—HIGGINS *v.* DAWSON, *H.L.*, 337; [1902] A. C. 1; 71 L. J. Ch. 132; 85 L. T. 763.

8. *Construction—Bequest—Compound designation—Inaccurate description—Validity.*—Where the description of a legatee is made up of more than one part, and one part is true but the other false, if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected and will not vitiate the gift. Thus the description of a legatee as "L., the wife of my son F.," is sufficient to pass the gift to L., although she was not in fact the lawful wife of F., although the testator believed that she was.—ANDERSON *v.* BERKLEY, *Ch.D. Joyce J.*, 684.

9. *Construction—Bequest—"Furniture and other personal effects"—Tenant's fixtures—Trade or business—Articles—Hotel.*—A testator bequeathed to A. "all the furniture and other personal effects belonging to me, and which at the date of my death are at the R. Hotel." The testator resided at and carried on the hotel, of which he was yearly tenant.

Held, that all the effects at the hotel belonging to the testator, whether used in connection with the hotel business or not, passed under the bequest, but that tenant's fixtures did not pass.—SETON SMITH, RE, BURNAND *v.* WAITE, *Ch.D. Buckley, J.*, 456; [1902] 1 Ch. 717; 71 L. J. Ch. 386; 86 L. T. 322.

10. *Construction—Chattels settled to go with dignity—So far as the rules of law and equity permit—Absolute vesting.*—A testatrix by her will bequeathed certain jewels to her son, the third Viscount H., for life, and after his death "to each and every of the persons who shall in turn succeed to the title and dignity of Viscount H. . . . severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said jewels shall descend as heirlooms as far as the rules of law and equity will permit."

Held, that the jewels vested absolutely in the first person who succeeded to the title on the death of the third viscount.

Tollemache v. *Coventry*, 2 Cl. & Fin. 611, followed.—HILL, RE, HILL *v.* HILL, *C.A.*, 434; [1902] 1 Ch. 807; 71 L. J. Ch. 417; 86 L. T. 336.

11. *Construction—Devise of "all my real estate"—Outstanding interests—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 26.—A. was owner in fee, subject to a lease of ninety-nine years, of certain property. A. also held a sub-lease of the same property for a term less by two days than the original lease. By his will he devised his real estate to B. and his leasehold estate to his executors.

Held, that the devise by A. of "all his real estate" passed all A.'s interest in the property which was his freehold, including his interest in the sub-lease.—GUYTON AND ROSENBERG'S CONTRACT, RE, *Ch.D. Cozens-Hardy, J.*, 38; [1901] 2 Ch. 591; 70 L. J. Ch. 751; 85 L. T. 66.

12. *Construction—Direction to pay "estate duty" out of residue—Settlement estate duty.*—A direction in a will to pay estate duty out of a particular fund will be taken to refer to settlement estate duty as well, unless a contrary intention is shown to exist.—LEVERIDGE, RE, SPAIN *v.* LEJOINDRE, *Ch.D. Joyce, J.*, 205; [1901] 2 Ch. 830; 71 L. J. Ch. 23; 85 L. T. 458.

13. *Construction—Estate for life to eldest son—Remainder to grandchildren—Gift over to heir-at-law.*—The testator devised his freehold estate called F. G. to trustees upon trust for his eldest son for life; and, after making directions as to the disposal of his personal estate among his six children, concluded his will thus: "When my six children shall have all departed this life it is my will and desire that the said estate called F. G. be sold in public sale to the highest bidder, and that the moneys arising from the sale thereof be equally divided among my then surviving grandchildren share and share alike, and in case no grandchild of mine be then living it shall become the property of the heir-at-law."

Held, that the heir-at-law must be construed as meaning the heir of the testator at his death, and not the person who would have been the heir of the testator if he had died at the death of the last of his children.—FRITH, RE, HINDSON *v.* WOOD, *Ch.D. Joyce, J.*; 85 L. T. 455.

14. *Construction—Estate in special tail—Issue—Gift to A. if he marries a gentlewoman and has issue male, to such issue male and their male descendants.*—A testator willed and bequeathed certain estates to his son Charles. Then after providing that another son might redeem those estates, he continued: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which," then over.

Held, that Charles took an estate in tail male special.

Decision of Buckley, J. (49 W. R. 12), affirmed.—PELHAM CLINTON *v.* NEWCASTLE (DUKE). *C.A.*, 83; [1902] 1 Ch. 34; 71 L. J. Ch. 53; 85 L. T. 439.

15. *Construction — Foreign law — Next-of-kin — Whole and half blood—Next-of-kin of a German subject.*—The expression next-of-kin means, in English law, the nearest blood relations in an ascending and descending line, whether of the whole or half blood, and this construction will be placed on that expression in the will of an English testator giving a legacy to the next-of-kin of a legatee who is a subject of a foreign state, under the law of which relations of the half blood are not deemed next-of-kin.—FERGUSSON'S TRUST, RE, *Ch.D. Byrne, J.*, 312; [1902] 1 Ch. 483; 71 L. J. Ch. 360.

16. *Construction — Gift of income of residue to children for life subject to annuity to widow — Death of widow — Advances — Hotchpot — Interest on advances.* — A testator by his will and codicil, dated the 5th of May, 1880, and the 12th of July, 1882, respectively, after giving certain legacies, devised and bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of £2,000 to his widow during her life, and, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, and to pay the annual income of such shares to his children; and then upon trusts therein expressed. The testator provided that, as to certain advances already made to some of his children, and as to any future advances to his children exceeding at any one time the sum of £1,000, these advances should be treated as capital of the original shares, and be brought into hotchpot and accounted for accordingly. The testator died on the 3rd of July, 1887, and left surviving him six children, of whom three had received advances, and three had not. The widow died in March, 1900.

Held, that, in bringing the advances into hotch-

pot for the purposes of determining the respective shares of the six children, the shares of the advanced children must respectively be debited with 4 per cent. on the amount of their respective advances from the testator's death down to the time when the estate ought, or should be deemed, to have been divided. — HARGREAVES, RE, HARGREAVES *v.* HARGREAVES, *Ch.D. Joyce, J.*; 86 L. T. 43.

17. *Construction—Gift of income to two persons "so that each shall receive half during their lives"—Gift over—Death of one person—Implied gift to the other.*—By his will a testator gave the income of his residuary estate to E. W. G. and H. H. G. "in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives." After "their deaths" the income was given over to other persons.

Held, that on the death of E. W. G., H. H. G. took by implication the income of the whole fund during her life.—TELFAIR, RE, GARRIOCH *v.* BARCLAY, *Ch.D. Farwell, J.*; 86 L. T. 496.

18. *Construction—Gift to class—Gift of residue to members of a class living at period of distribution—Direction for settlement of "the share" of any one of the class—Death of legatee before period of distribution.*—A testatrix, who died in 1854, by her will, made in 1849, directed the income of her residuary estate to be paid to her sisters S. and C., in equal shares, during their joint lives, or until one of them should marry or die, and after the death or marriage of either, then to the other, during her life, or until she should marry, and after the death or marriage of such surviving or last marrying sister the testatrix directed that, subject to trusts which she declared of a sum of £1,000, her residuary estate should be held in trust for all or such one or more of her brothers and sisters (except her sister E., but including S. and C., if they or either of them should marry) who should be living at the death or marriage of such surviving or last marrying sister, in equal shares, if more than one, as tenants in common. And (after providing for the event of her brothers, or either of them, being dead, or either of her sisters S. and C., having previously married, being dead at the death or marriage of such her surviving or last marrying sister) the testatrix directed that with respect to "the share" of her sister H. "the same share" should be held in trust to pay the income thereof to her during her life, for her separate use, and after her death the capital of "the same share" should be held in trust for her child or her children, as she should by deed or will appoint, and in default of appointment in trust for and to vest in her child or all her children, if more than one, being sons at twenty-one, and being daughters at twenty-one or marriage, and if more than one in equal shares.

At the date of the will the testatrix had living three brothers and four sisters, two of whom, S. and C., were unmarried, and the other two, E. and H., were married. S. and C. never married. C. died in 1900, having survived all her brothers and sisters. H. died in 1884. She had had four children, all of whom attained twenty-one; but they all died before C. Neither the brothers nor the sister E. left issue.

Held, that by the expression "the share" of H. was meant an aliquot part of the estate of the testatrix, and not merely the share which H. would have taken if she had survived her sister C., and that, consequently, the representatives of the deceased children of H. were entitled to the residue.—WHITMORE, RE, WALTERS *v.* HARRISON, *C.A.*; [1902] 2 Ch. 66.

19. *Construction—Gift to class—Gift to A. and B. and the children of C.—Gift divisible into thirds—No class gift.*—By his will dated the 7th of June, 1870, a testator bequeathed his residuary personal estate to trustees upon trust for sale and conversion, and upon certain trusts for the benefit of his daughter for life, and for her issue (all of which trusts failed), and the will then continued as follows: "And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said George Barker, his sister, Mary Barker, and the children now living of the said Richard Hollings who being male shall live to attain the age of twenty-one years, or being females shall live to attain that age or marry, and if more than one in equal shares, the share or shares of any of them being female to be for her or their sole and separate use." The testator died on the 26th of June, 1870. There were four children of Richard Hollings living at the date of the death of the testator, all of whom attained the age of twenty-one years.

Held (*dissentiente* Stirling, L.J.), that the intention of the testator was that the investments representing the residuary trust fund should be divided into equal thirds (one of such thirds being again divisible into fourths) between George Barker, Mary Barker, and the children of Richard Hollings; that those persons did not constitute a class, they not being united or connected by any common tie; and that the gift was therefore not a class gift.

Reasoning of Lord Westbury in *Davis* v. *Bennett*, 4 De G. F. & J. 327, applied.

Blackler v. *Webb*, 2 P. Wms. 383, considered.—CAPES *v.* DALTON, *C.A.*; 86 L. T. 129.

20. *Construction—Gift to a class—Gift over on death "leaving issue"—Period of indefeasible vesting.*—In a gift to a class with a gift over of the shares of any members of it who die "leaving issue," the members of the class take vested indefeasible interests only if and when they die leaving issue, unless there be some context limiting and defining the natural and proper meaning of the words, which is, death at any time.

O'Mahony v. *Burdett*, 23 W. R. 361, L. R. 7 H. L. 388, discussed and applied.

Decision of Joyce, J., [1901] 2 Ch. 338, 49 W. R. Dig. 198, affirmed.—SCHNADHORST, RE, SANDKUHL *v.* SCHNADHORST, *C.A.*, 485; [1902] 2 Ch. 234; 71 L. J. Ch. 454, 86 L. T. 426.

21. *Construction—Gift to illegitimate children—Gift to children by name—Gift to next-of-kin of children.*—A testator, after bequeathing legacies to each of his seven children by name, gave the residue of his estate to his said seven children in equal shares, the shares of each daughter to be settled as therein mentioned, with an ultimate trust in the event of a daughter dying without issue "for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of estates." Three of the children named in the will were born before marriage. One of these, a daughter, died without issue.

Held, that the testator having by his will shown an intention that all his children should be treated as legitimate and akin to one another, the persons who were to take under the statute were to be ascertained also on that footing. Consequently the deceased daughter's share devolved upon those persons who at the time of her death would have

been her next-of-kin according to the statute if she and all the other children named in the will had been legitimate.

Decision of Kekewich, J. (*ante*, p. 102), reversed. —WOOD, RE, WOOD *v.* WOOD, *C.A.*, 695.

22 *Construction—Gift to widow—Gift over of balance, "if any," of money.*—A testator bequeathed the residue of his estate to his wife for her sole use and benefit so long as she should remain his widow. In the event of her re-marriage he directed that the balance, if any, of money and farm stock left, not to exceed £400, should be divided between his brothers and sisters.

Held, that the widow took absolutely except as to a sum of £400, which went over upon her marrying again, in the event of there being a balance of unexpended residue to that amount on the day of her second marriage.—ROWLAND, RE, JONES *v.* ROWLAND, *Ch.D. Swinfen Eady, J.*; 86 L. T. 78.

23. *Construction—Gift over in default of issue—Surviving brothers and sisters—Children of deceased brother.*—A testator by his will devised and bequeathed his property in seven shares to his seven children for life, with remainder to each child's children or child. The share of any child dying without children was to go to his then surviving brothers and sisters as tenants in common for their respective lives, with remainder to their respective children, and if there should be but one surviving brother or sister, then to him or her absolutely. If any child left no child him surviving, but left grandchildren, the grandchildren were to take such child's share. In default of grandchildren, such child's share was to go to his then surviving brothers and sisters as tenants in common, and if there was but one to that one absolutely.

Held, that the word "surviving" was to be taken in its natural meaning, and that the children of a deceased child of the testator were not entitled to participate along with the surviving children of the testator in the share of a child of the testator who had survived their father and died without issue.

Per Romer, L.J.—The decision of Cozens-Hardy, J., in *Harrison* v. *Harrison* (49 W. R. 613, [1901] 2 Ch. 136), dissenting from the third rule in *In re Bowman* (37 W. R. 583, 41 Ch. D 525), approved.—INDERWICK *v.* TATCHELL, *C.A.*, 100; [1901] 2 Ch. 738; 71 L. J. Ch. 1; 85 L. T. 432.

24. *Construction—"Money"—"The rest of my money"—Other property—Residue.*—The meaning to be attached to the word "money" in construing a testamentary document is not absolute and technical, but must depend upon the context and surrounding circumstances.

Where a testator, by his will, left a specific legacy to his brother, and gave "the rest of my money" among six other persons, whom he named.

Held, that the latter bequest covered all the residue of his estate.—BRAMLEY, IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 106; 71 L. J. P. 32; 85 L. T. 645.

25. *Construction—"My personal estate," &c.—Devise of real estate.*—A testator after giving and bequeathing his real estates and all his presonal estate and effects to his wife for her life, after her death gave to certain relatives "an equal share of my personal estates, &c."

Held, that the gift after the death of the wife included the real estate of the testator.—ANDREW'S ESTATE, RE, CREASEY *v.* GRAVES, *Ch.D. Buckley, J.*, 471.

26. *Construction—Legacies given by will free of duty—Additional legacies by codicil, including one to a legatee not named in the will—Duty on such legacy.*—By her will a testator gave a number of legacies, and directed that "all the legacies and bequests given by this my will be paid and given free of all deduction for legacy or other duty." By codicil she said: "I give and bequeath the following legacies in addition to those named in my will." Then followed a number of legacies to legatees of the will, and this legacy to a legatee not named in the will, and she added the words, "given in addition to those already bequeathed."

Held, that the legacy to the legatee not named in the will was also free of duty.

Early v. *Benbow*, 2 Coll. 342, and *Byne* v. *Currey*, 2 Cr. & M. 603, discussed.—SEALY, RE, TOMKINS *v.* TUCKER, *Ch.D. Farwell, J.*; 85 L. T. 451.

27. *Construction—Power superadded to a life interest—Insufficiency of income—"To use as she may deem expedient"—Practice—Representation by separate counsel.*—Where a testator gave the income of his estate to his wife for her life with remainder to residuary legatees, but directed that "in case such income shall not be sufficient, she is to use such portion of my said real and personal estate as she may deem expedient."

Held, that she had a general power of appointment during her life over the capital.

In re Pedrotti's Will, 27 Beav. 583, 8 W. R. Ch. Dig. 100, distinguished.—RICHARDS, RE, UGLOW *v.* RICHARDS, *Ch.D. Farwell, J.*, 90; [1902] 1 Ch. 76; 71 L. J. Ch. 66; 85 L. T. 452.

28. *Construction—Secret trust.*—A testator built a museum and laid out pleasure grounds on a part of his estate, to which he admitted the public free, but carefully guarded against the public acquiring any right in respect thereof. By his will he devised his real estate, including the museum and grounds, to his first and other sons successively for life and in tail male. By a codicil to his will he devised the museum and grounds, with £300 per annum for their maintenance, to his eldest son and his heirs male, and also appointed two trustees for the purposes only of the museum and grounds. Evidence showed that the testator wished that his son should maintain the museum and grounds as in his lifetime, but that the public should acquire no rights therein, and that the son accepted the gift on these terms.

Held, that the intention of the testator having been that the public should acquire no rights, it was impossible to say that an effectual trust had been created binding on the son which could be enforced against him in favour of the public.

Decision of Kekewich, J. (49 W. R. 425, [1901] 1 Ch. 352), reversed.—PITT-RIVERS, RE, SCOTT *v.* PITT-RIVERS, *C.A.*, 342; [1902] 1 Ch. 403; 71 L. J. Ch. 225; 86 L. T. 6.

29. *Construction—Shifting Clause—Exception of eldest son entitled to other estates.*—Testator devised his real estates to the use of his nephew for life, with remainder to all and every the son and sons of the nephew born in the testator's lifetime, or in due time afterwards ("other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents issues and profits of certain estates" situate at C. "after the decease" of the nephew, "as tenant for life or any greater estate or interest whatsoever"), severally and successively in remainder, one after another for their respective lives. The nephew's eldest son, who was tenant in tail of the C. estates in remainder expectant on the death of his father,

joined with his father in disentailing them. They were sold, and the proceeds of sale settled upon trusts, in which the eldest son took some benefit. He subsequently became bankrupt, and his interest in the proceeds was sold.

Held, that on the nephew's death his eldest son was not within the exception, and was entitled to the first life interest, after his father's death, in the estates devised by the testator's will.—LAW UNION AND CROWN INSURANCE CO. *v.* HILL, *H.L.*; [1902] A. C. 263; 71 L. J. Ch. 602; 86 L. T. 773.

30. *Debts—Simple direction to pay debts—Executor according to the tenor.*—A simple direction to a certain person to pay debts of the testatrix, without any bequest to him and without specifically appointing him as trustee, may be enough to constitute him executor according to the tenor.

A testatrix, after bequeathing certain pecuniary legacies, desired J. G. to pay all her just debts, and then bequeathed to her niece, P. M., all her furniture and effects and all money she possessed.

Held, that J. G. was thereby constituted executor according to the tenor.—COOK. IN THE GOODS OF, *P.D. & Ad.D.*; [1902] P. 114; 71 L. J. P. 49; 86 L. T. 537.

31. *Execution—Attestation—"In the presence of the testator"—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 9.—A testator signed his will in his bedroom and the attesting witnesses added their signatures in the adjoining dressing-room, the door between the two rooms being open at the time. On its being shown that the testator could not have had the witnesses in sight when they attested the will, it was held that the will was not duly executed.—CARTER *v.* SEATON, *P.D. & Ad.D.*; 85 L. T. 76.

32. *Execution—"In the presence" of witnesses—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 9.—The expression "in the presence" in section 9 of the Wills Act must be taken to mean actual visual presence.

When a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time when the testatrix and first witness signed engaged at the other side of the shop with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness.

Held, that the testatrix did not sign "in the presence" of the second witness.—BROWN *v.* SKIRROW, *P.D. & Ad.D.*; [1902] P. 3; 71 L. J. P. 91; 85 L. T. 645.

33. *Execution — Knowledge and approval by testator—Presumption of law—Will read over by testator of sound mind, &c.—Words inserted by mistake of solicitor.*—Although a will may have been read by or read over to a testator of sound mind, memory, and understanding, and in every way competent to comprehend the purport of it, it is nevertheless competent to the court to hold that it was not properly read by or read over to the testator, and that he did not know and approve of its contents, if, on the consideration of all the facts and special circumstances of the case, the court should be of opinion that it ought to do so.

Guardhouse v. *Blackburn*, 35 L. J. P. 116, L. R. 1 P. & D. 109; *Fulton* v. *Andrew*, 44 L. J. P. 17, L. R. 7 H. L. 448, reviewed.—GARNETT BOTFIELD *v.* GARNETT BOTFIELD, *P.D. & Ad.D.*; [1901] P. 335; 71 L. J. P. 1; 85 L. T. 641.

34. *Executor—"Administer"—Executor according to the tenor—Construction of will.*—A testator, by his will, appointed H. E. "to hold and administer in trust all my estate well known to the said H. E."

Held, that as this person had duties to perform, the word "administer" was, without any express instruction to pay debts, sufficient to constitute him executor according to the tenor.—WAY, IN THE GOODS OF, *P.D. & Ad.D.*; [1901] P. 345; 71 L. J. P. 13; 85 L. T. 643.

35. *Ground-rents — Trustee — Tenant for life—Remaindermen—Interest of all persons entitled under settlement—Possession—Collection—Sale—Payment off of incumbrances—Title deeds—Custody.*—A testator gave his annual ground-rents, secured on two estates, to trustees upon trust to collect and apply the same in reduction of a mortgage debt thereon, and subject thereto upon trust as to two-fifths of the annual income for J. for life, as to the other two-fifths for P. for life, and as to the remaining one-fifth for L. for life. And he directed that on the decease of either J., P., or L. his or her share of the ground-rents should go to his or her children. And the testator empowered his trustees to sell the ground-rents, pay off the mortgage debt, invest the residuary proceeds of sale, and stand possessed thereof upon the trusts declared respecting the annual ground-rents should they remain unsold. The testator died in 1891. J. had three, and P. one, infant children entitled to the ground-rents in remainder. The trustees considered it advisable in the interest of all the beneficiaries to retain the ground-rents and apply the income in reduction of the mortgage debt thereon, which by January, 1901, was reduced to less than half. The mortgage debt became vested in the surviving trustee of the will. Upon a summons taken out by the tenants for life against the surviving trustee and infant remaindermen,

Held, that the tenants for life were entitled to immediate possession of the ground-rents and to sell them to pay off the mortgage debt and also to delivery up of the documents of title held by the surviving trustee, as trustee relating to the ground-rents.—RE WILKINSON, LLOYD *v.* STEEL, *Ch.D. Cozens-Hardy, J.*; 85 L. T. 43.

36. *Legacy for charitable purposes agreed upon—Admissibility of evidence.*—A testatrix bequeathed £4,000 to C. "for the charitable purposes agreed upon between us."

Held, that there was a limited charitable purpose, and that evidence was admissible to show what were the terms agreed upon.

In re Fleetwood, 29 W. R. 45, 15 Ch. D. 594, followed.—HUXTABLE, RE, HUXTABLE *v.* CRAWFURD, *Ch.D. Farwell, J.*, 185; [1902] 1 Ch. 214; 71 L. J. Ch. 168; 85 L. T. 516.

37. *Maintenance—Residue to individuals in shares—Gift of income for maintenance of all—Vested or contingent.*—Where a testator gives residue to several persons on their attaining twenty-one in equal shares and directs the income during their respective minorities to be applied for the maintenance of all indiscriminately, the gift will not be vested; *sicus*, if the direction be to apply the income of the respective shares of each for his or her maintenance.

Fox v. *Fox*, L. R. 19, Eq. 286 distinguished.—GOSSLING, RE, GOSSLING *v.* ELCOCK, *Ch.D. Swinfen Eady, J.*; [1902], 1 Ch. 945.

38. *Remoteness—Gift over—Splitting gif over—Cutting down absolute gift.*—A testator, who died in 1852, gave his residuary personal estate to trustees in trust for his wife (who died in 1876) for life, and

after her death he allotted two-fifths to S. D., and he directed that the two-fifths so given should remain in trust for her during her life for her separate use, and after her death in trust for her children, who being sons should attain twenty-five, or being a daughter or daughters should attain twenty-one or marry under that age, and in default of any such issue should be divided among the children of his brother C.

S. D. died in 1899 without ever having any issue.

Held, that the gift over on the death of S. D. without issue was void for remoteness, and that as the gift over failed, the original absolute gift took effect, and the two-fifths passed therefore to S. D.'s personal representatives.

Evers v. *Challis*, 7 H. L. Cas. 531, distinguished.

Decision of the Court of Appeal ([1901] 1 Ch. 482, 49 W. R. Dig. 203) affirmed.

Where you have an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity, or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be.—HANCOCK *v.* WATSON, *H.L.*, 321; [1902] A. C. 14; 71 L. J. Ch. 149; 85 L. T. 729.

39. *Remoteness—Restraint on anticipation—Separability of class.*—A restraint on anticipation imposed by will on a class of females is valid as regards members of the class born in the testator's lifetime, though void for remoteness as regards those born afterwards.

Herbert v. *Webster*, 15 Ch. D. 610, 28 W. R. Dig. 197, followed.—FERNELEY'S ESTATE, RE, *Ch D. Swinfen Eady, J.*, 346; [1902] 1 Ch. 543; 71 L. J. Ch. 422; 86 L. T. 413.

40. *Satisfaction—Bequest of legacies to several persons of sums equal to debts secured by promissory notes—Time for payment of legacies.*—Pecuniary legacies which by the express terms of the will were not payable until a period of four years after testator's decease are not a satisfaction for debts of equal amount secured to the legatees by a negotiable instrument made by the testator.—ROBERTS, RE, ROBERTS *v.* PARRY, *Ch.D. Byrne, J.*, 469.

41. *Survivor—Legatee entitled to share on surviving testator—Disappearance in testator's lifetime—No evidence of death—Presumption*—Onus probandi.—In September, 1892, P., who was then twenty-four years of age and employed as a commercial traveller, suddenly disappeared, his accounts showing that he was in default to his employers, and he had never since been heard of. Under his father's will he was entitled to a share of the residuary estate in the event of his surviving the testator. The testator died in June, 1893. Upon a summons taken out by the trustees in 1900 to have it determined how P.'s share ought to be dealt with:—

Held, that P. must be presumed to be dead, and, in the absence of proof that he had survived the testator, the court, without making any declaration as to the date of P.'s death, gave the trustees liberty to distribute his share on the footing that he had predeceased the testator.—BENJAMIN, RE, NEVILLE *v.* BENJAMIN, *Ch.D. Joyce, J.*; [1902] 1 Ch. 723; 71 L. J. Ch. 319; 86 L. T. 387.

WORKMAN.—See Master and Servant.

[THE END.]

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